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ORISSA HIGH COURT
1979

CHIEF JUSTICE :

The Hon'ble Mr. Justice S. K. Ray, M.A., B.L.

" " Sachidanand Acharya, B.A., B.L., (Acting J. C., from 20-4-1979 to 4-5-1979)

PUISNE JUDGES :

The Hon'ble Mr. Justice Sachidanand Acharya, B.A., B.L.

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5	(1978) 46 Cut L T 488
8	46 Cut L T 267
11	46 Cut L T 197
13	...
19	46 Cut L T 315
25	46 Cut L T 463
27	46 Cut L T 478
30	46 Cut L T 577
34	46 Cut L T 204
37	46 Cut L T 168
39	ILR (1979) 1 Cut 66
47	46 Cut L T 527
	ILR (1978) 2 Cut 546
51	46 Cut L T 545
	1979 Mat L R 280
55	47 Cut L T 98
	(1979) 1 Cut W R 122
58	47 Cut L T 1
	ILR (1979) 1 Cut 22
60	46 Cut L T 227
64	46 Cut L T 215
66	(1978) 46 Cut L T 577
	(1979) 1 Ren C R 750
69	(1978) 46 Cut L T 404
69con	ILR (1978) 2 Cut 886
71	(1978) 46 Cut L T 568
74	(1978) 46 Cut L T 415
76	(1978) 46 Cut L T 868
78	47 Cut L T 177
	(1979) 1 Cut WR 53
80	...
85	47 Cut L T 182
88	46 Cut L T 287
93	(1978) 46 Cut L T 359
96	(1979) 1 Cut W R 187
	ILR (1979) 1 Cut 458
101	(1979) 1 Cut WR 94
	ILR (1979) 1 Cut 306
110	(1979) 47 Cut L T 420
	(1979) 1 Cut WR 198
	ILR (1979) 1 Cut 295
115	(1979) 47 Cut LT 84
	(1979) 1 Cut W R 182
	ILR (1979) 1 Cut 211
120	(1979) 47 Cut L T 407
	(1979) 1 Cut W R 226
	ILR (1979) 1 Cut 412
126	(1979) 46 Cut L T 104
	ILR (1979) 1 Cut 519
130	(1979) 47 Cut L T 513
132	(1979) 1 Cut WR 92
133	ILR (1979) 1 Cut 8
140	(1979) 47 Cut L T 266
	(1979) 1 Cut WR 181
141	(1979) 47 Cut L T 806
	ILR (1979) 1 Cut 147
146	(1979) 1 Cut WR 78
147	...
150	(1979) 48 Cut L T 261
	ILR (1979) 1 Cut 486
	(1979) 1 Cut W R 240
159	(1979) 48 Cut LT 98
	ILR (1979) 1 Cut 627
162	...
165	(1979) 48 Cut L T 245
169	(1979) 47 Cut L T 341
	(1979) 1 Cut W R 175
	ILR (1979) 1 Cut 468
171	(1979) 47 Cut L T 322
	(1979) 1 Cut W R 127
175	47 Cut L T 648
177	48 Cut L T 10
178	48 Cut L T 200
181	48 Cut L T 178
186	47 Cut L T 658
189	48 Cut L T 7
	ILR (1979) 1 Cut 780
190	47 Cut L T 567
	ILR (1979) 1 Cut 622
191	48 Cut L T 59
	ILR (1979) 1 Cut 566
198	48 Cut L T 889
205	(1979) 48 Cut L T 456

ILR (1977) 1 Cut

ILR			AIR
633	1978	NOC	148
685	1977	Ori	216
657	1978	NOC	227
719	"	Ori	19
799	"	NOC	292

ILR (1977) 2 Cut

ILR			AIR
1	1977	SC	1194
20	1978	NOC	226
150	1977	"	800
157	"	"	301
228	"	Ori	178
243	1978	"	96
259	"	"	87
278	"	"	91
280	1977	NOC	299
286	1978	"	54
300	"	"	85
314	"	Ori	94
334	"	NOC	86
345	"	Ori	78
452	"	"	129
465	"	"	74
487	"	"	68
499	1977	NOC	875
550	1978	Ori	114
574	"	NOC	187
627	"	Ori	54
686	"	"	118
685	"	NOC	58
690	"	Ori	203
729	"	"	82

ILR (1978) 1 Cut

ILR			AIR
14	1978	NOC	224
78	"	Ori	65
112	"	NOC	149
188	"	Ori	11
257	"	"	167
335	"	"	108
355	"	"	179
362	"	"	183
410	"	"	233
424	"	"	190
495	"	"	228
508	"	"	217
524	"	"	198
545	"	"	159
552	"	NOC	809
577	"	Ori	211
595	"	NOC	296
606	"	Ori	121
610	"	"	186

ILR (1978) 2 Cut

ILR			AIR
12	1978	Ori	210
89	"	NOC	290
141	"	"	295
359	"	Ori	236
386	1978	"	69
546	"	"	47

ILR (1979) 1 Cut

ILR			AIR
1	1978	SC	1820
8	1979	Ori	188
22	"	"	58
66	"	"	89
147	"	"	141

ILR (1979) Cut

ILR			AIR
158	1979	NOC	99
174	"	"	93
211	"	Ori	115
295	"	"	110
306	"	"	101
412	"	"	120
437	"	NOC	100
458	"	Ori	96
468	"	"	169
486	"	"	150
519	"	"	126
566	"	"	191
580	1980	"	10
628	1979	"	190
627	"	"	159
780	"	"	189

(1977) 48 Cut LT

CutLT			AIR
498	1978	Ori	118
638	"	"	135

(1977) 44 Cut LT

CutLT			AIR
118	1978	Ori	8
235	"	NOC	227
248	"	"	188
262	"	"	225
290	"	Ori	91
368	"	"	78
389	"	"	94
397	"	"	5
420	"	"	87
439	"	NOC	85
449	"	"	86
477	"	Ori	182
498	"	NOC	54
505	"	Ori	129
519	"	"	1
528	"	NOC	24
568	"	"	187
576	"	Ori	82
588	"	"	128
594	"	"	127
597	"	"	125
624	"	"	151
635	"	"	54
650	"	NOC	149

(1978) 48 Cut LT

CutLT			AIR
1	1978	NOC	58
6	"	"	188
24	"	Ori	58
59	1977	NOC	875
75	1978	Ori	58
88	"	"	114
106	"	"	60
111	"	"	48
116	"	"	84
157	"	NOC	291
174	"	Ori	111
204	"	"	188
219	"	NOC	224
246	1977	SC	2014
288	1978	NOC	189
291	"	Ori	149
328	"	"	145
356	"	"	228
377	"	NOC	186
387	"	Ori	233
399	"	"	158
409	"	"	182

(1978) 45 Cut L T

Cut LT			AIR
421	1978	Ori	179
427	1979	NOC	26
431	1978	Ori	218
434	1979	NOC	27
448	1978	Ori	121
447	"	"	156
458	"	"	172
482	"	"	159
492	"	"	199
502	"	"	217
505	"	NOC	296
520	"	Ori	198
539	"	"	194
558	"	"	163
568	"	"	186
581	"	"	224
597	"	NOC	309
616	"	Ori	142
648	"	"	108

(1978) 46 Cut LT

CutLT			AIR
7	1978	Ori	222
14	"	NOC	290
50	"	"	24
52	"	Orl	211
89	"	"	167
103	"	"	190
109	"	"	208
135	"	"	210
145	"	NOC	295
149	"	"	298
163	1979	Ori	87
168	1978	"	209
171	"	NOC	294
197	1979	Ori	11
204	"	"	34
215	"	"	64
224	"	NOC	75
227	"	Ori	60
287	"	"	88
287	"	"	8
315	"	"	19
351	1978	"	175
359	1979	"	98
365	"	NOC	56
368	"	Ori	76
377	"	"	80
404	"	"	69
415	"	"	74
468	"	"	25
478	"	"	27
488	"	"	5
527	"	"	47
545	"	"	51
568	"	"	71
577	"	"	66
628	"	"	1

(1979) 47 Cut LT

CutLT			AIR
1	1979	Ori	58
57	1978	SC	1820
79	1979	NOC	74
84	"	Ori	115
98	"	"	55
158	1978	SC	1736
177	1979	Ori	78
182	"	"	85
218	"	SC	87
266	"	Ori	140
270	"	NOC	94
306	"	Ori	141
322	"	"	171

(1979) 47 Cut LT

Cut LT			AIR
341	1979	Ori	169
365	"	NOC	98
385	"	SC	366
407	"	Ori	120
420	"	"	110
451	"	"	96
518	"	"	180
567	"	"	190
570	"	NOC	100
624	"	SC	668
648	"	Ori	175
668	"	"	186

(1979) 48 Cut LT

CutLT			AIR
7	1979	Ori	189
10	"	"	177
25	"	NOC	185
59	"	Ori	191
79	1980	"	10
93	1979	"	159
104	"	"	126
155	"	NOC	184
178	"	Ori	181
190	"	NOC	92
200	"	Ori	178
245	"	"	165
261	"	"	150
292	1980	"	16
389	1979	"	196
418	"	SC	1534
445	"	"	1260
456	"	"	1262
459	"	Ori	205
469	"	SC	1414
515	"	"	1433
517	"	"	1344
533	"	"	1454

(1977) 1 Cut WR

Cut WR			AIR
16	1978	NOC	188
124	"	"	118
185	"	"	55
249	"	"	227
255	"	Ori	118
300	"	"	185
438	"	"	5
440	"	"	96

(1977) 2 Cut WR

Cut WR			AIR
497	1978	Ori	8
502	1977	"	222
507	"	"	167
519	1978	"	41
535	"	NOC	225
552	"	Ori	94
558	1977	NOC	298
576	1978	Ori	91
589	"	"	219
596	"	"	1
604	"	"	87
612	1977	NOC	876
616	1978	"	86
624	"	"	85
651	"	Ori	74
655	1977	NOC	876
658	1978	Ori	65
667	"	"	129
674	"	"	132
685	"	"	78
700	"	"	151

(1977) 2 Cut WR

Cut WR			AIR
705	1978	NOC	187
722	"	Ori	87
751	"	NOC	224
762	"	Ori	203
779	"	"	125
785	"	"	82
791	"	NOC	291
800	"	Ori	62
806	"	"	52
812	"	"	188
823	"	"	84
828	"	"	111
840	"	"	60
844	"	"	58
849	"	NOC	188
853	"	Ori	50
858	"	"	48
916	"	NOC	189

(1978) 1 Cut WR

Cut WR			AIR
8	1978	Ori	54
12	"	"	121
24	"	"	108
52	"	"	182
56	"	"	145
107	"	"	228
155	"	"	179
161	"	"	218
163	"	"	175
170	"	"	142
177	"	"	199
187	"	"	233
192	"	"	156
198	"	NOC	186
201	"	Ori	172
209	1979	NOC	25
213	1978	Ori	217
215	"	"	153
222	"	"	198
264	"	"	167
245	"	"	194
255	1979	NOC	26
259	1978	"	296
264	"	"	309
276	"	Ori	186
283	1979	NOC	27
291	1978	"	290
300	"	Ori	190
316	"	"	159
325	"	"	224
334	1979	NOC	24
342	1978	"	208
348	"	"	211
360	"	"	222

(1979) 1 Cut WR

Cut WR			AIR
58	1979	Ori	78
73	"	"	145
82	1979	NOC	98
85	"	"	94
92	"	Ori	182
94	"	"	101
122	"	"	55
127	"	"	171
162	"	"	115
175	"	"	169
181	"	"	140
184	"	NOC	92
187	"	Ori	95
198	"	"	110
226	"	"	120
240	"	"	150

THE

All India Reporter

1979

Orissa High Court

AIR 1979 ORISSA 1

N. K. DAS, J.

Industrial Development Corporation of Orissa, Ltd., Petitioner v. Jajodia Overseas (Pvt.) Ltd., Opposite Party.

Civil Revn. No. 123 of 1978, D/- 16-8-1978.*

(A) Arbitration Act (10 of 1940), S. 14 (2)—Orissa High Court Rules, Rr. 13 (i), (ii) and 3 — Filing of award in Court by arbitrator suo motu — Arbitrator need not make any application to Court — R. 3 requiring verification is not attracted.

Where the arbitrator suo motu files the award in the Court, no formality on the part of the arbitrator is necessary and, hence, he is not required to make any application to the Court and the question of his verifying it as required by R. 3 does not arise. R. 13 (ii) of the High Court Rules makes this quite clear. In such a case, Cl. (i) of R. 13 is not attracted. That clause relates to "cause the award to be filed" on the application of a party or on the direction of the court. The Rules framed by the Orissa High Court are in consonance with the provision of S. 14 (2) and Cl. (ii) of R. 13 clearly says that an arbitrator can directly file an award and the formalities as embodied in R. 3 are not required.

Further, there is no prohibition in the Act, particularly in S. 14 (2) against the arbitrator filing his award suo motu in Court. (Case law discussed). (Para 8)

Anno: AIR Manual (3rd Edn.), Arbitration Act S. 14, N. 6.

*(From order of R. N. Rath, Sub. J., Bhubaneswar, D/- 28-2-1978.)

IV/JV/E195/78/SNV

1979 Orissa/1 I G—32

(B) Limitation Act (36 of 1963), Art. 119 — Objection to award of arbitrator filed after 3 years of service of notice of filing thereof in Court — Barred by limitation. (Arbitration Act (1940) S. 30). (Para 10)

Cases Referred: Chronological Paras

AIR 1972 SC 1507	8
AIR 1968 Punj & Har 265	8
AIR 1967 Orissa 41 : 33 Cut LT 13	9
AIR 1958 All 720	8
AIR 1957 Andh Pra 11	8
AIR 1948 Pat 171	8
AIR 1945 Nag 117	8

B. Roy, B. M. Patnaik and A. Patnaik, for Petitioner; S. B. Mukherjee, R. K. Rath and Asok Misra, for Opposite Party.

ORDER:— This is a petition under S. 115 of the Code of Civil Procedure challenging the order dated 28-2-1978 passed by the learned Subordinate Judge, Bhubaneswar in Misc. Case No. 250 of 1975 under S. 33 of the Arbitration Act arising out of Original Suit No. 6 of 1972 (I). The opposite party entered into an agreement with the petitioner for supply of M. S. rounds. There is a clause in the agreement providing reference of all disputes to the Chief Secretary of Orissa. As dispute arose and the named arbitrator did not decide the same, application was filed by the present opposite party on 10-2-72 under S. 20 of the Arbitration Act for reference of the dispute to the arbitrator. This application was registered as O. S. No. 6/72 (I). After hearing, the application was allowed and the dispute was referred to the arbitrator. The arbitrator passed award on 24-9-75 and after due notice to the parties, the award was filed by the

arbitrator in Court along with the relevant records of the proceeding before him. Thereafter, the petitioner filed an application under S. 30 read with Ss. 31 and 33 of the Arbitration Act for setting aside the award. It is alleged by the petitioner that during the course of hearing, an application was filed by the petitioner stating that the award should be deemed to have been filed under S. 14 of the Arbitration Act and the misc. case should be registered as an original suit. The said application was rejected on 28-2-78 and the present revision has been filed against that order stating that the order of the learned court below would occasion failure of justice and the same is also illegal and full of material irregularities.

This application is challenged by the opposite party.

2. In the petition filed in this court, it is admitted by the petitioner that after the arbitration proceeding was over, the arbitrator filed his award along with relevant records of the arbitration proceeding in Court and thereafter the petitioner filed the application under S. 30 read with Ss. 31 and 33 and other provisions of the Arbitration Act for setting aside the award of the arbitrator (vide para 1). In paras 2 (iii) and (iv) of the petition, it is stated that the arbitrator, after conducting the arbitration proceeding, filed his award on 24-9-75 before the learned Subordinate Judge and soon after the filing of the award, in Nov. '75 the petitioner filed an application under Ss. 30, 31 and other provisions of the Act for setting aside the award of the arbitrator on grounds inter alia that the arbitrator misconducted the proceeding and the award was vitiated by error of law apparent on the face of it. This application was registered as Misc. Case No. 250 of 1975.

It is averred in para 2 (ix) that on 13-2-1978 a petition was filed by the petitioner to register the award filed under Sec. 14 (1) of the Arbitration Act as a regular suit as per Rule 2 (e) of the Rules made under the Arbitration Act, but the said petition was rejected and the case was posted to 27-2-1978 for hearing. In para 2 (x), it is also stated that on 27-2-1978 the petitioner filed a petition reiterating his prayer to register the filing of the award under Sec. 14 (2) of the Arbitration Act as a regular suit. Admittedly, the impugned order relates to rejection of the said petition.

3. The learned Subordinate Judge has held that an application filed under Section 20 of the Arbitration Act is uniformly registered as a suit. When the award is received from the arbitrator, it is not registered as a separate suit, but it is treated as continuation of the original suit in which the arbitrator has been appointed. Objections to the award under S. 30 or 33 of the Act when received, are registered as misc. cases and the same practice has been followed in this case. After the objection by the petitioner was filed, the same was registered as a misc. case on 24-11-1975 and the said misc. case was being heard. For the first time, on 13-2-1978 a petition was moved for converting the said misc. case to a suit and necessary orders were also passed. He has further held that the question whether an award received from the arbitrator is to be registered as a suit or a misc. case has no relevancy for disposing of the objection filed by the petitioner under S. 33 of the Arbitration Act for setting aside the award. The provisions in the G. R. & C. O. (Civil) regarding registration of suits and misc. cases are made for making an assessment of the work of the Court for statistical purposes and non-registration of an award as a suit in no way affects the merits of the contention raised by the parties and also there would be no change of position if it was registered as a suit. In the last petition, a prayer was made for examination of witnesses and the same was rejected by the Court below as it was a belated attempt. The learned Subordinate Judge has held that the case was being unnecessarily dragged on.

4. The sole point urged on behalf of the petitioner is that filing of award by arbitrator must be accepted to have been done under S. 14 (2) of the Arbitration Act and as per Rules 2 (e), 3 and 13 (i) of the Rules made by the Orissa High Court under the Arbitration Act, the award has not been properly filed by the arbitrator, inasmuch as the arbitrator has not followed the rules of this Court in filing the award. So, it should be registered as an original suit.

In this connection, it is necessary to consider the development of the case before the learned court below from time to time. From order dated 30-9-75, it appears that the arbitrator filed the award in Court and the Court ordered for issue of notice to the defendant fixing 24-10-75 for hearing of the matter. On 23-10-75, the defendant filed a peti-

tion praying to serve a notice of the filing of the award on the advocate for the defendant, and a power was filed on that date. On the next day, a memo was filed on behalf of the defendant stating that notice of the filing of the award was received by the advocate for the defendant and he applied for a copy of the award. The case was fixed to 15-11-75 for filing objection, if any. Objection was filed by the defendant on 22-11-75. On 23-11-75, after hearing counsel for both sides, the petition was registered as Misc. Case No. 250/75. On 28-1-76, the plaintiff filed an affidavit for passing decree as per the award. As the misc. case had been started on the application of the defendant, it was ordered that this would be considered along with objection of the defendant. On 6-2-76, the defendant contended that Misc. Case No. 250/75 should be put up along with the original suit for hearing. This prayer was allowed. Arguments were heard on 13-8-76 and after some adjournments, again arguments were heard on 31-8-76 and the case was posted to 2-9-77. On 2-9-77, two petitions were filed praying to set aside the award and to record necessary order. The order dated 13-2-78 shows that the plaintiff filed a petition that the case was being unnecessarily dragged on and the petition of the defendant for converting the misc. case to an original suit was rejected. This order dated 13-2-78 was not challenged by the defendant. The case was thereafter posted to 27-2-78. On that date, again another petition was filed reiterating the very same prayer for converting the misc. case to a suit. This was also rejected and that is the impugned order in this revision.

5. The fact that the arbitrator filed the award in Court is admitted. It is also admitted that the present petitioner filed objection under S. 30 read with Ss. 31 and 33 of the Arbitration Act praying to set aside the award. Arguments were also advanced on two dates. A petition was filed for converting the misc. case to an original suit and that was rejected on 13-2-78. That order not being challenged, stands as valid. The case was thereafter posted to 27-2-78 and another petition was also filed with the very same prayer. This would show that the prayer was once rejected which was not challenged and again another petition was filed with the same prayer. Rejection of the second petition does not amount to illegality nor does it amount to material irregularity in exercise of jurisdiction. The learned Subordinate Judge has made it clear in his order that no prejudice would be caused in any way to the present petitioner by not converting the misc. case to an original suit.

6. Section 14 (1) provides that when the arbitrators or umpire have made their award, they shall sign it and shall give notice in writing to the parties of the making and signing thereof and of the amount of fees and charges payable in respect of the arbitration and award. There is no dispute between the parties in the present civil revision about the arbitrator taking recourse to this provision. Clause (2) of S. 14 provides that the arbitrators or umpire shall, at the request of any party to the arbitration agreement or any person claiming under such party or if so directed by the Court and upon payment of the fees and charges due in respect of the arbitration and award and of the costs and charges of filing the award, cause the award or a signed copy of it, together with any depositions and documents which may have been taken and proved before them, to be filed in Court, and the Court shall thereupon give notice to the parties of the filing of the award.

It is admitted by the petitioner that the arbitrator filed the award in Court and the Court also issued notice to the parties and the petitioner filed a memo in Court admitting receipt of notice of filing of the award. Mr. Roy, the learned counsel for the petitioner, contends that R. 2 (e) of the Rules made by the Orissa High Court provides that applications under Ss. 14 (2) and 20 (1) of the Act shall, if the Court is satisfied that the petition is in order, be numbered and registered as regular suit. Other applications under the Act shall be numbered and registered as miscellaneous judicial cases. It is to be noted that the application filed by the present opposite party under S. 20 of the Act has been registered as an original suit. The award was also filed in the original suit. The objection filed by the petitioner for setting aside the award has been registered as a misc. case in the original suit. The petitioner also prayed that the misc. case might be put up along with the original suit and the Court had allowed the prayer.

Mr. Roy contends that R. 3 provides that all applications under the Act shall be made by petition and shall be present-

ed to the proper Court in the same manner as plaints or other applications and the petition shall be verified. According to Mr. Roy, the arbitrator should have filed an application along with the award and that application should have been verified. For this, he relies on R. 13 (i) which provides that the arbitrator or umpire or any of the parties to the arbitration may cause an award or signed copy thereof to be filed in Court in the manner prescribed in R. 3 and, therefore, contends that as the arbitrator has not filed the application as provided in R. 3, it should be deemed that there has been no proper filing of the award.

7. Section 14 (2) provides "cause the award to be filed in Court" and this envisages that it must be at the request of a party to the agreement or any person claiming under such party or if so directed by the Court. This provision does not make any bar for arbitrator to file the award himself in Court, or through any authorised person. Sec. 14 (2) relates to filing of award either on the application of a party or on the direction of the Court. Rule 13 (ii) clearly shows that where an award is filed by the arbitrators or umpire under S. 14 (2) of the Act, they shall send to the Court under sealed cover the award or a signed copy thereof together with any proceedings or depositions and documents which may have been taken along with the copy of the notice given to the parties under S. 14 (1) of the Act. It can also be sent under registered cover with acknowledgement due and the award so filed shall form a part of the record. Rule 13 (i) refers to "cause an award to be filed." This is in consonance with the provision of S. 14 (2) of the Arbitration Act. There is no inconsistency between S. 14 (2) and R. 13 (i). Both these provisions relate to "cause the award to be filed" on the application of a party or on the direction of the Court. In such cases, only R. 3 is to be followed. But R. 13 (ii) has made it clear that no formality is necessary when the arbitrator himself files the award in Court. It is not a case of "causing the award to be filed."

8. The Supreme Court in State of Madhya Pradesh v. Saith and Skelton (P) Ltd., AIR 1972 SC 1507, has held that there is no prohibition in the Act, particularly in S. 14 (2), against the arbitrator filing suo motu his award in Court. The Supreme Court rejected the contention that the award should be filed only if the parties make a request to the arbitrator to file the award or make an application to the Court for that purpose. The Supreme Court also approved the decision of the Nagpur High Court in Narayan Bhawu v. Dewajibhawu, AIR 1945 Nag 117. Mr. Mukherjee, the learned counsel for the opposite party, has also relied on several decisions of different High Courts of India in this regard. In Puppalla Ramlu v. Nagidi Appalaswami, AIR 1957 Andh Pra 11, it has been held that S. 14 (2) of the Act comes into operation if the arbitrator does not file the award and the party can obtain order of the Court directing the arbitrator to file the award and it has further been held (at p. 12):—

"In my opinion that section can apply only to a case where the help of the Court is sought for getting the award into Court by calling upon the arbitrators to do it."

A Division Bench of the Allahabad High Court in Amod Kumar Verma v. Hari Prasad Burman, AIR 1958 All 720, has also observed that S. 14 (2) contemplates the filing of the award in the Court by the arbitrator; it is not essential that he should himself take it to the Court and it is enough if he causes it to be filed. No formality in the act of filing the award is required. The arbitrator need not make an application for permission or leave to file the award. He can just file the award in the Court without any application, but the act of filing must be his or on his behalf. The effect of S. 14 (2) is that the Court is bound to receive the award and should proceed as laid down in it. In course of discussion, the Division Bench has referred to a case of the Patna High Court in Lachhmi Prasad v. Gobardhan Das, AIR 1948 Pat 171, wherein it has been observed that the filing of an award by an arbitrator is a mere ministerial act, that no solemnity attaches to it and that when he files the award he is doing an act which the statute requires him to do. In Balwant Singh v. Partap Singh Jawala Singh, AIR 1968 Punj & Har 265, it has been held that no application is necessary in law for an arbitrator for filing the award in Court. The decision reported in AIR 1945 Nag 117 (supra) has also been reiterated.

9. Mr. Roy contends that there is nothing in those decisions to show that any rule was prepared by the High Court on this aspect. As I have already pointed out, the Rules framed by the Orissa

High Court are in consonance with the provision of S. 14 (2) of the Act, and Cl. (ii) of R. 13 clearly says that an arbitrator can directly file an award and the formalities as embodied in R. 3 are not required. The contention of the petitioner, therefore, is not sustainable.

Reliance has also been placed by the petitioner on the decision reported in Mst. Puinbasi Majhiani v. Shiba Bhue, (1967) 33 Cut LT 13: (AIR 1967 Orissa 41). But this decision has no application to the facts and circumstances of the present case.

10. It may also be mentioned that in 1975 the award was filed and the defendant (petitioner in this revision) had already notice of filing of the award. Any objection to the award is to be filed within thirty days from the date of service of the notice of making of the award as provided in Art. 119 of the Limitation Act. The present application was filed near about three years after the notice and, as such, the application is also barred by limitation.

11. In the result, the civil revision has no merit and is accordingly dismissed with costs. The records be remitted back to the lower court immediately.

Revision dismissed.

AIR 1979 ORISSA 5

R. N. MISRA AND B. K. RAY, JJ.

Anand Padhan and others, Appellants v. Dhuba Mohanty and others, Respondents.

First Appeal No. 225 of 1970, D/- 11-8-1978.*

(A) Orissa Land Reforms Act (16 of 1960), S. 67 — Applicability — Does not apply when suit is not one as between landlord and tenant. **(Para 5)**

(B) Transfer of Property Act (4 of 1882), S. 43 — Applicability — Extent of.

Where some of the defendants and the predecessor in title of the other defendants entered into contracts of sale for valuable consideration and representing that they were authorised to transfer the property and later the defendants applied for settlement of the aforesaid lands under the Orissa Estates Abolition Act and the land was settled on them under the Act, held that where the land was settled on heir of the original vendors, S. 43 would have no application as the land was settled on these defendants in their own right and not as heirs of the original landlords but in case of other defendants who were the original vendors and on whom lands were settled under the aforesaid Act, S. 43 of the T. P. Act would apply in full vigour. AIR 1915 Cal 751 Foll. (Para 7)

Anno: AIR Comm. T. P. Act (4th Edn.) S. 43 N. 9.

Cases Referred: Chronological Paras

AIR 1915 Cal 751 7

(1704) 1 Salk 276 : 87 ER 1003 7

N. V. Ramdas, for Appellants; B. K. Pal, for Respondents.

R. N. MISRA, J.:— Plaintiffs, plaintiff No. 1 being the father of the remaining plaintiffs, have carried this appeal against the judgment and decree of the learned Additional Subordinate Judge of Berhampur dismissing their suit for declaration of title as occupancy tenants under the State Government.

2. They filed the suit on 11-3-1967 alleging that the disputed property was Darmilla Paik Service Inam lands of the Surangi Estate and the same has been abolished under the provisions of the Orissa Estates Abolition Act (hereinafter referred to as the 'Abolition Act'). Ancestors of defendants 1 to 7 were raiyats under the Estate with occupancy right over the disputed property. With respect to malevaram right of the disputed lands, the Zamindars of Surangi created Inams in favour of the defendants' ancestors for rendition of personal service. Nominal quit rent (Kathubadi) had, however, been fixed. The Inam-holders i.e. predecessors of defendants were thus enjoying the Kudivaram as also the Malevaram rights in the disputed property. The service was, however, discontinued around 1908. Plaintiffs obtained two sale deeds and four lease deeds from the defendants and their ancestors in respect of the Kudivaram right in regard to different portions of the disputed property details whereof would be indicated later and got into possession thereof. After the vesting of the estate, defendants applied for settlement of the lands with them under the Abolition Act. Under wrong advice, plaintiffs had also made similar applications. The Collector under the Abolition Act rejected the claim advanced by the plaintiffs and settled the lands with the defendants. After the

*(From decision of S. K. Behera, Addl. Sub. J. Berhampur, D/- 5-9-1970).

settlement of the property with the defendants, they started claiming title to the property and demanded Rajbhag from the plaintiffs treating them as Bhagchasis. Plaintiffs, therefore, claimed the declaration in the manner indicated.

3. Defendants 1 to 8 excepting defendant No. 5 filed a joint written statement while defendants 9 and 10 filed another written statement. The legal representatives of defendant No. 5 have adopted the written statement of the main group of defendants. They have accepted the allegation of alienations, but maintained that the Inam was of both Malevaram and Kudivaram for rendition of service to the Zamindar. Service continued to be rendered till the abolition of the Estate and the land being Paik Service Inam Jagir, no raiyati right could accrue therein in view of the provisions of S. 3 (16) of the Madras Estates Land Act of 1908. The sales and transfers through permanent leases in favour of the first plaintiff, therefore, were void. The Collector under the Abolition Act had rightly negatived plaintiff's claim for settlement. The suit was barred under S. 39 of the Abolition Act and the Civil Court would have no jurisdiction to entertain the suit in view of the provisions of the Orissa Land Reforms Act. Defendants 9 and 10 in their written statement pleaded almost in the same manner.

4. The learned trial Judge framed several issues and came to hold that the alienations under Exts. 1 to 6 — Exts. 1 to 4 being lease deeds and Exts. 5 and 6 being sale deeds — were genuine and for consideration. But the transfers under Exts. 1, 3, 5 and 6 were not binding on defendants while those under Exts. 2 and 4 were valid and binding on defendants 4 and 6 and their ancestors but in view of the provisions of Section 39 of the Abolition Act, the suit was barred and no relief was admissible. He negatived the applicability of S. 43 of the Transfer of Property Act and accordingly dismissed the suit.

5. Mr. Ramdas for the plaintiffs does not dispute acquisition of valid title by the defendants pursuant to settlement of the disputed lands with them by the Collector under the Abolition Act. He concedes that the applications made by the plaintiffs on the footing that they were the ex-intermediaries were misconceived and no such application is tenable. The only argument he advances is that on the finding that the transactions were genuine and for consideration, the transferors thereof having acquired title subsequent to the alienations, were bound under S. 43 of the Transfer of Property Act and such title as was created in favour of the plaintiffs should have been accepted by the trial Court. We are thus called upon to deal with the applicability of S. 43 of the Transfer of Property Act. Mr. Pal for the defendants-respondents does not seriously contend that the suit would be barred under S. 39 of the Abolition Act. In fact, the title created under the Abolition Act by virtue of settlement with the defendants is not at all disputed. It is on the footing of acquisition of title that the claim under S. 43 of the Transfer of Property Act is advanced. Mr. Pal has contended that the suit in the form laid was not maintainable in view of Sec. 67 of the Orissa Land Reforms Act. We do not agree with Mr. Pal's submission in view of the fact that this is not a suit between a landlord and tenant and plaintiffs have not contended that defendants are their landlords. On the other hand, they have claimed for declaration of the rights created in their favour under the alienations and on that footing their claim is for declaration of occupancy right directly under the State Government. It may be reiterated here that the subject-matter of the alienations under Exts. 1 to 6 was the tenancy right representing Kudivaram and not the Malevaram interest which was the service Inam.

6. Before we proceed to deal with S. 43 of the Transfer of Property Act, it is appropriate to furnish details of the transfers. For convenience, we have reduced the particulars into form of a chart :—

(See chart on next page)

Mr. Pal appearing for the defendants has accepted the correctness of the materials indicated above.

7. Section 43 of the Transfer of Property Act provides :—

"Where a person fraudulently or erroneously represents that he is authorized to transfer certain immoveable property and professes to transfer such property for consideration, such transfer shall, at the option of the transferee, operate on any interest which the transferor may acquire in such property at any time during which the contract of transfer subsists.

Nothing in this section shall impair the right of transferees in good faith for

Sl. No.	Khata/ Survey Number	Extent of land	Manner of acquisition of title	Vendor/ Transferor	Consideration/ Premium	Settlee under the Abolition Act.
1	2	3	4	5	6	7
1.	45/34	2.08	Sale deed (Ext. 5) 25-5-1926	Arjuno Mohanty (father of D-I).	Rs. 300/-	Defdt. No. 1.
2.	88/38	3.23	Sale deed (Ext. 6) 11-4-1927	A. Lokhan Patro	Rs. 600/-	Defdt. No. 2.
3.	33/116 118/1 118/2	1.53	Regd. Patta (Ext. 1) 19-5-1943	Defendant No. 3 and others.	Rs. 300/-	Defdt. No. 3.
4.	61/45/1 45/2 47	2.34	Regd. Patta (Ext. 2) 19-5-1943	Bhikari Dalei (predecessor-in-interest of defdts. 5 (a) to 5 (e)).	Rs. 500/-	Bhikari Dalei.
5.	68/28	1.01	Regd. Patta (Ext. 3) 28-3-1944	Loka Rout (father of Defdt. No. 6).	Rs. 280/-	Defdt. No. 6.
6.	36/26/2 39	1.07	Permanent Lease Deed (Ext. 4) 28-3-1944	Defendant No. 7.	Rs. 360/-	Defdt. No. 7.

consideration without notice of the existence of the said option."

Defendatns have pleaded that they had no right to alienate the property by the time the alienations were made. It has been conceded that they have now acquired good title following the settlement of the properties with them by the Collector under the Abolition Act. A reference to the terms of Exts. 1 to 6 would clearly indicate that the transferors therein had entered into the transactions by representing that they were authorised to transfer the property. Each of the transfers is for consideration as indicated above.

A Division Bench of the Calcutta High Court in the case of Chota Bahira Saheba v. Purna Chander Chaudhuri, AIR 1915 Cal 751 consisting of Sir Asutosh Mookerjee and Beachcroft, JJ. quoted in the judgment the provision of S. 43 of the Transfer of Property Act and after discussing the scope of the provision observed :—

"The contract could have been enforced against the seller and yet it was doubted whether the remedy was available against the heir although Sir Edward Sugden did not share the doubt : See Trevivan v. Lawrence, (1704) 1 Salk 276. The distinction for which Sir Edward Sugden could see no good reason may be regarded as unsound on principle for as Bigelow observes (Estoppel Edn. 6 pp. 459 and 479) the heir of the transferor in such a case is rightly bound by the same estoppel as the transferor himself because he takes without value and no injustice is done to him; he is bound as a privy because he gets the estate without cost and it is right therefore that he should stand in the situation of his ancestor. The true rule may accordingly be taken to be that if the transferor himself has once become entitled to a valid estate in the land the transferee's equity would attach upon it in the hands of all persons claiming under the transferor otherwise than for a legal interest by purchase for value without notice: ..... To avoid misapplication of this principle it is useful to bear in mind the successive steps of the process of reasoning by which the result is reached; first a contract by X for valuable consideration to assign property to be acquired by him whether it is expressed as a contract or whether it takes the form of an immediate assignment merely binds X personally until the property comes into existence; secondly when X acquires property which comes within the scope of the contract that property is bound; X becomes a trustee of it for the assignee who acquires an equitable interest therein; and it is not necessary that any fresh act should be

done by X to perfect such equitable interest of the assignee; thirdly, the interest acquired by assignee in after-acquired property when it is acquired is an equitable interest; as such it is not available against a purchaser for value without notice of a legal interest in the property."

Applying this dictum, we find that the alienations under Exts. 3, 5 and 6 would not be covered by S. 43 of the Transfer of Property Act. The transferor under Ext. 3 was Loka Raut while the application under Chap. II of the Abolition Act was made by defendant No. 6 and the land was ultimately settled with him. The vendor under Ext. 5 was Arjuno Mohanty, father of defendant No. 1. The claim under Chap. II of the Abolition Act was made by defendant No. 1 and he obtained settlement with him. The sale under Ext. 6 was by Laxman Patra, father of defendant No. 2. The claim under Chap. II of the Abolition Act was by the daughter (defendant No. 2) and the settlement has been with her. In respect of these transactions, following the principle indicated in the Calcutta case, S. 43 of the Transfer of Property Act would not have application, because the transferor never became owner of the property and the settlement has been obtained by the parties noted above in their own right and not as heirs of the persons who are bound by contracts. So far as the other three transactions are concerned, i. e. transactions under Exts. 1, 2 and 4, the transferors are the settlees and, therefore, S. 43 of the Transfer of Property Act has direct application.

8. We would accordingly allow the appeal in part. Plaintiffs' suit is decreed in regard to items 3, 4, 6 and 7 of the plaint schedule which are covered by Exts. 1, 2 and 4 respectively. Their suit in regard to items 1, 2 and 5, namely transactions covered by Exts. 3, 5 and 6 is dismissed and the decree of the trial court in regard to those three items is confirmed. The appeal is accordingly allowed in part and plaintiffs shall have a decree giving them occupancy right under the State of Orissa in regard to 1.53 acres under Ext. 1, 2.43 acres under Ext. 2 and 1.07 acres under Ext. 4. Parties are directed to bear their respective costs of the litigation throughout.

B. K. RAY, J.:— I agree.

Appeal partly allowed.

AIR 1979 ORISSA 8

R. N. MISRA AND B. K. RAY, JJ.

Satyabadi Naik, Appellant v. The State of Orissa, Respondent.

Second Appeal No. 241 of 1975, D/- 25-7-1978.*

Civil P. C. (1908), S. 9 — Suit against State Government for declaration of title and injunction — Maintainability — Portion of suit land acquired by State Government but possession not taken — In proceedings under Orissa Prevention of Land Encroachment Act, Tahsildar ordering eviction of plaintiff as encroacher — Suit if barred by Encroachment Act. (Specific Relief Act (1963), Ss. 34 and 36).

In a proceeding initiated under Orissa Prevention of Land Encroachment Act, 1972, on allegation that portion of disputed land had already been acquired by State Government, under Land Acquisition Act, Tahsildar directed eviction of plaintiff on footing that he was an encroacher. The plaintiff filed suit for declaration of title and injunction. The concurrent finding of Lower Courts that plaintiff had no title was not challenged by plaintiff. Plaintiff was, however, found to be in possession for at least 3 or 4 years before suit. It was not disputed by defendant-State that possession had not been taken by State Government of property acquired. It was also conceded by defendant that if the land would not be Government land, the Encroachment Act would not have application.

Held: Possession having not yet been taken, the acquired land had not yet vested with the title in State in view of Sec. 16 of the Land Acquisition Act and therefore the defendant was not entitled to contend that it being the real owner no relief on basis of possessory title could be given to plaintiff against true owner. (Paras 6, 7)

There was no provision in Orissa Prevention of Land Encroachment Act of 1972 which excluded jurisdiction of Civil Court to determine whether the Tribunal created thereunder had acted within its bounds. Civil Court did have jurisdiction to entertain the suit even in respect of property which had been made subject-matter of encroachment proceeding. (Para 8)

*(From decision of J. Tyadi, Addl. Sub. J. Jeypore, D/- 5-8-1975).

As the property had not vested in the State, the land had not become Government land and the fact that encroachment proceeding was concluded was not of any avail. AIR 1940 PC 105; AIR 1963 SC 1547, Rel. on. (Para 8)

The suit was maintainable and the plaintiff was entitled to decree for injunction on basis of previous possession only. The injunction would not be operative when possession was taken by defendant. (Para 9)

Anno: AIR Comm. C.P.C. (9th Edn.), S. 9 N. 50; AIR Man. (3rd Edn.), Specific Relief Act, S. 34 N. 19; S. 36 N. 2.

Cases Referred: Chronological	Paras
(1974) 1 Cut WR 568	6
AIR 1963 SC 1547	8
ILR (1963) Cut 482	6
AIR 1940 PC 105	8

S. Mohanty and S. D. Das, for Appellant; Standing Counsel, for Respondent.

R. N. MISRA, J.:— Plaintiff has appealed against the affirming judgment and decree of the learned Additional Subordinate Judge of Jeypore upholding dismissal of his suit for declaration of title and injunction restraining the defendant from disturbing his possession.

2. Plaintiff alleged that he had purchased 86 decimals of land out of plot No. 57 in Mauza Kaki under a registered sale deed dated 28-11-1970 (Ext. 2) for a consideration of Rs. 2,580/- after obtaining the requisite permission from the competent authority under the provisions of the Orissa Land Reforms Act from one Dalapati Hantal. Dalapati had purchased the property from Hadi Hantal and Laxman Hantal in Feb., 1969. Plaintiff has remained in possession of the property following his acquisition and had constructed an asbestos-roofed house thereon. On 14-4-1972, the Additional Tahsildar of Sunabeda initiated a proceeding under the Orissa Prevention of Land Encroachment Act, 1972, on the allegation that the land in question had already been acquired under the Land Acquisition Act (I of 1894) by the State Government of Orissa and notwithstanding the objection of the plaintiff, directed his eviction on the footing that plaintiff was an encroacher. Plaintiff tried to obtain relief under the Statute, but since his appeal and revision were dismissed, he was obliged to institute the suit. According to him, the land is not "Government property" within the definition of the Encroachment Act and as such the proceeding was not maintainable. It may be stated that the proceeding was in respect of 8 decimals out of the 86 decimals purchased by the plaintiff.

3. In its written statement, the defendant pleaded that the land belonged to one Raghunath Hantal and he died leaving behind his daughter Padma. The 92 decimals of land belonging to Raghunath Hantal including the disputed property was notified for acquisition. A dispute arose as to who was the proper person to be compensated and the matter was referred to the Court of the Subordinate Judge, Jeypore, in M. J. C. No. 109 of 1964 under S. 30 of the Land Acquisition Act. The learned Subordinate Judge held that the land was the separate property of Raghunath Hantal and Hadi Hantal had no title over it. Plaintiff's vendor had never acquired any title to the property and plaintiff, therefore, is not entitled to declaration of his title. The construction of the house by the plaintiff is an encroachment after the acquisition and plaintiff is not entitled to protection. The land encroachment proceeding had been rightly initiated as the disputed property was Government land and plaintiff was an encroacher.

4. Several issues were raised and the learned trial Judge came to hold that the plaintiff had no title and the disputed property was a part of the land acquired by the State for the purpose of the Central Government, i.e. the MIG factory at Sunabeda and plaintiff had, therefore, no cause of action for instituting the suit. The learned Appellate Judge affirmed the finding that Hadi Hantal, the vendor had no title. Possession of Hadi Hantal and Dalapati Hantal as also of plaintiff was unauthorised and plaintiff was a mere trespasser. Plaintiff was not entitled to claim possessory title. He, however, came to hold that there was no evidence that the State Government had taken over possession of the property in the land acquisition proceeding. On these findings, the appeal was dismissed.

5. The second appeal was placed before our learned brother Das, J. who referred the matter to a larger Bench for considering the question of maintainability of the suit in view of the provisions contained in the Orissa Prevention of Land Encroachment Act. That is how this appeal is before us.

6. The finding that plaintiff has acquired no title appears to have become

final as learned counsel for the appellant does not ask us to take a different view. It is contended that the learned Appellate Judge failed to appreciate the claim of possessory title. The learned Appellate Judge was not inclined to accept the principles enunciated by this Court in the case of Gadadhar Sahu v. Karsanbasta Patel, ILR (1963) Cut 482 and in the case of E. Mangulu v. Paddili Sriramlu, (1974) 1 Cut WR 568, by saying:—

".....But in the present case there is no evidence to show that the plaintiff was in long possession of the property, or he came into lawful possession of the property. It is significant to note that there is no averment in the pleadings that the plaintiff has any possessory title or for that matter was in lawful possession of the property since long. It is the specific case of the plaintiff that the property belonged to Hadi Hantal who sold the same to Dalapati Hantal (P. W. 1) who in his turn sold the same to the plaintiff. P. W. 1—Dalapati Hantal purchased the property from Hadi Hantal in the year 1969 and sold the property to the plaintiff in the year 1970. As already stated, the property admittedly belonged to one Raghunath Hantal who is the brother of Hadi and both of them were living separate. There is no evidence worth the name to show that Hadi Hantal was in possession of the property for a long time in exercise of his rights. It is in evidence that Raghunath was living with Hadi after the death of his wife and it is thus how Hadi was in possession of the property and continued to possess the same after the death of Raghunath....."

The learned subordinate Judge had taken note of the observation of this Court to the effect:—

"Lawful possession does not mean that there must be a semblance of title to make the possession lawful though the title is not proved conclusively."

In that view of the matter, plaintiff being in possession of the property for at least three or four years prior to the dispute must be found to have been in prior possession and is entitled to retain possession by resorting to the judicial process against the entire world but not the true owner.

7. There is no dispute that there has been a land acquisition proceeding for acquisition of this property for the purposes of the MIG factory at Sunabeda and the said acquisition is for a Central owned Corporation by the State of Orissa on behalf of the Central Government. Learned Standing Counsel does not dispute the finding of the lower appellate court that possession has not been taken of the property in the land acquisition proceeding. Sec. 16 of the Acquisition Act provides:—

"When the Collector has made an award under S. 11, he may take possession of the land, which shall thereupon vest absolutely in the Government, free from all encumbrances."

Possession having not yet been taken, the acquired land has not yet vested with title in the State and the defendant is not, therefore, entitled to contend that title to the property vests in the Government and Government being the real owner, no relief on the basis of possessory title can be given against the true owner. On the aforesaid analysis, plaintiff being in prior possession, was entitled to maintain his possession as against the State Government.

8. Learned Standing Counsel has conceded before us that the property in dispute in the suit is a total area of 86 decimals which plaintiff claimed to have acquired under a registered sale deed. The proceeding under the Encroachment Act was only in regard to 8 decimals of land. In that view of the matter, the suit could not have been found not to be maintainable. It has been the case of the plaintiff that the land in regard to which proceeding was taken under the Encroachment Act was not 'Government land'. It is conceded before us by defendant's counsel that if the land would not be 'Government land', the Encroachment Act would not have application. No provision in the Orissa Prevention of Land Encroachment Act of 1972 has been shown to us which excludes the jurisdiction of the Civil Court to determine whether the Tribunal created under the statute has acted within its own bounds. It has been held by the Privy Council in the case of Secretary of State v. Mask & Co., AIR 1940 PC 105 that it is open to the Civil Court to examine in a given case whether a tribunal created by an Act has acted within its own limitations. In the case of Firm Seth Radha Kishan (deceased) v. Administrator, Municipal Committee, Ludhiana, AIR 1963 SC 1547 it was observed (at p. 1551):—

"Under S. 9 of the Code of Civil Procedure the Court shall have jurisdiction

to try all suits of civil nature excepting suits of which cognizance is either expressly or impliedly barred. A statute, therefore, expressly or by necessary implication, can bar the jurisdiction of Civil Courts in respect of a particular matter. The mere conferment of special jurisdiction on a tribunal in respect of the said matter does not in itself exclude the jurisdiction of Civil Courts. The statute may specifically provide for ousting the jurisdiction of Civil Courts; even if there was no such specific exclusion, if it creates a liability not existing before and gives a special and particular remedy for the aggrieved party, the remedy provided by it must be followed. The same principle would apply if the statute had provided for the particular forum in which the remedy could be had. Even in such cases, the Civil Court's jurisdiction is not completely ousted. A suit in a Civil Court will always lie to question the order of a tribunal created by a statute, even if its order is, expressly or by necessary implication, made final, if the said tribunal abuses its power or does not act under the Act but in violation of its provisions."

In view of what has been said above, we are inclined to take the view that the Civil Court did have jurisdiction to entertain the suit even in respect of the property which has been made the subject matter of the encroachment proceeding. The encroachment proceeding had been decided on the basis that the land had been acquired and had thus become Government land. As we have found that the property had not vested in the State, the presumption on which the encroachment proceeding was concluded is not of any avail.

9. On our findings that the Civil Court had jurisdiction and, therefore, the suit was maintainable and the plaintiff being in previous possession was entitled to protection of his possession against the State which has not yet acquired title to the property, plaintiff must be entitled to a decree for injunction on the basis of previous possession only. The claim of title which had been negatived in the courts below stands affirmed in the absence of any challenge from the plaintiff. The defendant shall be restrained from interfering with plaintiff's possession as long as in the land acquisition proceeding possession is not taken under S. 16 of the Land Acquisition Act. Once such possession be taken, the title in the property would vest in the State and plaintiff with possessory right would not be entitled to any further remedy. We make it clear that injunction shall not be operative once possession is taken under S. 16 of the Act by the defendant and the relief granted in the suit must come to an end.

Parties are directed to bear their respective costs throughout.

B. K. RAY, J.:— I agree.

Order accordingly.

AIR 1979 ORISSA 11

P. K. MOHANTI, J.

M. P. Swami, Appellant v. Mangaram Agarwalla, Respondent.

Second Appeal No. 183 of 1976, D/- 17-7-1978.*

Evidence Act (1 of 1872), S. 114 — Common course of business — Presumption as to service of notice by registered post — Endorsement of postman "refused to receive" — Sufficient to arrive at the presumption under S. 114 — Examination of postman — Not necessary.

Where a notice sent by post in a registered cover is returned by the postman with the endorsement that the addressee refused to receive it, and the posting of the notice has been proved, there arises a presumption under S. 114 that the addressee did refuse to receive it even though the postman has not been produced to prove tender and refusal. Undoubtedly the presumption is one of fact and rebuttable. It can never be regarded as conclusive. But the presumption would not be rebutted by mere denial on oath by the addressee unless it is believed by the Court. AIR 1963 SC 822 and AIR 1976 SC 869, Foll. (Para 7)

Anno: AIR Manual (3rd Edn.) Evidence Act, S. 114 N. 42.

Cases Referred : Chronological Paras

AIR 1976 SC 869 7

AIR 1963 SC 822 : 1963 All LJ 397 7

S. S. Basu, for Appellant; R. K. Mohapatra, for Respondent.

JUDGMENT:— The second appeal is by the defendant against a decree of affirmance arising out of a suit for eject-

*(From decision of A. P. Guru, Addl. Dist. Judge, Sambalpur, D/- 13-7-1976.)

ment and for recovery of arrears of house rent.

2. The plaintiff's case was that the suit house was let out to the defendant in the month of July, 1968 on a monthly rent of Rs. 15, but the defendant failed to pay the rent from May, 1972 despite repeated requests and did not vacate the house despite service of notice under S. 106 of the Transfer of Property Act determining the tenancy with effect from 31st October, 1973.

3. The defendant disputed the plaintiff's title to the suit house and denied that he was a monthly tenant under the plaintiff in respect of the same.

4. The learned Munsif decreed the suit holding that the plaintiff was the owner of the suit house, that the defendant was a monthly tenant in respect of the same, that he was in arrears of house rent from May, 1972 and that the notice under S. 106 of the Transfer of Property Act terminating the tenancy with effect from 31st October, 1973 was duly served on the defendant.

5. Before the first appellate court the defendant did not challenge the finding of the trial court that he was a monthly tenant under the plaintiff in respect of the suit premises, but contended that the notice under S. 106 of the Transfer of Property Act was not served on him. The learned Addl. District Judge on a consideration of the evidence on the record came to the findings that the defendant had refused to accept the notice under S. 106 of the Transfer of Property Act and that he had not vacated the house despite termination of the tenancy. Accordingly he confirmed the decree passed by the trial court. The findings of the lower appellate court are assailed in this appeal.

6. According to the plaintiff, the notice (Ext. 1) was sent to the defendant by registered post and he had refused to accept the same as per the endorsement of refusal made by the postal peon on the registered cover. The defendant made statement on oath that the postal envelope containing the notice was not tendered to him and the allegation that he refused to accept the same is false. The lower appellate court came to the conclusion that the presumption arising out of S. 114 of the Indian Evidence Act had not been rebutted by the defendant.

It is urged in this appeal that the endorsement of refusal by the postal peon could not be taken into consideration unless the postman was examined.

7. According to S. 114 of the Evidence Act the Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case. The Court may thus presume that the common course of business or of any office has been followed in the particular case. Where a notice sent by post in a registered cover is returned by the postman with the endorsement that the addressee refused to receive it, and the posting of the notice has been proved, there arises a presumption under S. 114, Evidence Act that the addressee did refuse to receive it even though the postman has not been produced to prove tender and refusal. Undoubtedly the presumption is one of fact and rebuttable. It can never be regarded as conclusive. The presumption is not rebutted by denial on oath by the addressee unless it is believed by the Court. I am fortified in this view by two decisions of the Supreme Court reported in AIR 1963 SC 822 (Radha Kishan v. State of Uttar Pradesh) and AIR 1976 SC 869 (Puwada Venkateswara Rao v. Chidamana Venkata Ramana). In the latter case the Supreme Court held (at p. 871):—

"..... It is not always necessary in such cases, to produce the postman who tried to effect service. The denial of service by a party may be found to be incorrect from its own admissions or conduct....."

8. In the present case, the statement of the defendant in court that the notice was not tendered to him has not been believed by the lower appellate court. Taking into consideration the conduct of the defendant and several circumstances appearing against him it came to hold as follows:—

"..... These are the circumstances, which are against the appellant, who cannot be taken to have rebutted the presumption available to the plaintiff, under S. 114 of the Evidence Act, to the effect that the notice, Ext. 1 was offered to the defendant, but was refused by him."

I see no cogent ground to interfere with the above finding of the lower appellate Court.

9. There is no merit in this appeal and it is accordingly dismissed with costs.

Appeal dismissed.

AIR 1979 ORISSA 13

S. ACHARYA AND P. K. MOHANTI, JJ.

Hrudananda Patra and another, Petitioners v. Revenue Divisional Commissioner Central Division, Cuttack and others, Opposite Parties.

O. J. C. Nos. 725 and 738 of 1978, D/-10-8-1978.

Constitution of India, Arts. 19 (1) (g), 14 — Scope of — Monopoly, if can be created by administrative order — Grant of lease having effect of creating illegal monopoly — Arts. 14 and 19 (1) (g), if violated.

The right to carry on any trade, occupation or business can be impaired by the State by a valid law within the permissible limits prescribed under Clause (6) of Art. 19. A restriction which is not authorised by a valid law cannot be saved. The State can by a valid law create monopoly in favour of itself or in favour of a Corporation owned or controlled by the State without being called upon to justify its action in court as reasonable. But when a law creates exclusion of competition or imposes restrictions creating something like a monopoly in somebody to the exclusion of others, the basis on which the said exclusion or restrictions are imposed must be reasonable and the same can be questioned by the Court. (Para 6)

A monopoly cannot be created by an administrative order. It can be created only by law made in the interest of the general public or in favour of the State or a corporation owned or controlled by the State, as is evident from Art. 19 (6). It is open to the State authorities to give preference to co-operative societies if they are of the opinion that granting the lease to a co-operative society would facilitate the objects of any law in force. (Para 6)

A and B were the highest bidders in public auction of two quarries and both of them deposited 50% of the lease amounts. The auction notice did not contain any stipulation that quarries would be settled with a Co-operative Society, if it agreed to pay the amount offered by the highest bidder. The concerned authority recommended to the higher authorities that the said quarries should be settled with A and B. The Tahsildar reported that the previous lessee C (a Co-operative Society) had defaulted and misconducted itself in various ways in complying with the terms and conditions of the lease of the previous year. In spite of these, the Revenue Divisional Commissioner directed that the said two stone quarries be settled with C and not with A and B. On writ petitions filed by A and B, the concerned authorities sought shelter under Government instructions contained in Letter No. 62388-E.A.-III-200/64-R dtd. 25-9-64 from the Revenue Secretary. It was stated that they felt bound to settle the said Sairats in favour of C and not with the highest bidders, as C, the co-operative society communicated its acceptance to take the Sairats on lease for the highest bid amounts.

Held (1) that by the settlement of the Sairats with C in the aforesaid manner A and B had been actually excluded at the threshold from carrying on trade with the Government, which was in violation of Art. 19 (1) (g) read with Art. 14 of the Constitution. The said grant had in effect created an illegal monopoly in favour of C. So the exclusion of A and B merely on the aforesaid basis amounted to a discrimination which violated the right guaranteed under Art. 14 and had created a monopoly at the threshold in favour of C to the exclusion of the highest bidder, thereby violating Art. 19 (1) (g) read with Cl. (6) thereof. AIR 1962 SC 386 and AIR 1971 SC 2068 Rel. on. (Para 8)

(2) That the order, settling the lease in favour of C had the effect of shutting out all persons other than the co-operative societies, thereby depriving them of the equality of opportunity in the matter of public contracts. Scope of Art. 14 explained. AIR 1977 SC 1496 and AIR 1975 SC 266, Rel. on. (Para 8)

(3) that the discrimination made on the basis of the administrative instructions did not indicate that it was made on the basis of any intelligible differentia having a rational relation to the object sought to be achieved or in the interest of the general public. AIR 1962 SC 386, Rel. on. (Para 8)

(4) that the orders settling the lease of the Sairats in favour of C in preference to or to the exclusion of A and B were illegal, arbitrary and unconstitu-

tional and were therefore liable to be set aside. AIR 1975 SC 434, AIR 1973 SC 303, AIR 1977 SC 1496 and AIR 1975 SC 266, Rel. on. AIR 1972 SC 1816, Dist. (Para 10)

(5) that since the auction notice did not contain any stipulation as to preference to be given to co-operative societies, the authorities were not justified in settling the lease in favour of C, AIR 1968 SC 718, Rel. on. (Para 11)

(6) that A and B had no vested right to get settlement of the Sairats merely because they were the highest bidders. The authorities were directed to consider the matter afresh and pass necessary orders in accordance with law. (Para 13)

Anno: AIR Comm. Constn. of India (2nd Edn.), Art. 14, N. 1 (cc) and (e); and Art. 19, N. 79.

Cases Referred: Chronological	Paras
AIR 1977 SC 1496	8, 9
AIR 1975 SC 266	8, 9
AIR 1975 SC 434	9
AIR 1973 SC 303: 1973 Lab IC 191	9
AIR 1972 SC 1816: 1972 Tax LR 2298	9
AIR 1971 SC 2068	8
AIR 1968 SC 718	11
AIR 1962 SC 386	8

G. Rath, R. K. Rath, N. C. Panigrahi and G. S. Sarangi, for Petitioners in both the cases; R. C. Ram (for No. 4) and B. B. Mohanty, Govt. Advocate (for Nos. 1 to 3), for Opposite Parties in both the cases.

S. ACHARYA, J.:— The facts in both these two writ petitions are similar and the orders impugned in both the writ applications are identical. The counsel appearing for the parties in both the cases are the same; facts are similar; the questions of law involved for decision in both these cases are the same; the counsel appearing for the parties advanced only one set of arguments which covers both the cases and they desire that both the cases may be disposed of by one judgment. Accordingly both the cases are hereby disposed of by this one judgment.

2. The Patia stone quarry and the Kalarahang stone quarry were put to public auction on 6-3-78 as per notice (Annexure 3) issued by opposite party No. 3. The petitioner in O.J.C. No. 725/78 was the highest bidder in respect of the Patia stone quarry, and the petitioner in O.J.C. No. 738/78 was the highest bidder in respect of the Kalarahang stone quarry. The petitioners in both the cases deposited 50% of the lease amounts as required under the notice Annexure 3 and being called upon by the concerned authority. The Additional District Magistrate, Puri thereupon recommended to the higher authorities that the said quarries should be settled with these highest bidders. The Tahsildar, Bhubaneswar (opposite party No. 3) in his report (Annex. 6 in both the cases) also reported that the previous lessee, opposite party No. 4, had defaulted and misconducted himself in various ways in complying with the terms and conditions of the lease of the previous year.

In spite of the above facts the Revenue Divisional Commissioner, Central Division, Cuttack (opposite party No. 1) directed that the said two stone quarries be settled with opposite party No. 4, a co-operative society, and not with the petitioners, as can be seen from Annexure 7. Accordingly the said two Sairats have been settled for one year in favour of opposite party No. 4 in spite of the highest bid amounts offered by the petitioners in the auction. While confirming the lease of the said two Sairats in favour of opposite party No. 4 the lease amounts as stated above were directed to be paid in four equal instalments, as can be seen from the order of the Sub-divisional Officer, Bhubaneswar (opposite party No. 2) dated 24-5-78 quoted in paragraph 11 of the counter filed on behalf of opposite parties 1 to 3. The aforesaid orders, settling the Sairats with opposite party No. 4 in preference to the petitioners, are being challenged in these two writ applications.

3. The stand taken by opposite parties 1 to 3 is that the two stone quarries in question are the property of the Government; Government has the exclusive power to dispose of the same or to carry on any trade or business in respect of the same in any manner it thinks fit and proper; the administrative order of the Government in that direction is not justiciable and cannot be questioned in these writ applications; merely because the petitioners were the highest bidders they did not acquire any right to get settlement of the said Sairats as specifically mentioned in Cl. (4) of Annexure 3; and that a case of monopoly, as urged by the petitioners, is not made out in settling the Sairats in favour of opposite party No. 4. The writ petitions are contested mainly on the above averments.

4. Opposite party No. 4 filed a separate counter, and at the hearing the

learned counsel for opposite party No. 4 merely supported the contentions of the counsel for opposite parties 1 to 3.

5. It is urged by Mr. Rath, the learned counsel for the petitioners, that the basis on which the Sairats have been settled with opposite party No. 4 in preference to the petitioners, in effect amounts to creation of a monopoly in favour of opposite party No. 4 without any law to support the same, and it constitutes an infringement of the fundamental right to trade with the Government guaranteed under Art. 19 (1) (g) of the Constitution of India; and the exclusion of the petitioners and others similarly placed from getting the benefit of the settlement of Government Sairats on the aforesaid basis is prohibited by Art. 14 of the Constitution. In this connection it is urged that the fundamental right to trade with the Government guaranteed under Art. 19 (1) (g) of the Constitution cannot be taken away or restricted in any manner except by making any law for the purposes enunciated under Cl. (6) of that Article, and there is no law supporting the arbitrary and monopolistic order passed in this case. Mr. Rath contends that it is evident from paragraph 5 of the counter of opposite parties 1 to 3 that the orders settling the Sairats with opposite party No. 4 are monopolistic in nature and are therefore liable to be quashed.

6. The word 'monopoly' has not been defined in the Constitution. According to the Shorter Oxford English Dictionary the word 'monopoly' means — "exclusive possession of the trade in some commodity; an exclusive privilege (conferred by the sovereign or the State) of selling some commodity or trading with a particular place or country; exclusive possession, control or exercise of something." In Gresham's Comprehensive English Dictionary the meaning of that word is stated as — "an exclusive trading privilege; sole right or power of selling something or full command over a sale of it; possession or assumption of anything to the exclusion of others." In Jowitt's Dictionary of English Law 'monopoly' has been explained as "the exclusive privilege of selling any commodity; a licence or privilege allowed by the Crown, for the sole buying, selling, making, working, and using of anything." The Constitution of India disfavours monopoly in trade because of the provisions in Art. 19 (1) (g) and Art. 14 of the Constitution. Under our Constitution any citizen has the right to engage in any lawful business or trade or occupation as of right and at his pleasure, subject of course to the power of the State to regulate or restrict any occupation, trade or business on the grounds specified in Cl. (6) of Art. 19.

The right to carry on any trade, occupation or business can be impaired by the State by a valid law (as it is understood in the wider sense in the Constitution) within the permissible limits prescribed under Cl. (6) of Art. 19. A restriction which is not authorised by a valid law cannot be saved. If a monopoly is created by law in favour of the State or a Corporation owned or controlled by the State to carry on any trade or business on any particular field to the exclusion of others that cannot be questioned on the ground that it is an infringement of the right guaranteed by Art. 19 (1) (g). So the State by a valid law can create monopoly in favour of itself or in favour of a Corporation owned or controlled by the State without being called upon to justify its action in court as reasonable. But when a law creates exclusion of competition or imposes restrictions creating something like a monopoly in somebody to the exclusion of others, the basis on which the said exclusion or restrictions are imposed must be reasonable and the same can be questioned by the Court.

A monopoly cannot be created by an administrative order. It can be created only by law made in the interest of the general public or in favour of the State or a corporation owned or controlled by the State, as is evident from Article 19 (6) of the Constitution. It is open to the State authorities to give preference to co-operative societies if they are of the opinion that granting the lease to a co-operative society would facilitate the objects of any law in force. Law is well settled that the State can make a classification for the purpose of achieving particular legislative objects, but the classification must satisfy two conditions — (1) This must be founded on intelligible differentia and (2) the differentia must have a rational relation to the object sought to be achieved.

7. In the present case there is no law creating any special right in favour of the co-operative societies in a matter of this nature. For the purpose of defending the settlement of the Sairats in favour of the co-operative society the

concerned authorities seek shelter under the Government instructions contained in letter No. 62388-E.A.-III. 200/64-R dated 25-9-64 from the Secretary to Government (Revenue) to the Board of Revenue, Orissa. In paragraph 5 of the counter filed by opposite parties 1 to 3 by the Assistant Financial Advisor-cum-Under Secretary to the Revenue Divisional Commissioner, Central Division, Cuttack it is, inter alia, stated :—

"5. That the contention of the petitioner that the Government Circular under Annexure-1 is only applicable where a lease is for five years and not otherwise is not correct. Even if the said contention is accepted then the Government Circular dated 25-9-64 would apply to the present case and under the said circular the Co-operative Society if takes part in the bid and is not highest bidder then the chance has to be given to the said society to communicate its acceptance to take the bid on the amount which was the highest bid, and in case the Society agrees, then the sairat has to be settled with it and not with the highest bidder. It is respectfully submitted that whether Annexure 1 is operative or 1964 Circular is operative, in either case the Society has the right to get the lease if it agrees to take it on the amount which was the highest bid."

Mr. Rath submits that the settlement of the Sairats on the above basis creates a monopoly in favour of the co-operative societies, which is not permitted under Cl. (6) of Art. 19 and it offends the provisions of Art. 19 (1) (g) and Art. 14 of the Constitution.

8. In paragraph 5 of the said letter from the Secretary to the Government (Revenue) to the Board of Revenue, Orissa under the caption "Preference to Co-operative Societies in the auction sale", it is inter alia, stated as follows :—

"As already said all Sairats shall normally be settled by public auction. Where a registered Co-operative Society takes part in the bid and is the highest bidder, the sale should be confirmed in favour of such Society. If, however, the society taking part in the bid is not the highest bidder, it should be called upon to state in writing within 7 days from the date of receipt of the communication in that regard if it agrees to take the lease by paying the amount offered by the highest bidder. This statement should always be supported by a resolution of the Society. In case the Society agrees, the Sairat should be settled with it and not with the highest bidder."

From paragraph 5 of the aforesaid counter quoted above, it is evident that opposite party No. 1, in applying the Government instructions contained in paragraph 5 of the aforesaid letter felt bound to settle the said Sairats in favour of opposite party No. 4 and not with the highest bidders as the said co-operative society (O. P. No. 4) communicated its acceptance to take the Sairats on lease for the highest bid amounts. By the settlement of the Sairats with opposite party No. 4 in the aforesaid basis and manner the petitioners have been actually excluded at the threshold from carrying on trade with the Government, which is prohibited under Art. 19 (1) (g) read with Article 14 of the Constitution. It is of course true that the Government is free to enter into contract with any party in respect of its property and opposite party No. 1 was not bound to settle the Sairats in favour of the highest bidders. But in preferring some one who was not the highest bidder the concerned authorities cannot adopt a policy of excluding particular persons from entering into the contract with the Government by merely saying that as per the said Government instruction some others have the right to get the lease of the Government land. In this case the authority concerned has settled the Sairats to the exclusion of the petitioners only because he felt that he was bound to do so on the aforesaid Government instruction. Granting the lease on the aforesaid discriminatory basis, without indicating therein that the said grant was in the interest of the general public or would facilitate or advance the object or the purpose of any law in force, has in effect created an illegal monopoly in favour of opposite party No. 4. So the exclusion of the petitioners merely on the aforesaid basis amounted to a discrimination which violated the right guaranteed under Art. 14 and has created a monopoly at the threshold in favour of opposite party No. 4 to the exclusion of the highest bidder, thereby violating the provisions of Art. 19 (1) (g) read with Cl. (6) thereof. In this connection reference may be made to the observations made in paragraphs 9 and 10 of the decision reported in AIR 1962 SC 386 (Mannalal Jain v. State of Assam),

In the decision reported in AIR 1971 SC 2068 (State of Rajasthan v. Mohan Lal) it has been held:—

"5. It is manifest that after the Constitution came into force every citizen under Art. 19 (1) (g) of the Constitution has the right of freedom of trade including the right to ply buses and trucks on the road. Under Art. 13, the law has to be in consonance with the Constitution. It has, therefore, to be found out as to whether there is any law by virtue of which the State of Rajasthan could grant or keep alive any monopoly contract. The answer is in the negative. There cannot be any law in violation of the provisions of the Constitution. A monopoly right cannot be conferred on a citizen under the Constitution nor can it be justified under the Constitution.

6. In 1951 there was an amendment of the Constitution whereby Art. 19 (6) provided that the monopoly rights could be created in favour of the State in respect of any trade or business. The monopoly contracts in the present case were not in favour of the State Government. Art. 19 (6) of the Constitution provides a reasonable restriction on the fundamental rights of citizens as contained in Art. 19 (1) (g). If the State obtained a monopoly it would be defensible as a reasonable restriction on the rights of citizens to carry on any business or trade and to ply buses. On the other hand, if the State conferred any monopoly right on a citizen it would be indefensible and impermissible and would be an infraction of the inviolable provision of the Constitution."

The order, setting the lease in favour of opposite party No. 4 without any rational basis but only on the sole basis that the co-operative societies have a right to take the lease if they offer the highest bid, had the effect of shutting out all persons other than the co-operative societies, thereby depriving them of the equality of opportunity in the matter of public contracts. Art. 14 speaks of equality before the law and equal protection of the laws. Equality of opportunity applies also to matters of public contracts. Though the State has the right to trade, it has a corresponding duty to observe equality as provided under Art. 14 of the Constitution. In this connection, the observations of their Lordships of the Supreme Court in paragraphs 9 and 10 of the decision reported in AIR 1977 SC 1496 (Radhakrishna Agarwal v. State of Bihar) and in paragraph 12 of the decision reported in AIR 1975 SC 266 (E. E. and Chemicals' Ltd. v. State of West Bengal) may be seen.

In Cl. (4) of Annexure 3 (the auction sale notice) it is stated that the authorities are not bound to accept the highest bid. So the highest bidder does not acquire a vested right to get settlement of the Sairats. It is, therefore, open to the authorities not to settle the Sairats at all with anybody. They can, under Art. 298 of the Constitution, also settle the same with any of the other bidders including the co-operative society or any other person. But in so doing they cannot act arbitrarily or capriciously, nor can they thereby create a monopoly in favour of anybody. In exercising the executive power of the Government, it is the duty of the State to observe fairness and impartiality as far as possible, and this power is to be exercised to facilitate the object of any law or the purpose for which the lease is granted or in the interest of the State or the general public. From Annexure 7 and the counter filed by opposite parties 1 to 3 it is quite evident that the settlement of the lease with opposite party No. 4 was not on any such consideration. The highest bidders, i.e. the petitioners, have not been granted the lease merely on the sole reason and basis that the co-operative society has the right under the said administrative instructions to get the lease of the Sairats. Thus by granting the lease in favour of the co-operative society, opposite party No. 4, a monopoly in favour of the co-operative society has been created, and the discrimination made on the basis of the administrative instructions does not indicate that it was made on the basis of any intelligible differentia having a rational relation to the object sought to be achieved or in the interest of the general public. A monopoly created by an administrative instruction issued by the Assam Government in the matter of granting licence for dealing in rice and paddy in favour of a particular co-operative society was struck down by the Supreme Court in the case reported in AIR 1962 SC 386 (Mannalal Jain v. State of Assam) as the grant of the said licence created a monopoly in favour of a particular co-operative society.

9. The learned Government Advocate contended that the authorities by rejecting the highest bidders and granting the lease in favour of opposite party No. 4 merely performed an executive function,

and so the correctness of their executive decision is not open to judicial review. The decision reported in AIR 1972 SC 1816 (State of Orissa v. Harinarayan) cited in support of the above contention, is distinguishable on facts and it does not squarely apply to this case. In that case the Government supported their order on the provisions of Ss. 22 and 29 of the Excise Act. The validity of these two sections was not challenged in that case. As the impugned order was passed under Ss. 22 and 29 of the Excise Act, whose validity was not challenged, their Lordships held that the power that the Government reserved for itself under Cl. (6) of its order is nothing more than what was conferred on it by the legislature under Ss. 22 and 29 of the Excise Act. Accordingly it was not possible to challenge the validity of S. 29 itself. It has been further held that even apart from the power conferred on the Government under Ss. 22 and 29, the power retained under Cl. (6) of its order was not unconstitutional. Thus it is obvious that the said decision cannot be called in aid for this case.

In Raghunandan Panda's case reported in AIR 1975 SC 434 their Lordships approved the following observation made in Union of India v. K. P. Joseph (AIR 1973 SC 303) (at p. 434 of AIR) :—

"Generally speaking, an administrative order confers no justiciable right, but this rule, like all other general rules, is subject to exceptions."

Having approved the above observations their Lordships in Raghunandan Panda's case held :—

"... ... ... No person has a vested right to get any lease of the Government land; of course, he has got a right to get his application for lease disposed of fairly and not arbitrarily. If, therefore, it could be held in favour of the appellant that his claim for lease of the plot in question was capriciously, arbitrarily and unfairly rejected and that the lease granted to respondent No. 3 was arbitrary and unfair a case could be found in his favour ... ..."

In Radhakrishna Agarwal's case (AIR 1977 SC 1496) it has been held that Art. 14 of the Constitution imports a limitation or imposes an obligation upon the State's executive power under Art. 298 of the Constitution. All constitutional powers carry corresponding obligations with them.

In Erusian Equipment and Chemicals' case (AIR 1975 SC 266 at page 268) it has been held :—

"Under Art. 298 of the Constitution the executive powers of the Union and the State shall extend to the carrying on of any trade and to the acquisition, holding and disposal of property and the making of contracts for any purpose. The State can carry on executive function by making a law or without making a law. The exercise of such powers and functions in trade by the State is subject to Part III of the Constitution. Art. 14 speaks of equality before the law and equal protection of the laws. Equality of opportunity should apply to matters of public contracts. The State has the right to trade. The State has therefore the duty to observe equality. An ordinary individual can choose not to deal with any person. The Government cannot choose to exclude persons by discrimination. The order of blacklisting has the effect of depriving a person of equality of opportunity in the matter of public contracts xx xx xx xx xx xx xx xx xx When the State acts to the prejudice of a person it has to be supported by legality."

10. On the above considerations I am of the opinion that the orders settling the lease of the Sairats in favour of opposite party No. 4 in preference to or to the exclusion of the petitioners are illegal, arbitrary and unconstitutional and are therefore liable to be set aside.

11. Apart from the above, it is also seen that Annexure 3 does not contain any stipulation that the quarries shall be settled with a co-operative society if such a society gives an intimation within 7 days that it is agreeable to pay the amount offered by the highest bidder. If the authorities concerned were actually peremptorily bound to grant the lease in favour of a co-operative society, as stated in the administrative instruction and the counter of opposite parties 1 to 3, then they should have mentioned the same in the auction notice so that intending bidders would have participated in the auction with the knowledge of the said stipulation or restriction. The Government and/or their agencies in exercise of their power, particularly in relation to the general public, must act very fairly. Public authorities should not act in derogation of their own representations, for that will affect the grace and

the sanctity of the authority on which the government is founded.

In the present case the petitioners not only took part in the auction of the Sairats in question but also deposited 50% of the highest bid amount as required in Annexure 3, the auction notice. Thus on the representations made by the public authorities under Annexure 3 the petitioners acted to their detriment, and at that time they did not know that all their efforts in that direction would be reduced to nothing as soon as a co-operative society came into the field at a later stage. In the Union of India v. Anglo Afghan Agencies (AIR 1968 SC 718) their Lordships observed (at p. 723):—

"10. xx xx xx xx xx We are unable to accede to the contention that the executive necessity releases the Government from honouring its solemn promises relying on which citizens have acted to their detriment. Under our constitutional set-up, no person may be deprived of his right or liberty except in due course of and by authority of law: if a member of the executive seeks to deprive a citizen of his right or liberty otherwise than in exercise of power derived from the law — common or statute — the courts will be competent to, and indeed would be bound to, protect the rights of the aggrieved citizen."

On the above consideration also the authorities were not justified in settling the lease in favour of opposite party No. 4, in preference to and exclusion of the petitioners.

12. Mr. Rath, the learned counsel for the petitioners has also contended that opposite party No. 4 is not entitled to get settlement of the Sairats even under the aforesaid Government instruction because of its misconduct in the previous year, non-acceptance of the terms and conditions of settlement as stated in Annexure 3, as can be seen from the resolution passed by the society (Annexure A to the counter filed by opposite parties 1 to 3); and as the offer made by opposite party No. 4 is in the nature of a counter offer. The decision on these questions would depend on disputed facts alleged by the parties on these issues and so I would better not decide these matters here.

13. For reasons stated above, the orders in both the cases settling the Sairats in question in favour of opposite party No. 4, in preference to and exclusion of the petitioners, are quashed. The petitioners have no vested right to get settlement of the Sairats merely because they are the highest bidders. The appropriate authorities, on fresh consideration, shall pass necessary orders in accordance with law for the settlement of these two Sairats.

14. Both the writ applications are accordingly allowed. The petitioner in each case is entitled to a hearing fee of Rs. 100/-.

MOHANTI, J.:— I agree.

Petitions allowed.

AIR 1979 ORISSA 19

N. K. DAS, J.

Fertiliser Corporation of India Ltd., Petitioner v. Ravi Kumar Ohri, Opposite Party.

Civil Revn. No. 131 of 1977, D/- 2-8-1978.*

(A) Arbitration Act (10 of 1940), Ss. 8 and 20 — Jurisdiction and powers of Court under S. 8 — Scope of — Distinction between S. 8 and S. 20.

Under S. 8 the court does not make any reference to any dispute. Its powers are limited only to the appointment of arbitrator or an umpire, as the case may be, if there is an arbitration agreement between the parties and there is no appointment or concurrence despite notice under S. 8 (1) of the Act. After the appointment is made, it is for the parties to file their claims before the arbitrator who is to decide the same on merits. There is a clear distinction between the provisions of S. 8 and S. 20. Under Section 20, the court has to decide where disputes or differences have arisen and after directing the parties to file the agreement, the court has to make a reference of the disputes to the arbitrator.

Section 8 only empowers the court to appoint an arbitrator where the parties do not concur in the appointment. S. 20 confers power on the court to order the agreement to be filed and, further, to make an order of reference to the arbitrator appointed by the parties, or, where the parties cannot agree upon an appointment, to an arbitrator appointed by the court. (Para 7)

Whether a particular claim is untenable by the arbitrator on the ground that notice of the claim has not been

*(From order of J. Nairk, Sub-J., Bhubaneshwar, D/- 29-3-1977.)

given and whether the same is time-barred or not, are all matters for examination by the arbitrator and not by the court while exercising its jurisdiction under S. 8. It has no jurisdiction to see whether there is a really any dispute. That question is to be gone into by the arbitrator. On this very principle also the question whether the payment of final bill constitutes a complete discharge of all obligations under the contract, is a matter which has to be decided by the arbitrator and not by the court. The court is only to examine if there is an arbitration agreement at all. The existence or the validity of the claims and disputes are matters within the jurisdiction of the arbitrator. (Paras 4, 7)

An accord and satisfaction which is concerned with the obligations arising from the contract does not affect an arbitration clause. Whether the obligations under the contract have been fully satisfied as claimed by a party is a question which relates to the contract itself and comes within the arbitration clause therein and this has to be referred to for decision of the arbitrator. (Para 7)

Anno: AIR Manual (3rd Edn.), Arb. Act, S. 8 N. 2; S. 20 N. 1.

(B) Arbitration Act (10 of 1940), S. 8 (1) — Notice under — Notice to General Project Manager who was principal administrative officer of Corporation — Notice, held, could be construed as notice to Corporation. (Para 8)

Anno: AIR Manual (3rd Edn.), Arb. Act, S. 8 N. 7.

(C) Arbitration Act (10 of 1940), S. 12 — Removal of sole arbitrator — Option need not be given to him to nominate another arbitrator.

After an arbitrator is removed, the matter remains with the court and under S. 12 either the court can appoint a new arbitrator or supersede the reference itself. The Court cannot surrender its power and delegate the same to an officer however highly placed he be. AIR 1972 J & K 63; AIR 1958 Mad 296; AIR 1961 Pat 228, Rel. on. (Para 10)

Anno: AIR Manual (3rd Edn.), Arb. Act, S. 12 N. 1.

Cases Referred : Chronological Paras

(1978) Misc. Appeal No. 250 of 1977 and Civil Revision No. 438 of 1977, D/- 5-4-1978 (Orissa) 8

(1977) Misc. Appeal Nos. 9 & 10 of 1977 and Civil Revn. Nos. 22 & 23 of 1977, D/- 6-7-1977 (Orissa) 8

AIR 1976 SC 1745 7

(1976) 1 Cut WR 261 7

AIR 1974 SC 158 7

AIR 1972 J & K 63 10

AIR 1972 Orissa 219 11

AIR 1969 Orissa 280 : 35 Cut LT 630 7, 8, 10

AIR 1965 Cal 183 7, 8

AIR 1961 Pat 228 7, 8, 10

AIR 1958 Mad 296 10

R. Mohanty and K. Patnaik, for Petitioner; G. Rath, R. K. Mohapatra, A. Misra, S. C. Basa, K. C. Panigrahi and R. K. Rath, for Opposite Party.

ORDER:— The Fertiliser Corporation of India (hereinafter referred to as 'the Corporation') is a company incorporated under the Companies Act and it has its branch office at Talcher in the district of Dhenkanal. For construction of its factory at Talcher, tenders were invited for supply of 175 lakhs of kiln burnt bricks and the opposite party was one of the tenderers. After negotiation, his tender was accepted and supply thereunder was to be completed by 30th of June, 1975. The opposite party filed a petition under S. 8 (2) read with S. 8 of the Arbitration Act in the court of the Subordinate Judge, Bhubaneswar. The said petition was allowed and one retired District Judge was appointed as arbitrator. The present revision is directed against that order.

2. Opposite party was the petitioner in the court below. His case was that after negotiation, tender for supply of 175 lakhs of kiln burnt bricks was accepted and supply was to be completed within eighteen months from 22-8-73. It was further fixed that supply of 72,00,000 bricks would be made by 30-6-74 and 15,00,000 bricks were to be supplied by 30-9-74. The officers of the corporation did not fix the stacking ground till 24-12-73. Some quarters were constructed and for construction of those quarters, the corporation received 12,50,000 bricks by 6-3-74 and the stipulation was that no payment would be made on bricks at the kiln site. As huge number of bricks could not be lifted due to want of stacking ground, a large number of bricks of the opposite party was blocked, but the corporation assured him to compensate the loss sustained by him due to blocking of the area. The opposite party had to suffer a lot due to rise of prices on tyre, fuel etc. As per the terms of agreement, in case of dispute, the same should be referred to

arbitration. The opposite party accordingly served notice under S. 8 (1) of the Arbitration Act to the arbitrator which was received on 31-3-76. The corporation did not act in spite of that notice and instead of being impartial and judicious, the General Project Manager became biased. So, the opposite party prayed for leave to revoke the authority of the General Project Manager and to appoint another person as arbitrator.

The corporation in its counter contends that non-availability of stacking ground at the kiln site was of no concern to the petitioner (corporation) as per the agreement. The rate regarding supply of bricks is fixed and there is no scope for reduction (enlargement?) of rate as per the contract. The corporation is not responsible for the alleged loss sustained by the opposite party. The allegation of bias has been refuted and it is stated that if there would be a question for arbitration, then it is only the General Project Manager, or some other person to be appointed by him, to act as arbitrator.

3. The learned Subordinate Judge has held that there was due notice to the arbitrator as per the stipulation in the agreement. The question of limitation raised by the corporation is to be decided by the arbitrator. Even if the present opposite party has accepted the final bill, that would not debar him to file the present petition. There was a dispute and it has been properly referred to. He also held that there was reasonable grounds for apprehension in the mind of the present opposite party that he would not get proper justice. Accordingly, he allowed the petition and revoked the authority of the General Project Manager and appointed Shri J. C. Tripathy, a retired District Judge as arbitrator.

4. It is contended by Mr. Mohanty, the learned counsel for the petitioner, that without complying with the requirements of clause 64 of the contract, the opposite party cannot take recourse to clause 65. Clause 64 is general term and condition of the contract. Clause 65 particularly relates to reference to arbitration. After going through both the clauses in the contract, it does not appear that compliance of clause 64 is a condition precedent to action under clause 65 of the contract. Moreover, such a plea has not been taken in the counter by the corporation. In the present revision petition it has been stated that it is obligatory for the contractor to first give notice of the dispute to the company as required under clause 64. Whether a particular claim is untenable by the arbitrator on the ground that notice of the claim has not been given to the corporation and whether the same is time-barred or not, are all matters for examination by the arbitrator and not by the court while exercising its jurisdiction under Section 8 of the Arbitration Act.

5. Documents were produced by both sides and counsel for both sides based their arguments on those documents. No objection was taken at that stage by either party about the documents. Mr. Mohanty contends in this court that there was no sufficient opportunity as the corporation who is petitioner in this court did not raise any objection at that stage and based arguments on those documents. This contention cannot be entertained here. The letter of the opposite party dated 6-3-74; the letter dated 29-3-76 requesting for enhancement of rate of bricks; the letter dated 2-4-75 of the corporation to the opposite party that it cannot enlarge the rate; the letter for enhancement of rate dated 19-5-75 and the letter dated 1-9-75 by the corporation repudiating the claim, clearly show that notice of the dispute was given to the corporation as required under cl. 64 before taking action under Section 8 of the Act.

6. In this revision the scope for consideration is whether the Subordinate Judge committed any error of jurisdiction or any illegality in the exercise of jurisdiction by appointing a retired District Judge as the sole arbitrator.

7. The contention of the petitioner is that the opposite party having received the final bill, in full and final settlement, on 10-5-76, his claims are extinguished by satisfaction and the question of making any reference does not arise. The petition was filed in court on 3-5-76. Under S. 8 of the Arbitration Act, the court does not make any reference to any dispute. Its powers are limited only to the appointment of arbitrator or an umpire, as the case may be, if there is an arbitration agreement between the parties and there is no appointment or concurrence despite notice under Section 8 (1) of the Act. After the appointment is made, it is for the parties to file their claims before the arbitrator who is to decide the same on merits. There is a clear distinction between the provisions of S. 8 and S. 20 of the Act.

Under S. 20, the court has to decide where disputes or differences have arisen and after directing the parties to file the agreement, the court has to make a reference of the disputes to the arbitrator. The present application is only under Section 8 and so the question of determining the dispute or making any reference of the dispute to the arbitrator does not arise. The court has to see if the conditions laid down under S. 8 are satisfied, so as to make appointment of an arbitrator as provided under sub-sec. (2) of S. 8 of the Act. Under cl. 65 of the agreement, both the parties agreed that the General Project Manager of the corporation at Talcher would be the sole arbitrator. There was no question of any consent of any of the parties for appointment of an arbitrator. This principle was clarified in Surendranath v. Union of India, AIR 1965 Cal 183, and Union of India v. D. P. Singh, AIR 1961 Pat 228. The aforesaid principle laid down by the Calcutta High Court and the Patna High Court has also been accepted by this Court in State of Orissa v. Govinda Choudhury, (1969) 35 Cut LT 630: (AIR 1969 Orissa 280). Also in Union of India v. Om Prakash, AIR 1976 SC 1745, it has been held that the validity of the order of reference depends upon the scope of S. 8 which deals with the power of the court to appoint an arbitrator or umpire. Sub-sec. (1) of S. 8 provides that if any appointed arbitrator is incapable of acting, and the arbitration agreement does not show that it was intended that the vacancy should not be supplied, any party to the agreement may serve the other parties with a written notice to concur in supplying the vacancy. Sub-sec. (2) of S. 8 lays down that if no appointment is made within 15 days after the service of the said notice, the court may, on the application of the party who gave the notice and after giving the other parties an opportunity of being heard, appoint an arbitrator or arbitrators who shall have like powers to act in the reference and to make an award as if he or they had been appointed by consent of all parties. An agreement to submit differences to arbitration implies an agreement to refer the differences to the arbitrator. Sec. 8 only empowers the court to appoint an arbitrator where the parties do not concur in the appointment. S. 20 confers power on the court to order the agreement to be filed and, further, to make an order of reference to the arbitrator appointed by the parties, or, where the parties cannot agree upon an appointment, to an arbitrator appointed by the court. Thus, it would be seen that the parties had already agreed upon appointment of the arbitrator and provisions of S. 8 had been complied with and the court had no other option than to appoint the arbitrator. It has no jurisdiction to see whether there is really any dispute. That question is to be gone into by the arbitrator. On this very principle also the question whether the payment of final bill constitutes a complete discharge of all obligations under the contract, is a matter which has to be decided by the arbitrator and not by the court. The court is only to examine if there is an arbitration agreement at all. The existence or the validity of the claims and disputes are matters within the jurisdiction of the arbitrator. Relying on the decision in Damodar Valley Corporation v. K. K. Kar, AIR 1974 SC 158, this Court held in Brajabehari Das v. Chief Engineer (Project), (1976) 1 Cut WR 261, that whether the obligations under the contract have been fully satisfied as claimed by the Department is a question which relates to the contract itself and comes within the arbitration clause therein. A question was raised in that case, as in the instant case, that there being a full and final settlement, there was no dispute to be referred. After discussing the decision of the Supreme Court in Damodar Valley case (referred to above), it was held that the position of law emerging from the decision is that an accord and satisfaction which is concerned with the obligations arising from the contract does not affect an arbitration clause. Whether the obligations under the contract have been fully satisfied as claimed by a party is a question which relates to the contract itself and comes within the arbitration clause therein and this has to be referred for decision of the arbitrator. Therefore, the submission on behalf of the petitioner that there being full satisfaction of the bill, nothing was left for reference, is not sustainable.

8. It is contended by Mr. Mohanty that there was no notice under S. 8 (1) of the Arbitration Act. Parties had already agreed as to the person to whom reference is to be made. The General Project Manager is not an outsider, but admittedly is principal administrative officer of the corporation. Notice to the

General Project Manager can be construed as notice to the corporation itself because he is the principal officer at Talcher Project. Notice having been issued to him and he having been already named by the parties in the agreement to be arbitrator, amounts to notice contemplated under Section 8 of the Act. I have already held that there is nothing in clause 65 of the agreement to show that unless the conditions or cl. 64 are complied with, no action can be taken under cl. 65. It is admitted by the petitioner that the notice has been received by the corporation. Therefore, the corporation cannot challenge the question of notice at this stage.

A similar question arose in Union of India v. D. P. Singh, AIR 1961 Pat 228. In that case, there was provision in the agreement that in the event of any dispute or difference of opinion between the Railway Administration and the contractor, such dispute or difference of opinion shall be referred to the sole arbitration of an officer who shall be nominated for the purpose by the General Manager, Northern Railway, and his decision shall be final, conclusive and binding. It was held that consent of the parties was implied and concurrence to the nomination of the arbitrator, whoever he may be, in terms of the arbitration agreement had already been given. In that case, notice was given to the General Manager asking him to appoint an arbitrator in terms of the arbitration agreement. But in spite of receiving notice, no appointment was made. The General Manager even did not send any reply to the notice. After a lapse of fifteen days, as required under S. 8 (2) of the Act, application was made to court under S. 8 (2) for appointment of arbitrator. It was held (at p. 231):—

"When such an application is made, there is no provision in the Act which requires the Court to give an opportunity to the defaulting party to make an appointment before making its own appointment. Section 8 nowhere says that the Court, in the first instance, shall ask the party in default to nominate an arbitrator, and, then, and then only on his failure to do so, the Court will get jurisdiction to appoint an arbitrator itself under S. 8 (2) of the Act.

What S. 8 (2) provides is that if the party who has to make an appointment does not do so, as here, in spite of the notice having been given, as contemplated by S. 8 (2), the party giving the notice may then apply to the Court, after the expiry of fifteen days, within which the party served with the notice has to make the appointment under Section 8 (2) of the Act for appointment of an arbitrator, and, thereupon, the Court after giving an opportunity to the other party to be heard, shall appoint an arbitrator. The discretion, therefore, has been given to the Court to make its own appointment. There is no duty cast on the Court to consult the defaulting party and ask him first to make the appointment, before itself making the appointment."

The facts and circumstances of the Patna case are on par with the facts and circumstances arising in the instant case. A similar question was also raised in this Court in Union of India v. M/s. Builders Union Engineers & Contractors, (Misc. Appeal No. 250 of 1977 and Civil Revn. No. 438 of 1977, decided on 5-4-1978) and this Court held as has been held by the Patna High Court. This Court also in Union of India v. Allied Construction Co. (Misc. Appeals Nos. 9 and 10 of 1977 and Civil Revn. Nos. 22 and 23 of 1977, decided on 6-7-1977) has reiterated the views reported in 35 Cut LT 630: (AIR 1969 Orissa 280) and AIR 1961 Pat 228 (supra) as well as the views reported in Surendranath Paul v. Union of India, AIR 1965 Cal 183, and has held that if the appointment under the arbitration clause is not made within fifteen clear days after service of the notice, the court is entitled on the application of the party who gives the notice and after giving the other parties an opportunity of being heard, to appoint an arbitrator. It was ultimately held in that case that the party having failed to make the appointment as contemplated under the arbitration clause forfeited its right to claim that the dispute should be referred to the arbitrator to be appointed by the named authority. In the case of Builders Union Engineers (referred to above), notice under S. 8 of the Act was given by the contractor to the Engineer-in-Chief, Army Headquarters who was authorised under the agreement to nominate the arbitrator. It was contended that notice should have been given to the Chief Engineer, Bengal Zone who was the contracting party as required under S. 8 (1) of the Act. But this Court held that by virtue of cl. 70 of the contract, by consent of parties the person to appoint arbitrator has

been accepted. S. 8 (1) of the Act does not require any further notice to be given. In these circumstances, I hold that the contention of the petitioner is not tenable.

9. The next question for consideration is whether the General Project Manager named in the agreement is to be appointed by the court as the sole arbitrator. Notice under S. 8 (1) of the Act was issued personally to the General Project Manager. He did not enter upon the reference, nor nominated any person as arbitrator. The notice was issued in his name. But he did not care to send any reply. The reply dated 3-7-76 repudiating the claim was issued only by the Additional Chief Engineer. So also the letter dated 9-11-76 sent by the advocate for the opposite party was addressed to the General Project Manager requesting to nominate a retired Chief Engineer and no reply was sent by the General Project Manager. But the Additional Chief Engineer declined to accept the request saying that it was within the option of the General Manager to nominate the arbitrator. The General Project Manager also did not intimate the court during pendency of the case that he was agreeable to act as arbitrator. Thus he failed to act in terms of the statutory requirement and has disabled himself from subsequently projecting his case for appointment as the sole arbitrator. It is contended that most probably the Additional Chief Engineer did not place the matter before the General Project Manager, and the court below has not considered this fact. If any laches have been committed by the Additional Chief Engineer, the corporation cannot claim benefit out of it. On the other hand, this is a matter between the corporation and the Additional Chief Engineer. The Additional Chief Engineer has also filed affidavit in this Court on 30-6-78 and it is contended therein that the General Project Manager was always agreeable to act as sole arbitrator. It is for the General Project Manager to express his willingness or not. The Additional Chief Engineer cannot act as his agent in Court.

It is contended by the petitioner that the opposite party had approached the General Project Manager on 9th Nov., 1976, during the pendency of the proceeding in court, to act as arbitrator, and, as such, the opposite party did not object to the appointment of the General Project Manager as arbitrator. Reliance has been placed on the correspondence relating to this fact. In the body of the letter, specific suggestion has been made for appointment of some retired Chief Engineer and to be nominated by the General Project Manager. This suggestion was not acted upon. The General Project Manager even did not send any reply or intimation to the opposite party, or even to the Court that he was inclined to take up the arbitration. In the letter sent by the Additional Chief Engineer the opposite party was asked to send his acceptance of the General Manager to appoint the arbitrator as per his discretion. This indicates that instead of nominating one of the persons named in the letter dated 9-11-77, the General Manager wanted to nominate some other person of his choice. This would show that either the opposite party or the corporation did not agree in course of discussion to the arbitration by the General Project Manager and the negotiation centered round the question whether the General Project Manager should nominate one of the persons suggested by the contractor or nominate someone else of his own choice. This also indicates that the General Project Manager was reluctant to take up the responsibility imposed on him by the agreement. It is contended that sufficient time was not given to the General Project Manager for reply to the notice sent by the opposite party. The statutory time as provided in S. 8 (1) is clear 15 days and unless action is taken within these 15 days, the court assumes jurisdiction to make the appointment. Notice was sent on 29-3-76 in the address of the General Project Manager. The corporation was also impleaded as a party through its General Project Manager in the court below. The opposite party also sent another letter on 9-11-77 to the General Project Manager. But at no stage the General Project Manager showed any inclination to take up the arbitration. Therefore, the question of time is of no consideration in this case.

10. The next question for consideration is whether after removal of the General Project Manager, any option is to be given to nominate another arbitrator by him. After the arbitrator is removed, the matter remains with the court and under S. 12 of the Act, either the court can appoint a new arbitrator or supersede the reference itself. The Court cannot surrender its power and delegate the same to an officer however

highly placed he be—vide Mohinder Singh & Co. v. Union of India, AIR 1972 J & K 63. The same view has also been taken in the Union of India v. Mangaldas N. Varma, Bombay, AIR 1958 Mad 296 and AIR 1961 Pat 228 (referred to above). This Court was of the same view in the Civil Revisions and Misc. Appeals of Builders Union and Allied Construction, referred to above. In the case of Allied Construction, it has been held that the defendants having failed to make the appointment as contemplated under the arbitration clause, forfeited their right to claim that the dispute should be referred to the arbitrator to be appointed by the named authority. In the Builders Union case also the same view was taken.

In the case reported in 35 Cut LT 630: (AIR 1969 Orissa 280) (referred to above), it was also held that the more formidable obstacle in the path of the petitioners is that the Court had jurisdiction to appoint an arbitrator in the facts and circumstances of the case and once an arbitrator had been appointed, it was again a question of discretion on the part of the court whether the prayer to change him should be accepted or not. In the present case, no allegation has been made against the retired District Judge appointed by the Court that he is either biased or otherwise incompetent to deal with the matter and so the question of cancelling the appointment does not arise.

11. It is contended by Mr. Mohanty that the allegation of bias against the General Project Manager is vague and not tenable. The possibility of bias or apprehension thereof is enough to exclude a person from consideration. From the total silence of the General Project Manager and his subsequent repudiation of the allegation of the opposite party in his notice, apprehension in the mind of the opposite party cannot be ruled out that the General Manager may not conduct himself impartially. Once such a situation is found, it is not necessary that the same arbitrator must be permitted to handle the proceeding. The Court cannot be said to be helpless in the matter. It has to meet the situation immediately in exercise of its inherent power vested in it for doing justice and to uphold fair play in judicial proceedings — vide State of Orissa v. Modern Construction Co., AIR 1972 Orissa 219. The Corporation has been impleaded in this case through its General Project Manager. But the General Project Manager by opposing the proceeeding and disputing the claim has displayed an attitude which is enough to be said that he is biased and it would create an apprehension that he would not act justly and fairly in adjudicating the claims and disputes and will not act in a disinterested manner.

12. On the aforesaid analysis, I hold that the contentions raised by the petitioner fail and the revision is to be dismissed.

13. In the result, the revision is dismissed. In the circumstances of the case, I make no order as to costs.

Revision dismissed.

AIR 1979 ORISSA 25

R. N. MISRA AND B. K. RAY, JJ.

Nilakamal Das and others, Petitioners v. Commissioner, Land Records and Settlement, Orissa, Cuttack and others, Opposite Parties.

Original Jur. Case No. 786 of 1976, D/- 4-10-1978.

(A) Orissa Survey and Settlement Act (3 of 1959) S. 15, Proviso — Expression 'parties concerned' — Meaning of — Person affected by direction of Commissioner is entitled to a hearing.

"Parties concerned" in the proviso to S. 15 would not necessarily mean those who had been contesting the particulars in the record-of-rights before the Settlement authorities. Any person who would be affected by the direction of the Commissioner would be entitled to a hearing.

Opposite parties 2 to 5 filed a revision under S. 15 for correction of a finally published record of rights showing them to be in forcible possession of the land in dispute. During the pendency of this revision the petitioners got the disputed land settled with them in 1975 from the Tahsildar and on its basis sought to intervene in the pending revision. The Commissioner disallowed the application and passed a final order in favour of opposite parties 2 to 5.

Held that even though petitioners had no right in the property by 1966, when the record was published, by subsequent events and on the footing of the record as published, they had come to ac-

quire certain rights. The settlement of the lands with the petitioners was on the footing that the same belonged to the State and there was no tenant in occupation thereof. If the record in support of that position was altered, the settlement with the petitioners would become inoperative. In this view of the matter, petitioners should have been given a hearing. (Para 4)

(B) Constitution of India, Art. 226 — Order of settlement commissioner directing correction of record of rights without giving opportunity of hearing to person affected — On facts of case, High Court refused to vacate the order in the interests of justice. (Para 5)

Anno : AIR Comm. Constn. of India, 2nd Edn., Art. 226 N. 18.

R. C. Ram, for Petitioners; Addl. Govt. Advocate, R. N. Sinha and S. N. Sinha, for Opposite Parties.

R. N. MISRA, J.:— This is an application for a writ of certiorari for quashing the order of the Commissioner of Land Records and Settlement (opposite party No. 1) refusing to allow the petitioners to be heard in Revision Case No. 1529 of 1968 as also the final order dated 26th of May, 1976 in the said case directing correction of the record of rights published under the Orissa Survey and Settlement Act, 1958 (Orissa Act 3 of 1959) (hereafter referred to as the 'Act').

2. The present proceeding relates to 14.98 acres of land out of plot No. 116/274 under Khata No. 46 in mauza Badatubi in the Marshaghai Tahsil of the district of Cuttack. The final record of rights in respect of these lands under the Act was published on 27-2-1966 wherein opposite parties 2 to 5 were shown to be in forcible possession of the lands. On 27-2-1968 the said opposite parties filed a revision under S. 15 of the Act for correcting the record and instead of showing the petitioners to be trespassers to record them as raiyats in respect of the same. This application of the opposite parties came to be registered as Revn. Case No. 1529 of 1968. During the pendency of this case, the Tahsildar settled the disputed properties together with some other lands with the petitioners on the footing that the lands belonged to the State Government and were available for settlement with landless people. The petitioners made an application to the opposite party No. 1 to be permitted to intervene in the pending revision case and to be given a hearing. By order dated 27-3-1976, the Commissioner rejected the application saying :—

"Heard counsel on both sides regarding intervention. Since it appears that the interveners claim some right on the disputed land subsequently to final publication, it is clear that the interveners have no right to be impleaded as parties in this case which is concerned with the correctness of the finally published records. As such intervention is not allowed....."

Thereafter on hearing the petitioners of the revision case and the State, the application was allowed and the record was corrected by directing :—

"In view of all these circumstances, I am of opinion that including plots which have been mentioned as being under the possession of petitioners 1 to 4 in Khata No. 11, a total area of 33 acres should be recorded in the names of petitioners 1 to 4. The name of petitioner No. 5 cannot be recorded as in his case there is no valid lease. Since 18.02 acres have been recorded in the names of petitioners 1 to 4, an area of 14.98 acres should be demarcated out of plot No. 116/274 under Khata No. 46 and this should be recorded in the names of petitioners 1 to 4 with an appropriate khata number. Demarcation of this 14.98 acres should be done by concerned Tahsildar and appropriate boundaries fixed. The status of the petitioners should be the same as is presently recorded in Khata No. 11."

Petitioners challenge the order refusing permission to intervene as also the final order directing correction of the record.

3. The opposite parties 2 to 5 have filed a counter affidavit supporting the action of the Commissioner.

4. Section 15 of the Act provides that no direction for correction of the records shall be made until reasonable opportunity has been given to the parties concerned to appear and be heard in the matter. As already noticed, the record of rights were finally published in 1966. Petitioners claimed a right in the disputed property on the basis of settlements made with them in 1975. In fact, their claim for intervention was based on that feature only. The commissioner under the impression that the correctness of the record as and when published has to be examined on the basis of contemporaneous materials or

facts then in existence rejected the request of the petitioners for being heard as their interest in the property was only with effect from 1975. We are inclined to agree with Mr. Ram for the petitioners that the view taken by the Commissioner is not appropriate. The Proviso to S. 15 runs thus :—

"Provided that no such direction shall be made until reasonable opportunity has been given to the parties concerned to appear and be heard in the matter." "Parties concerned", would not necessarily mean those who had been contesting the particulars in the record of rights before the settlement authorities. Any person who would be affected by the direction of the Commissioner would be entitled to a hearing. In the instant case, the settlement of the lands with the petitioners was on the footing that the same belonged to the State and there was no tenant in occupation thereof. If the record in support of that position was altered, the settlement with the petitioners would become inoperative. In this view of the matter, petitioners should have been given a hearing, and as is rightly contended by Mr. Ram on their behalf, if petitioners had been heard, they would have been able to persuade the Commissioner not to interfere in the matter. Even though petitioners had no right in the property by 1966, when the record was published, by subsequent events and on the footing of the record as published, they had come to acquire certain rights.

5. Ordinarily we would have vacated the order of the Commissioner and remitted the matter for a fresh disposal. We, however, decline to do so, inasmuch as the facts are somewhat telling and we are satisfied that in the facts of the case it would not be in the interests of justice to vacate the order. It has been found by the Commissioner that opposite parties have been in long possession. An attempt was made to set aside the leases granted to the opposite parties by the ex-intermediary and on a finding that the ex-intermediary had obtained permission of the Collector under Orissa Act 1 of 1948 before granting the leases, the said proceedings were dropped. The Commissioner has recorded a finding that ever since then the opposite parties have been in possession. On their own showing, petitioners came upon the lands by virtue of settlement made in 1975. In view of the fact that the opposite parties had been in long possession on the basis of leases granted in their favour by the ex-intermediary, prima facie, the petitioners should not be entitled to the lands. We, however, do not propose to enter into an examination of the matter and record positive findings. Our doing so would certainly prejudice the petitioners in case they intend to institute a suit for declaration of their title. We are, therefore, not inclined to interfere in the matter as we hold that it is not a fit case where our extraordinary jurisdiction should be permitted to be invoked. We accordingly dismiss the writ application, but without any direction for costs.

B. K. RAY, J.:— I agree.

Writ petition dismissed.

AIR 1979 ORISSA 27

R. N. MISRA AND B. K. RAY, JJ.

Kabir Padhi and others, Petitioners v. State of Orissa and others, Opposite Parties.

Original Jur. Case No. 1091 of 1976, D/- 3-10-1978.

Constitution of India, Arts. 226 and 227 — Land Acquisition Act (1894), Sections 5-A and 6 — Orissa Town Planning and Improvement Trust Act (10 of 1957), Ss. 32, 32-A — Notifications for acquisition violating Master plan under Sec. 32 — Proposal to vary it under S. 32-A pending acquisition — High Court refused to interfere with acquisition in special facts of case.

It cannot be said that once the master-plan is approved and is final under S. 32 of Orissa Act, there is no scope for deviation and until the variation has been made, the proposed acquisition for a purpose not in accordance with the master-plan would not be tenable. (Para 4)

Where the purported acquisition of land for the purpose of locating a hostel of a public institution was sought to be challenged by the petitioners on the ground that it violated the zoning regulation and the Master plan as approved and notified under S. 32 of Orissa Town Planning & Improvement Act and it was the specific case of the opposite parties that the Master plan was being varied and the proposed construction was not coming up immediately and

by the time the acquisition proceeding is finalised, the proposed modification in the Master-plan may have come :

Held that the Court would not interfere with the acquisition in the special facts and circumstances pleaded. There is clear provision in S. 32-A of the 1957 Act for compensating those who are affected by the variation. If petitioners are really entitled to compensation, there is a machinery provided under S. 32-A and petitioners cannot, therefore, have any real grievance. (Para 4)

Anno: AIR Comm. Const. of India, 2nd Edn., Art. 227 N. 3 (c).

R. Mohanty, for Petitioners; Addl. Govt. Advocate and S. S. Basu, for Opposite Parties.

R. N. MISRA, J.:— Petitioners are owners of residential holdings in the Janata Hospital Road within the town of Berhampur in the district of Ganjam and in this application they assail the notification under the Land Acquisition Act, 1 of 1894 (hereinafter referred to as the 'Act') purporting to acquire 1.61 acres of land as per notification dated 23-5-1976. In July, 1964, the State Government had notified their intention to acquire 2.20 acres of land for the purpose of construction of a hostel and staff quarters of the Government Women's College at Berhampur. The said notification was withdrawn on 8-4-1965. Berhampur Town is governed by the Orissa Town Planning and Improvement Trust Act of 1956 (Orissa Act 10 of 1957) and the locality in question has been marked as a residential zone. It is claimed by the petitioners that after withdrawal of the notification for acquisition, several of them have developed the lands in the locality for construction of houses. On 11-4-1970, the State Government again notified for acquisition of 1.90 acres of land for the same purpose and on this occasion they also resorted to the procedure provided under S. 17 of the Act. O. J. C. No. 500 of 1973 was filed in this Court challenging the invoking of the special procedure under S. 17 of the Act. By Judgment dated 7-8-1974, the notification was quashed. On 23-5-1976, the State Government again notified their intention to acquire 1.61 acres of land out of the lands originally notified for acquisition. On this occasion, the procedure under Sec. 17 of the Act was not followed. Notice was given under S. 5-A of the Act inviting objections against the proposed acquisition. Thirty-five objections were received and after disposal of the objections, the requisite notification under S. 6 of the Act was made on 13 Aug., 1976 and was published under the authority of the State Government in the State Gazette on 24-8-1976 (vide Annexure-8). Petitioners thereupon filed this application for quashing the notifications under Sections 4 and 6 of the Act and for a direction that the land in question may not be acquired. Petitioners have advanced two contentions in the main that (i) there has been no appropriate enquiry under S. 5-A of the Act and (ii) the purpoted acquisition for the purpose of locating a hostel of a public institution violates the zoning regulation under the Orissa Town Planning and Improvement Trust Act.

2. Opposite parties 1 to 4 being the State and its Officers in a common counter affidavit ffled on their behalf by the Land Acquisition Officer have claimed that there is great pressure for expanding the Women's College with hostel accommodation and staff quarters; the institution is so located that unless these lands are acquired, there would be no possibility of expansion; it is not open to the petitioners to challenge acquisition by contending that any other site is available and the ultimate choice as to suitability is for the State to decide and petitioners are only entitled to reasonable compensation. It is contended that there was full investigation into the objections and parties had been given appropriate hearing. Though it has been conceded that there has been an approved master plan and the area in question has been reserved for residential localities, variation of the plan has already been proposed and is under consideration of the Government. Petitioners are not entitled to raise objection to the acquisition on the allegation of violation of S. 32 of Orissa Act 10 of 1957.

In a separate counter affidavit filed on behalf of opposite parties 5 and 6, it has been stated that the Berhampur Regional Improvement Trust gave a proposal to the State Government to vary the master plan to the extent that a portion of Bijipur mauza which is under dispute and which is marked as residential zone should be marked as public and semi-public zones and this is as provided in S. 32-A of the 1957 Act.

3. At the hearing of the application, the records of the Land Acquisition

Collector were produced and on verification thereof, Mr. Mohanty for the petitioners does not press the first point, namely that no adequate hearing under S. 5-A of the Act had been given to the petitioners. In view of the fact that the point is not pressed, it is not necessary to refer to the documents and decide the question.

4. The only question that remains for examination, therefore, is the alleged violation of the provisions in the Orissa Town Planning & Improvement Trust Act of 1956. S. 32 of the aforesaid Act on which petitioners placed reliance provides:—

"The Director or the State Government, as the case may be, shall take into consideration the said views of the Planning authority under sub-sec. (2) of S. 52 and approve the said Plan with or without modification. Thereupon the Planning authority shall notify in the Gazette and a local newspapers, if any, that the Master Plan has been duly approved and then any person interested in the said plan may see it at a fixed time and place."

Section 32-A provides:—

"(1) If on a proposal made in that behalf by the Planning authority or otherwise the State Government are of opinion that it is necessary in the public interest to make any variation in any Master Plan approved under S. 32, they may incorporate the proposed variations in the Master Plan and notify in the Gazette and in a local newspapers, if any that any person interested therein may see it at a fixed time and place and file objections or suggestions, if any, within sixty days from the date of such notification.

(2) The State Government may, after taking into consideration all objections and suggestions received under sub-sec. (1) and making such enquiry as they deem necessary, finalise the variations so made with or without modifications and notify in the Gazette and in a local newspaper, if any, that the variations in the Master Plan have been duly made and any person interested therein may see it at a fixed time and place.

(3) If any person, who is affected by such variation, has incurred any expenditure in compliance with the Master Plan as it existed before such variation, such person shall be entitled to receive compensation for the loss he has suffered by reason of such variation.

(4) Any person claiming compensation under sub-sec. (3) may, within sixty days from the date of the notification under sub-sec. (2), make an application in that behalf to the prescribed authority who shall determine the compensation in the prescribed manner.

(5) The compensation determined under sub-sec. (4) shall be paid, where the variation is made on a proposal from Planning authority, by such authority and in any other case by the State Government."

Mr. Mohanty for the petitioners maintains that once the master-plan is approved and is final, there is no scope for deviation and until the variation has been made, the proposed acquisition for a purpose not in accordance with the master-plan would not be tenable. We do not think, the contention is justified. It is true that for the purpose of planned improvement of towns, this Act makes specific provisions and master-plan is the foundation for such purpose. It is the specific case of the opposite parties that the master-plan is being varied. Learned Additional Government Advocate rightly contended that the construction is not coming up immediately and by the time the acquisition proceeding is finalised, the proposed modification may have come. We agree with the submission and are not inclined to interfere with the acquisition in the special facts and circumstances pleaded. There is clear provision in Sec. 32-A of the 1957 Act for compensating those who are affected by the variation. If petitioners are really entitled to compensation, there is a machinery provided under S. 32-A of the 1957 Act and petitioners cannot, therefore, have any real grievance.

5. In view of the fact that the sole contention raised by the petitioners is not accepted, this writ application has got to be dismissed as being without any merit. We make no order for costs.

B. K. RAY, J.:— I agree.

Petition dismissed.

AIR 1979 ORISSA 30

S. K. RAY, C. J. AND
J. K. MOHANTY, J.

Punjab National Bank Ltd., Appellant v. Udyog Silpa Pvt. Ltd. and others, Respondents.

First Appeal No. 43 of 1975, D/- 10-8-1978.*

(A) Civil P. C. (5 of 1908), O. 34, R. 11 — Mortgage suit — Award of interest — Principles — Court is not bound to award interest at contractual rate.

Order 34, R. 11 is not mandatory in character. It is open to a Court to vary the rate of interest so far as the period between the date of suit and the date fixed for redemption in a preliminary decree is concerned, even in a case where interest is legally recoverable and the rate of interest is not penal or unconscionable or otherwise excessive. The decisions which seem to take a contrary view that where interest is allowed it must be allowed at the contractual rate and that the rate cannot be varied do not lay down the law correctly. As for subsequent interest, i. e. from the date of redemption fixed in the preliminary decree up to the date of payment or realisation of the mortgage money, the matter rests clearly in the domain of judgment and the grant of rate of such interest is entirely in the discretion of the Court. Case law discussed. (Para 9)

Anno : AIR Comm. C. P. C. (8th Edn.) O. 34 R. 11 N. 2 (c).

(B) Civil P. C. (5 of 1908), Sec. 35 — Court has discretion to award costs according to facts and circumstances of case. (Para 10)

Anno: AIR Comm. C.P.C. (9th Edn.), S. 35 N. 5.

Cases Referred: Chronological	Paras
AIR 1975 Andh Pra 113	6
1974 (2) Cut WR 1135	10
AIR 1973 Andh Pra 245	6, 8
AIR 1973 Ker 196	8
AIR 1963 Guj 253	6
AIR 1958 Raj 145	8
AIR 1957 Cal 140	7
AIR 1953 Bom 445	6
AIR 1953 Nag 258	6
AIR 1942 Pat 102	6
AIR 1940 FC 20	7, 8

*(From decision of B. Misra Sub. J. Cuttack, D/- 27-11-1974).

IV/KV/E189/78/GDR

S. C. Sinha, for Appellant; R. C. Patnaik, P. K. Misra and Miss R. Natia, for Respondents.

J. K. MOHANTY, J.:— The successful plaintiff has filed this appeal being aggrieved by the order of the trial court refusing to grant pendente lite and future interest at the contractual rate and to award costs at contested scale. The only point for determination, therefore, is as to whether either as matter of law or on account of equitable consideration, the plaintiff is entitled to pendente lite and future interest at the contractual rate and also entitled to costs at contested scale.

2. Plaintiff-Punjab National Bank (Nationalised) instituted Title Mortgage Suit No. 37 of 1971 in the court of the Subordinate Judge, Cuttack against the defendants-respondents for a preliminary decree for Rs. 2,34,797.25 p. with interest at the rate of 10½ per cent per annum, which is the contractual rate of interest, and, on failure to pay the decretal amount within the time stipulated by the Court, for a decree for sale of the properties as per Schedules 'A' and 'B' of the plaint.

3. Defendants 1, 2 and 4 to 10 filed their written statement denying the plaintiff's case by taking various pleas. But at the time of hearing, they practically conceded the claim for Rs. 2,34,797.25 p. It may be mentioned here that by order of this Court in Civil Revision No. 185 of 1972 the stock of Pig Iron and the C. I. Pipes pledged with the Bank were sold and the amount was deposited in April, 1974. The total amount of deposit was Rs. 2,71,791.36 p. as per Ext. A. The learned Subordinate Judge decreed the suit preliminarily on contest for Rs. 2,34,797.25 p. with costs and consolidated Pleader's Fee of Rs. 500/-. It was further ordered that the decretal amout was to be adjusted from the deposited amount as shown in Ext. A within three months and the pendente lite and future interest, if any, shall run at the rate of 3% per annum till the date of disposal of the suit. The defendants were directed to pay the decretal dues within the stipulated period given by the court. On failure to pay, the plaintiff Bank was at liberty to apply for final decree for sale of properties.

4. Mr. S. C. Sinha, learned counsel for the appellant, contends relying on O. 34, R. 11, C. P. C. that the Court is bound to allow pendente lite and future

interest at the rate agreed to between the parties. Secondly, he contends that as the plaintiff has been deprived of the opportunity of rolling the huge amount of money as decreed in any business for a period of three years and more from 1971, when the suit was filed, till the end of 1974, when judgment was passed, the plaintiff should have been granted pendente lite and future interest at the contractual rate as a matter of justice and equity.

5. The first contention is based on the hypothesis that provisions of O. 34, R. 11 are mandatory in nature. This provision is extracted hereinbelow.

"O. 34, R. 11. Payment of interest.— In any decree passed in a suit for foreclosure, sale or redemption, where interest is legally recoverable, the Court may order payment of interest to the mortgagee as follows, namely :—

(a) interest up to the date on or before which payment of the amount found or declared due is under the preliminary decree to be made by the mortgagor or other person redeeming the mortgage—

(i) on the principal amount found or declared due on the mortgage,— at the rate payable on the principal, or where no rate is fixed, as such rate as the Court deems reasonable,

xx xx xx, and

(iii) on the amount adjudged due to the mortgagee for costs, charges and expenses properly incurred by the mortgagee in respect of the mortgage-security up to the date of the preliminary decree and added to the mortgage money, at the rate agreed between the parties, or, failing such rate, as such rate not exceeding six per cent per annum as the Court deems reasonable; and

(b) subsequent interest up to the date of realisation or actual payment on the aggregate of the principal sums specified in Cl. (a) as calculated in accordance with that clause at such rate as the Court deems reasonable."

6. It is argued that since the rate of interest has been agreed to between the parties, the plaintiff Bank is entitled to interest at the contract rate. In support of the above contention Mr. Sinha relies on a decision reported in AIR 1975 Andh Pra 113 (Konakalla Venkata Satyanarayana v. State Bank of India) and drew our attention to para. 12 of the judgment which is quoted below :—

"The fifth point raised by the learned counsel, that the lower Court should not have awarded interest at the rate of 10 per cent per annum from the date of suit till date of decree, is devoid of any merit. Under O. 34, R. 11, Civil P. C. interest can be awarded at the contract rate till the period of redemption expires. The provisions of S. 34, Civil P. C. are not applicable to cases of mortgages, and the award of interest is governed by the provision of Order 34, R. 11, Civil P. C. This position is well-settled and Shri P.L.N. Sarma, has frankly submitted that this legal position cannot be controverted."

But this decision does not support his contention as it has not been decided that the Court is bound to pay interest at the contract rate. What has been said is that interest can be awarded at the contract rate. Unforunately in the above decision, an earlier decision of a Division Bench of the same High Court reported in AIR 1973 Andh Pra 245 (Githavardhana Rao v. Andhra Bank Ltd.) which held a contrary view has not been noticed. Mr. Sinha also cited a case reported in AIR 1953 Nag 258 (Mst. Bainabai v. Doma) wherein it has been held that in a mortgage suit the ordinary rule is that interest from the date of suit to the date of redemption should be awarded at the contract rate and not at a different rate unless there are circumstances which justify doing so. So this decision also does not support Mr. Sinha. Again reliance is placed on a decision reported in AIR 1942 Pat 102 (Sukhraj Rai v. Ratinath Panjiara) which says that in the matter of awarding pendente lite interest ordinarily the contractual rate ought to be allowed unless it appears to be penal or excessive. This decision also does not support the case of the plaintiff. The next decision cited by Mr. Sinha is AIR 1963 Guj 253 (Narharilal Kuberdas v. Firm of Parl Bhogilal Amratlal). In this case the trial court did not grant any interest, but the appellate court granted interest at the rate of 3 per cent per annum from the date of the suit till the date of relisation (although 6% was the rate of interest mentioned in the charge). Before the High Court the granting of interest by the appellate court was challenged on the ground that it (appellate court) has erred in awarding interest when after exercise of discretion, the trial court declined to award interest. So it was held (at p. 254):—

"While under S. 34, the Court has a discretion to order interest at such rate

as the Court deems reasonable to be paid on the principal sum from the date of the suit to the date of the decree, in the case of a suit for the sale of property mortgaged or charged, the Court must take an account of the principal and interest on the mortgage and the amount due to the plaintiff on the date of the decree. The Court has, therefore, no discretion in the matter of taking accounts of the mortgage but it is under an obligation to include interest.

There is no inconsistency between the provisions of S. 34 and O. 34. Sec. 34 gives a discretion to the Court in cases where the Court passes a pure money decree. O. 34 leaves no discretion to the Court where the Court is dealing with suits under O. 34.

Under O. 34, R. 11 the Court has a discretion whether or not to order interest for the subsequent period of six months from the date of the preliminary decree till the time of actual payment." As there was no cross-objection, the Court did not consider as to whether 6% interest should be granted or not. This decision has dissented from an earlier decision reported in AIR 1953 Bom 445 (Dawoodbhai v. Shaikhali) by Honourable Chief Justice Chagla.

7. Mr. Pathak, learned counsel appearing on behalf of the respondents cited a series of decisions of different High Courts. The first and most important case to which Mr. Patnaik invites our attention in this connection is a decision of the Federal Court reported in AIR 1940 FC 20 (Jaigobind Singh v. Lachmi Narain Ram) wherein it has been held :—

"By Act 21 of 1929, O. 34 was amended, and a new R. 11 was inserted, which deals specially with interest, and provides that the Court "may" order payment of interest to the mortgagee up to the date fixed for payment at the rate payable on the principal. It follows that this special provision, which removes any conflict that there might have been between S. 34 and O. 34, Rr. 2 and 4, gives a certain amount of discretion to the Court, so far as interest pendente lite and subsequent interest are concerned. It is no longer absolutely obligatory on the Courts to decree interest at the contractual rate up to the date of redemption in all circumstances, if there be no question of the rate being penal, excessive or substantially unfair within the meaning of the Usurious Loans Act, 1918."

In the decision reported in AIR 1957 Cal 140 (Nilmoni Sardar v. Baidyanath Das Manna) a Division Bench of the Calcutta High Court relying on the decision of the Federal Court referred to above held (at p. 141) :—

"In our view, the Court is bound to decree pendente lite interest, it being left to the discretion of the Court at what rate it is to be allowed. The circumstances of each particular case have to be taken into consideration."

Considering all circumstances of that case the Court held that the rate of interest from the date of the suit should be allowed at 4 per cent per annum.

8. The next case cited is AIR 1958 Raj 145 (Kishen Raj v. Radhalal). In this case several earlier decisions of the different High Courts and of the Federal Court reported in AIR 1940 FC 20 were considered and the Court came to the following conclusion: —

"From a review of the decisions referred to above, the true principles for the award of interest, pending and future in a mortgage suit may be laid down somewhat as follows :—

(1) There can be no doubt or dispute that where the interest claimed as opposed to any law, or the rate of interest claimed is penal or extortionate or is contrary to any law, such interest has to be disallowed or the rate claimed cannot be permitted and must be reduced as the case may be.

It seems to me that this rule applies equally to interest up to the period of the suit as well as to pending and future interest.

(2) But even where interest is legally recoverable and the rate of interest is not penal or unconscionable or otherwise excessive according to any law, it is open to a court to vary the rate so far as the period between the date of suit and the date fixed for redemption in a preliminary decree is concerned, and high support for this view is to be found in several decisions of the Federal Court including Jai Gobind Singh's case (AIR 1940 FC 20) already cited above.

The decisions which take a contrary view namely, that where interest is allowed, it must be allowed at the contractual rate and the rate cannot be varied, do not lay down the law correctly."

In the decision reported in AIR 1973 Ker 196 (Rama Vadhyar Guna Bhatt v.

Trivandrum Permanent Bank Ltd., Trivandrum) it was held (at p. 198) :—

"It is within the discretion of the Court to award such rate of interest from the date of the suit as the Court thinks reasonable in the circumstances of the case. The court is not bound to award interest at the contractual rate after the date of suit as the same can govern only for a period anterior to the date of the suit."

The next case to which reference was made is AIR 1973 Andh Pra 245 (Githavardhana Rao v. Andhra Bank Ltd.) in which it has been held :—

"In suit for redemption the Courts are under no obligation to award interest at the contractual rate after date of redemption, even though that rate is not penal or excessive. Award of interest for period subsequent to the date of the suit is discretionary with the Courts."

9. On a plain reading of O. 34, Rule 11, C.P.C. and on a review of the decisions referred to above the position of law that emerges is that Order 34, Rule 11 is not mandatory in character and that it is open to a Court to vary the rate of interest so far as the period between the date of suit and the date fixed for redemption in a preliminary decree is concerned, even in a case where interest is legally recoverable and the rate of interest is not penal or unconscionable or otherwise excessive. The decisions which seem to take a contrary view that where interest is allowed it must be allowed at the contractual rate and that the rate cannot be varied do not lay down the law correctly. As for subsequent interest, i.e. from the date of redemption fixed in the preliminary decree up to the date of payment or realisation of the mortgage money, the matter rests clearly in the domain of judgment and the grant of rate of such interest is entirely in the discretion of the Court.

10. The other point that was canvassed on behalf of the appellant is that the consolidated Pleader's Fee of Rs. 500 has to be re-assessed and the Court should have allowed Pleader's Fee at the contested scale. In support of this Mr. Sinha placed reliance on a case reported in 1974 (2) Cut WR 1135 (Smt. Patnala Urmila Devi v. Parankusam Jagannath Rao) where according to the facts and circumstances of that case, the Court allowed cost at the contested scale. Where no cost was allowed by the court below, this Court held that the plaintiff was entitled to full cost. But this decision does not say that the Court has no discretion in the matter in awarding cost according to the facts and circumstances of the case. Section 35 of the Civil P. C. provides that the costs of and incident to all suits shall be in the discretion of the Court and where the Court directs that any costs shall not follow the event, the Court shall state its reasons in writing. This section gives discretion to the Court to award costs according to the facts and circumstances of the case.

11. Considering the contention of claim of interests at contractual rate on equitable ground, the same is not sustainable in view of the following facts. The plaintiff claimed in his plaint a sum of Rs. 2,34,797.25 p. which included interest at the rate of 10½ per cent per annum from 1968 till 23-3-1971. An amount of Rs. 2,71,791.36 p. belonging to the defendants was lying in deposit with the plaintiff Bank since April, 1974. Thus, for 7 months from April till November, when the judgment in the suit was passed, a sum of Rs. 37,000 belonging to the defendants was with the plaintiff Bank and the latter must have invested the same in some business. Further the industry has been closed since 16-8-67 and since then the industry is being treated as a sick industry since it has lost its capital. Again two of its most active Directors Madanlal Jajodia and Harihar Mohapatra have expired in a Motor Car accident on 18-5-73. It is also pertinent to notice that defendants did not contest the plaintiff's claim, but admitted it as would appear from the evidence of D.W. 1. Considering all these circumstances, in our opinion, the Court exercised its discretion most equitably and judicially and allowed pendente lite and future interest at 3 per cent per annum and awarded costs of pleader's fee at consolidated rate of Rs. 500.

12. In the result, the appeal is dismissed. But in the circumstances of the case, parties are to bear their own costs of this Court.

S. K. RAY, C. J.:— I agree.

Appeal dismissed.

AIR 1979 ORISSA 34

R. N. MISRA, J.

State of Orissa, Applicant v. M/s. Builders Union Engineers and Contractors, Opposite Party.

Civil Revns. Nos. 219 to 223 of 1978, D/- 19-7-1978.*

Arbitration Act (10 of 1940), S. 29 — Court adopting award stipulating payment of interest by defendant after expiry of 30 days from award — No objection raised by defendant to term of interest — Effect.

Where the Court adopted the award stipulating that interest would be payable after expiry of thirty days from the award and no objection was raised by the defendant when the Court made the award a rule of the Court, it must be construed that the Court wanted the term of interest contained in the award to be continued as its own. In such a case, there was nothing in the award which could be said to impinge upon court's power under S. 29. Moreover legal position is well settled that the executing court has power to interpret a decree and where the same court which granted the decree is the executing court and it construes its decree by saying that impliedly it meant that the provision of interest in the award shall be continued in the decree of the court, it cannot be contended that future interest is not payable. AIR 1963 Cal 70 and AIR 1966 Cal 478, Disting. (Para 5)

Anno: AIR Manual (3rd Edn.), Arbitration Act, S. 29, N. 1.

Cases Referred : Chronological Paras

AIR 1966 Cal 478 4

AIR 1963 Cal 70 4

Addl. Govt. Advocate, for Applicant; G. Rath and R. K. Rath, for Opposite Party.

ORDER:— These applications by the State of Orissa are directed against the orders of the Subordinate Judge, Bhubaneswar in several execution cases.

2. The decree-holder-opposite party, a firm of contractors, had undertaken the construction of certain portions of the Buria Medical College Hospital under F-2 contracts and disputes having arisen between the State and the contractor, the same had been referred to arbitration under the arbitration clause in the contracts. There were five disputes in all and five awards were passed for different amounts of claim. The awards were almost in similar terms and, inter alia, stipulated:—

"..... I hereby direct the opposite party-defendant do pay the same amount of ..... to the claimant-plaintiff within a period of thirty days (30 days) from today ..... and in case the opposite party-defendant fails to pay the said amount to the claimant-plaintiff within the aforesaid date, the opposite party-defendant will pay interest at the rate of nine per cent per annum on the said amount of Award from the date of expiry of the said period of one month (thirty days)."

Steps were taken to make the several awards rule of the Court and accordingly five different cases were registered. No objection was filed on behalf of the State and in fact, the Government Pleader at Bhubaneswar conceded that decrees may follow. Accordingly, the learned Subordinate Judge gave the following direction:—

"..... it is ordered and decreed that the award submitted by the arbitrator is made rule of the court."

On 6-4-1977, the State of Orissa made certain deposits and maintained that the decrees were satisfied. Plaintiff-decree-holder, however, did not accept the position and levied execution of the several decrees. Five execution cases were accordingly registered. Therein, the State of Orissa as judgment-debtor reiterated its stand of satisfaction of the decrees by payment and the decree-holder disputed the position. After hearing parties, the learned Subordinate Judge came to hold:—

"..... The award directed payment of money within a stipulated period and failing to carry interest at the rate of 9 per cent till the date of payment. The J.-Dr. who is also common in all these cases did not make payment within the time specified in the award. He, however, paid the specific amount mentioned in the award through court on 10-4-77, but did not pay the interest due by them. The decree-holder acknowledged receipt of the amount so paid. But he now contends that out of the money received by him he has first appropriated such amount as was due to him towards interest and the balance towards the principal amount mentioned in the award and for that he is still entitled to get the amount claimed in the execution

*(From common order of R. N. Rath, Sub-J., Bhubaneswar, D/- 9-2-1978.)

cases. On behalf of the judgment-debtor it is contended that since the decree-holder was paid the amount awarded under the decree nothing more remains to be paid.

It is well settled that when certain amount is due towards the principal and interest and the debtor while making payment does not signify his intention as to whether the amount paid by him is towards the principal or the interest, the option is left to the creditor to appropriate the amount either towards the principal or interest as he may think proper. In the present case undisputedly by the time of payment some amount was due towards interest on the principal amount specified in the award. The judgment-debtor did not specifically state while making payment that the said payment was towards the principal amount specified in the award. So the appropriation of the amount towards the interest due and balance towards part satisfaction of the principal amount cannot be said to be illegal. In this view of the matter the claim in all cases is maintainable....."

Petitioner has carried these revisions challenging the aforesaid order.

3. Learned Additional Government Advocate relying on the provisions of S. 29 of the Arbitration Act contends that the decree of the court having not granted any interest on the award from the date of the decree, the decree-holder is not entitled to any future interest. Counsel for the decree-holder on the other hand contends that in the award, interest was directed to run after thirty days from the date it was made and no upper limit had been fixed. When that award was adopted by the court without indicating any variation in regard to payment of interest, it must follow that the court intended to continue the direction of the arbitrator in the matter of payment of interest and, therefore, had not made any alteration.

4. S. 29 of the Arbitration Act provides:—

"Where and in so far as an award is for the payment of money the Court may in the decree order interest, from the date of the decree at such rate as the Court deems reasonable, to be paid on the principal sum as adjudged by the award and confirmed by the decree."

Reliance has been placed on two Calcutta cases being Union of India v. Bunge Steel Furniture (Pvt.) Ltd., AIR 1963 Cal 70 and Lal Chand Roy v. Nerode Kanta Goswamy, AIR 1966 Cal 478. The first case was an appeal under S. 39 of the Act, where the court had refused to set aside an award which contained a direction to the following effect (at pp. 73, 74):—

"..... I award and direct the Union of India to pay the said amount to the claimant with simple interest at 5% per annum from this date till payment or realisation."

Examining the question of payment of interest, the Court held:—

"The next question is whether S. 29 of the Indian Arbitration Act has affected this power and if so, to what extent. S. 29 provides that where and so far as an award is for the payment of money the Court may in the decree order interest from the date of the decree at such rate as the Court deems reasonable, to be paid on the principal sum as adjudged by the award and confirmed by the decree. Having regard to this section the umpire cannot fetter the discretion of the Court with regard to the interest from the date of the decree. The award in the instant case, in so far as it gave interest from the date of the decree to be passed by the Court is in contravention of S. 29 and as such is beyond the powers of the umpire. But the award in the instant case may well be read as an award of interest on the principal sum adjudged at 5 per cent per annum from the date of the award up to the date of the decree and from the date of the decree till payment or realisation. The award as to interest so read consists of two parts and the second part is clearly severable from the first part. The second part of the award is excessive and bad and as such may be struck out and the first part of the award may be maintained....."

The second case also arose out of an appeal under Section 39 challenging the refusal to set aside an award. The award contained the following term (at p. 478):—

"I further award and direct that the said owelty money will carry interest at 6% per annum from the date when the separate possession of 2A, Colonel Biswas Road is delivered to Sri Lal Chand Roy as aforesaid till the date of payment."

Sinha, J., as the learned Judge then was, spoke for the Division Bench thus (at p. 479):—

"..... Various authorities were cited before the learned Judges, but Bachawat, J., having considered all the authorities came to the conclusion that the position in law before the introduction of S. 29 in the Arbitration Act, 1940 was that where the arbitration clause was wide enough for the arbitrator to adjust all equities between the parties, there was no impediment in his granting interest on any amount awarded, and that this power did not flow from S. 34 of the Code of Civil Procedure but from the submission of the parties to arbitration in terms which were wide enough for the arbitrator to adjust all equities between the parties, including the payment of interest on any sum awarded. There certainly was a conflict of decisions but the learned Judge pointed out that the consensus of opinion upheld the position stated above. The learned Judge, however, pointed out that the position was altered when S. 29 was introduced into the Arbitration Act, 1940. S. 29 provides that where, and in so far as an award is for the payment of money, the Court may, while passing a decree order interest, from the date of the decree at such rate as the Court deems reasonable, to be paid on the principal sum as adjudged by the award and confirmed by the decree. The learned Judge rightly came to the opinion that an arbitrator, by making such an order for the payment of interest, could not fetter the discretion of the Court, from the date of the decree. He was finally of the opinion that if the arbitrator awarded interest, it would only be valid up to the date of the decree but granting interest after the date of the decree was beyond the powers of the arbitrator. The award was however set aside not on this point but on another point. Incidentally, the learned Judge made an observation that, if a judgment on award was made, it might be construed that the interest up to the decree was awarded by the arbitrator and thereafter by the Court. With respect, I am unable to appreciate this observation. This was, however, only mentioned casually and forms no part of the decision. As I have stated above, the application was really decided on another point altogether. I respectfully agree with the proposition that where the submission is in a sufficiently wide form and the arbitrator has been given the power to adjudicate on all disputes between the parties and to adjust all the equities, he can make an order as to interest, not as a result of Section 34 of the Code of Civil Procedure but by virtue of the submission. This power, however, comes to an end upon the passing of the decree. The arbitrator has no power to make an award granting interest after the decree. If he exercised any such power, it would be in violation of the jurisdiction conferred upon the Court by S. 29 of the Arbitration Act, 1940 and as such, void....."

5. The award in the instant case does not suffer from the defect pointed out in the two Calcutta decisions. The relevant portion of the present award has already been extracted and its terms were such that they did not affect Section 29 of the Arbitration Act in any manner. The arbitrator only indicated that after lapse of thirty days from the date of the award, interest became payable. There was no reference to the date of payment or realisation. Realisation obviously postulates recovery through court by execution. Since in the award there was nothing which could impinge upon court's power under S. 29 of the Act and there having been no objection to the award when the court made it a rule, there can be absolutely no difficulty in construing that the court wanted the term of interest contained in the award to be continued as its own. Legal position is well settled that the executing court has power to interpret a decree and where the same court which granted the decree is the executing court and it construes its decree by saying that impliedly it meant that the provision of interest in the award shall be continued in the decree of the court, it cannot be contended that future interest is not payable. I do not think, there is justification to interfere with the impugned order.

Accordingly, each of the revision applications is dismissed. There would, however, be no order for costs.

Revisions dismissed.

AIR 1979 ORISSA 37

R. N. MISRA, J.

Ananta Jena, Appellant v. Deity Shri Gopinath Jew, Respondent.

Misc. Appeal No. 90 of 1977, D/- 30-6-1978.*

(A) Orissa Estates Abolition Act (1 of 1952), Ss. 5, 7, 7A, 8A — Decree for eviction of trespasser — Pending execution petition, estate vesting in the State under the Act — Subsequent settlement of the land with the decree-holder — Decree does not cease to be executable.

A harmonious reading of Ss. 5, 7, 7A and 8A gives the clear impression that the statutory scheme is that when a vesting notification is made, an ex-intermediary to whom S. 7 applies is not evicted and he is entitled to hold the land and remain in possession unaffected by the vesting on the basis of a 'deemed settlement'. His right to possession terminates if he fails to make a claim within the prescribed period in terms of S. 8-A, sub-sec. (3) whereof provides that such a defaulting ex-intermediary becomes liable for eviction in terms of S. 5 (h) of the Act. Notwithstanding the vesting and until settlement was made, the ex-intermediary is entitled to remain in possession and such possession has been protected by the Statute. The decree-holder therefore is entitled to evict the judgment-debtor-trespasser. AIR 1962 SC 1230; AIR 1967 SC 354; AIR 1969 SC 971; AIR 1975 SC 2295, Dist. (Para 4)

(B) Civil P. C. (1908), S. 11 — Res judicata — Suit by A on the basis of his title, against B for eviction as trespasser — Plea of loss of title by A subsequent to suit not raised by B in the suit or in the appeal against the decree — Such objection cannot be raised in the application by A to execute the decree. AIR 1972 Madh Pra 217, Rel. on. (Para 5)

Anno: AIR Comm. Civil P. C. (9th Edn.), S. 11 N. 23, 106-A.

Cases Referred : Chronological	Paras
AIR 1975 SC 2295	4
AIR 1972 Madh Pra 217	5
AIR 1969 SC 971	4
AIR 1967 SC 354	4
AIR 1962 SC 1230	4

B. Pal, for Appellant; R. C. Ram, for Respondent.

*(From decision of L. Pradhan, Sub-J., Nayagarh, D/- 18-2-1977.)

HV/IV/D202/78/KNA/VBB

JUDGMENT:— This is a judgment-debtor's appeal against the affirming appellate order of the learned Subordinate Judge of Nayagarh.

2. The decree-holder-respondent obtained a decree in Title Suit No. 14/51 of 1972/71 in the court of the Munsif, Nayagarh for recovery of possession of the disputed property by evicting the judgment-debtor and for recovery of mesne profits. It levied execution of the said decree in Execution Case No. 16 of 1974. On notice, the judgment-debtor challenged the executability of the decree by filing an application under S. 47 of the Civil P. C. which came to be registered as M.J.C. No. 2 of 1975. The executing court dismissed the objection. On appeal, the learned Subordinate Judge upheld the dismissal. Hence this second appeal.

3. The sole contention of Mr. Pal for the judgment-debtor-appellant is that the lands from which the judgment-debtor was to be evicted constituted an estate and the same having already vested in the State of Orissa under the Orissa Estates Abolition Act (hereinafter referrred to as the 'Act'), the decree-holder was not entitled to execute the decree.

4. The brief facts to appreciate the point are these: The decree of the trial court as already noted is dated 10-12-1972. The judgment-debtor carried an appeal which was dismissed on 25-3-1974. He preferred a second appeal which was dismissed at the stage of hearing under O. 41, R. 11 of the Civil P. C. on 9-7-1974. The estate vested on 18th of March, 1974. The question of loss of title of the decree-holder had not been canvassed in the appeals. The application of the decree-holder was registered as Vesting Case No. 214 of 1974-75 and on 24-1-1976, the Collector under the Act directed settlement of the property in dispute with the decree-holder and the status of the decree-holder has been treated to be that of an occupancy tenant. Mr. Pal maintains that the decree-holder had obtained the decree in the status of an estate holder against the judgment-debtor who has been found to be a trespasser. The decree-holder is, therefore, not entitled to proceed with the execution on the basis of the settlement obtained from the Estates Abolition Collector. Mr. Pal places reliance on certain Supreme Court decisions in support of his stand. See Haji Sk. Subhan v. Madharao, AIR 1962 SC 1230; Ahmad Hafiz Khan v.

Mohammad Hasan Khan, AIR 1967 SC 354; Shivashankar Prasad Sah v. Baikunth Nath Singh, AIR 1969 SC 971 and Vidya Sagar v. Smt. Sudesh Kumari, AIR 1975 SC 2295. The ratio of none of these cases is applicable to the facts of the present case. In most of the decisions of the Supreme Court, the title of the decree-holder was lost by abolition and there was no fresh settlement; whereas here, admittedly there has been a settlement in favour of the decree-holder. The relevant provisions of the Act may now be referred to. The consequences of vesting are provided in S. 5, which reads:—

"Notwithstanding anything contained in any other law for the time being in force or in any contract, on the publication of the notification in the Gazette under sub-sec. (1) of S. 3 or sub-sec. (1) of S. 3-A or from the date of the execution of the agreement under S. 4, as the case may be, the following consequences shall ensue, namely:—

(a) subject to the subsequent provisions of this Chapter the entire estate including all communal lands and porambokes, other non-raiyati lands,..... shall vest absolutely in the State Government free from all encumbrances and such intermediary shall cease to have any interest in such estate other than the interests expressly saved by or under the provisions of this Act;

Explanation ....."

S. 7, which is a subsequent provision of the same Chap. II, provides:—

(1) On and from the date of vesting:—

(a) All lands used for agricultural or horticultural purposes which were in Khas possession of an intermediary on the date of such vesting,

(b) lands used for agricultural or horticultural purposes and held by a temporary lessee or lessees or an intermediary who owns either as intermediary or in any other capacity less than thirtythree acres of land in total extent situated within the State,

(c) .....

shall notwithstanding anything contained in this Act, be deemed to be settled by the State Government with such Intermediary and with all the shareholders owning the estate and such intermediary with all the shareholders shall be entitled to retain possession thereof and hold them as raiyats under the State Government having occupancy rights in respect of such lands subject to the payment of such fair and equitable rent as may be determined by the Collector in the prescribed manner."

Section 7-A which was inserted by President's Act 3 of 1974 made a specific provision for Trust Estates and provides:—

"If the State Government are of the opinion that any land or building (being part of a trust estate) vested in the State Government is needed for carrying out the purposes of the trust efficiently, then, notwithstanding anything contained in any other law for the time being in force or in any other provision of this Act, the State Government may settle such land or building with the person who immediately before such vesting was an intermediary in respect of such land or building, subject to the payment of such fair and equitable rent as may be determined by the Collector in the prescribed manner and subject to such other terms and conditions as may be prescribed:

Provided....."

Since the judgment-debtor was a trespasser, S. 8 of the Act which protected tenancies is not relevant to be referred to. S. 8-A lays down the procedure for filing of claims and sub-sec. (3) thereof provides:—

"On the failure of filing the claims within the period specified under this section the provisions of cl. (h) of S. 5 shall, notwithstanding anything to the contrary in Ss. 6, 7 and 8, apply as if the right to possession of the lands or buildings or structures, as the case may be, had vested in the State Government by the operation of this Act and thereupon the right to make any such claim as aforesaid shall stand extinguished.

Provided....."

A harmonious reading of the aforesaid provisions, gives the clear impression that the statutory scheme is that when a vesting notification is made, an ex-intermediary to whom S. 7 applies is not evicted and he is entitled to hold the land and remain in possession unaffected by the vesting on the basis of a 'deemed settlement'. His right to possession terminates if he fails to make a claim within the prescribed period in terms of S. 8-A, sub-sec. (3) whereof provides that such a defaulting ex-intermediary becomes liable for eviction in terms of S. 5 (h) of the Act.

On a reference to the relevant provisions of the Act, therefore, it is manifestly clear that notwithstanding the

vesting and until settlement was made, the ex-intermediary was entitled to remain in possession and such possession has been protected by statute. The appellant being a trespasser was liable to be evicted and the decree-holder on the basis of the decree for eviction was certainly entitled to keep him out. In my opinion, the appellant is not entitled to contend on the ratio of the aforesaid Supreme Court decisions that notwithstanding the fact that the statute protected the possession of the ex-intermediary on the basis of a deemed settlement and as a fact in due course there has been a settlement, the decree becomes unexecutable on account of the vesting and the decree-holder must now be asked to go to a fresh suit on the basis of his new title as per the settlement.

5. There is also some force in the submission of Mr. Ram for the decree-holder that the question of loss of title had not been argued in the title appeal or in second appeal though the vesting took place prior to the disposal of the title appeal. In execution, the judgment-debtor was precluded from raising the point. The observation made by the Madhya Pradesh High Court in the case of Bherusingh v. Ramgopal, AIR 1972 Madh Pra 217 supports this submission.

6. There is no merit in the appeal and it must accordingly be dismissed. As no costs were decreed in the courts below, I would also direct that parties will bear their own costs here.

Appeal dismissed.

AIR 1979 ORISSA 39

N. K. DAS, J.

State of Orissa and others, Appellants v. U. N. Samantray, Respondent.

Misc. Appeal No. 135 of 1978, D/- 4-10-1978.*

Arbitration Act (10 of 1940), Ss. 30, 20, 8, 29 — "Is otherwise invalid" — Reference to arbitrator — Revocation — Appointment of arbitrator by consent of parties — Validity of — Appointment, whether under S. 20 or S. 8 — Award by such arbitrator — Interference by Court — When not open — Question of limitation — Amenability to jurisdiction of Court — Arbitrator, if has jurisdiction to award interest.

In respect of certain construction work, various disputes arose in course of execution thereof between a Govt. Contractor P and the State Govt. D. On 11-1-74 P requested D for appointment of arbitrator as per agreement but without any response. So, on application by P under S. 8 read with Sec. 20, the Court appointed M (a retd. Chief Engineer) as the sole arbitrator. During the pendency of the arbitration proceeding, D filed application in Court for revocation of reference and removal of M. The application was allowed and the order was confirmed by High Court. On the matter being carried to the Supreme Court, a retd. High Court Judge, J was appointed as sole arbitrator on 23-8-76 by consent of both parties. On 10-1-77, the Court accordingly directed J to decide disputes which were referred to M on 4-4-74. J submitted the award on 20-12-77. D raised objection under S. 30 challenging the award on ground inter alia that J's appointment was a nullity and reference to him was without jurisdiction as being not in accordance with the agreement. The claim was also alleged to be barred by limitation. The Court negatived all objections and the award was made the rule of the Court. On appeal by D :

Held (i) that in fact the reference to J was under S. 20. The substance of the reference was to be looked to in order to find out what was the nature of reference. Because the court had made the reference subsequently in a wrong form it could not be said that the reference was under S. 8. As such, the arbitrator, J had full jurisdiction to arbitrate upon the disputes referred to him. Accordingly, the reference made to the arbitrator could not be said to be illegal and the award could not be said to be void. (Para 6)

(ii) that the arbitrator J had not appended any document, nor he had stated that he had based his decision on any particular point of law. Therefore, it could not be said that the award suffered from any error of law or fact apparent on the face of record, so as to warrant interference by the court.

Simply because he had not assigned reasons for his conclusions, it could not be said that the award suffered from error of law or fact apparent on record. 1977 Kash LJ 162 Dist. Case law discussed. (Para 10)

*(From order of G. C. Chopdar Sub J., Bhubaneswar, D/- 19-6-1978.)

If parties constitute an arbitrator as the sole and final judge of the disputes arising between them, they bind themselves as a rule to accept the award as final and conclusive and the award is ordinarily not liable to be set aside on the ground that either on facts or in law it is erroneous. Case law traced. (Paras 7, 9)

(iii) that the question of limitation was for the arbitrator and non-dealing of the same in the award or even an erroneous decision was not amenable to the jurisdiction of Court. 1970 All LJ 740, Foll. (Para 11)

(iv) that in view of S. 29 it was within the jurisdiction of the arbitrator to award pendente lite and future interest till the date of the decree. AIR 1967 SC 1032, 1970 SCD 530, 1974 (2) Cut WR 917 and AIR 1978 NOC 294 : 46 Cut LT 171, Foll. (Para 12)

Anno: AIR Manual (3rd Edn.), Arbitration Act, S. 30 Notes 7 and 17; S. 20 Notes 1 and 2; S. 8 N. 2; S. 29 N. 2.

Cases Referred : Chronological Paras

AIR 1979 Orissa 19 : 46 Cut LT 315 13
AIR 1978 Orissa 121 : 45 Cut LT 443 7, 9
AIR 1978 NOC 294 : 46 Cut LT 171 12
AIR 1977 SC 2014 : 45 Cut LT 246 8
1977 Kash LJ 162 10
(1977) 44 Cut LT 603 9, 11
(1977) 44 Cut LT 666 7
AIR 1975 SC 230 7, 9, 11
(1974) 40 Cut LT 1229 7
1974 (2) Cut WR 917 9
1972 (1) Cut WR 951 7
AIR 1971 SC 696 9
AIR 1971 SC 1646 9
1970 SCD 530 8, 12
1970 All LJ 740 : (1969) 2 SCC 620 11
AIR 1967 SC 1030 7, 9
AIR 1967 SC 1032 9, 11
AIR 1965 SC 214 9
(1965) 31 Cut LT 412 7
AIR 1963 SC 1677 7
AIR 1963 SC 1685 7, 9
AIR 1961 Orissa 143 7
AIR 1923 PC 66 9, 11, 12

R. C. Misra and S. C. Mohapatra, for Appellants; R. Mohanty, R. C. Patnaik, A. K. Tripathi, C. A. Rao, A. C. Mohanty and K. Patnaik, for Respondent.

JUDGMENT :— This appeal is directed against an order under S. 30 of the Arbitration Act rejecting the objections raised by the present appellants against the award passed by the arbitrator in the matter of a dispute between the respondent-contractor and the State Government. By consent of parties before the Supreme Court, Justice A. Misra, a retired Judge of this Court was appointed as the arbitrator.

2. Plaintiff-respondent is a registered special class contractor under the State Government. He took up the work covered by F-2 Agreement for construction of up-stream and down-stream lock chamber at Munduli. His tender, being the lowest, was accepted by the State Government. Work order was issued to him and agreement was executed between the parties on 29-5-65 for execution of the work. Various disputes arose between the parties in course of execution of the work and also in respect of payments due to the plaintiff-respondent under the agreement. Ultimately, defendant No. 1 directed the plaintiff to take recourse to arbitration, as contemplated in the agreement. On 11-1-74, the plaintiff addressed a letter to defendant No. 2 asking for appointment of an arbitrator, as envisaged in the agreement. As there was no response, plaintiff made an application under S. 8 read with S. 20 of the Arbitration Act to court for appointment of an arbitrator.

The said application was allowed by the court and Mr. Mumtaz Alli, a retired Chief Engineer, was appointed as the sole arbitrator. While the arbitration proceeding was pending before Mr. Alli, the defendants filed an application in court for revocation of the reference and for removal of Mr. Alli. This application for revocation of reference was allowed by the learned Subordinate Judge and the said order was also confirmed by this Court. The matter was thereafter carried to the Supreme Court in Civil Appeal No. 940 of 1976. The Supreme Court, on agreement of both parties, appointed Justice A. Misra, a retired Judge of this Court, as the sole arbitrator to adjudicate upon the disputes of the parties by order dated 23-8-76. In compliance with the order passed by the Supreme Court, reference was made to Justice A. Misra. After completion of the arbitration proceeding, he submitted the award on 20-12-77.

3. The defendants raised objections under S. 30 of the Act challenging the validity of the award on grounds that the appointment of the arbitrator was a nullity and the reference made to him was without jurisdiction because according to the terms of the agreement, one

of the Superintending Engineer of the State un-connected with the work was to be appointed and in case of non-availability of such engineer, the Chief Engineer ought to be the sole arbitrator. It was also averred that the arbitrator violated the principles of natural justice in not giving adequate opportunity to the defendants and he exceeded the scope of reference and award of interest was also illegal. It was further alleged that the arbitrator misconducted himself in awarding an amount in excess of what was claimed by the plaintiff. The claim was also alleged to be barred by limitation. On the aforesaid grounds, the defendants sought to set aside the award.

4. The plaintiff countered the aforesaid allegations and contended that the award was legal and valid; the objections raised by the defendants were not tenable in law and thus prayed for rejection of the objections and for passing a decree in terms of the award.

5. The learned Subordinate Judge has negatived all the objections raised by the defendants and has ordered that the award passed by the arbitrator on 20-12-77 be made the rule of the Court and decree be passed accordingly. He has further held that the plaintiff is entitled to costs of the suit along with future interest on the principal amount from the date of the decree till the date of payment, at the rate of six per cent per annum.

6. Mr. Misra, the learned counsel for the appellants, contends that the arbitrator was appointed under S. 8 of the Act and the reference of disputes to him by the court was illegal and for this reason the award passed by the arbitrator was a nullity. Admittedly, the reference to the first arbitrator Mr. Alli was made under S. 20 of the Act. During pendency of the proceeding before Mr. Alli, the defendants applied for revocation of the reference and for cancellation of the appointment of the arbitrator. This matter went up to Supreme Court and in the Supreme Court, on agreement of both parties, Justice A. Misra, a retired Judge of this Court, was appointed as arbitrator to decide the disputes between the parties. To this extent, there is no dispute between the parties. The application of the plaintiff was under S. 8 read with S. 20 of the Act and the reference was originally made under S. 20 of the Act.

When Justice A. Misra was appointed as arbitrator by the Supreme Court, the disputes referred to Mr. Alli were again referred to Justice A. Misra. The reference made to Justice A. Misra by the court also shows that he had to arbitrate upon the disputes which were referred to Mr. Alli. In the application filed by the plaintiff for reference, it was pleaded that defendant No. 1 by his letter dated 20-12-73 directed the plaintiff to take recourse to arbitration. It is mentioned in para 6 of the plaint that it is filed with a prayer for directing the defendants to file the agreement in court and for appointment of an arbitrator and also for reference of the disputes specifically stated in the schedule appended to the application. The disputes have been set out in paragraph 6. The cause of action is mentioned in para. 8 which is founded on the letter dated 20-12-73 and the notice of arbitration dated 12-1-74.

The prayer in the plaint was to direct the defendants to file the agreement in court and after hearing the parties to appoint an arbitrator and to refer the disputes mentioned in the schedule to the said arbitrator. The learned Subordinate Judge by his order dated 4-4-74 stated that on a perusal of the pleadings and on a consideration of the arguments advanced by the counsel for both parties, he was convinced that there was existence of disputes between the parties as envisaged in Cl. 23 of the agreement and, therefore, a direction should be issued to file the agreement in court and reference is to be made to the arbitrator to decide the disputes between the parties. He, accordingly, directed the defendants to file the agreement in court and appointed Mr. Alli as arbitrator. The reference to Mr. Alli was under S. 20 of the Arbitration Act. By order dated 10-1-77, the learned Subordinate Judge directed Justice A. Misra to decide the disputes as mentioned in order dated 4-4-74, which were referred to Mr. Alli.

Justice A. Misra also proceeded with the arbitration basing on a reference under S. 20 of the Act. The defendants-appellants contend that subsequent to the reference made to Justice A. Misra, the learned Subordinate Judge has again made a reference to the arbitrator under S. 8 of the Act. The learned Subordinate Judge also has held that this was a reference under S. 8 of the Act. On examination of the records, I find that in fact the reference was un-

der S. 20 of the Act. The substance of the reference is to be looked to in order to find out what was the nature of reference. Because the court has made the reference subsequently in a wrong form (form J-48), it cannot be said that the reference was under Section 8 of the Act. The nature of reference is contained in the original order dated 10-1-77. From the orders of the aforesaid dates, it is clear that the reference was actually under S. 20 of the Act.

Justice A. Misra was directed to adjudicate upon all the disputes referred to Mr. Alli and there is no ambiguity in the same. When admittedly the reference to Mr. Alli was under S. 20 of the Act, it cannot be said that the reference subsequently made to the arbitrator Justice Misra by the court is to be construed to be under S. 8 of the Act. It is apparent from the record that the reference to Justice Misra was under S. 20 of the Act, Moreover, the order of the Supreme Court is clear. Justice A. Misra was appointed as arbitrator in the arbitration proceeding to adjudicate upon the disputes of the parties and it can invariably mean he has to adjudicate upon the disputes which were referred to Mr. Alli. I, therefore, hold that the reference to Justice A. Misra was under S. 20 of the Act and not under S. 8 and, as such, the arbitrator had full jurisdiction to arbitrate upon the disputes referred to him. Accordingly, the reference made to the arbitrator cannot be said to be illegal and the award cannot be said to be void.

7. The award is the decision of a domestic tribunal chosen by the parties and the civil courts which are entrusted with the power to facilitate arbitration and to effectuate the awards, cannot exercise appellate powers over the decision. The decision of the arbitrator, wrong or right, is binding if it be reached fairly after giving adequate opportunity to the parties to place their grievances in the manner provided by the arbitration agreement (See Union of India v. A. L. Rallia Ram) AIR 1963 SC 1685.

It is well established that if parties constitute an arbitrator as the sole and final judge of he disputes arising between them, they bind themselves as a rule to accept the award as final and conclusive and the award is ordinarily not liable to be set aside on the ground that either on facts or in law it is erroneous.

The arbitrator is a judge of the choice of the parties and his decision should not be set aside even if the court as a court of law would come to a different conclusion on the same facts, unless there is an error apparent on the face of the record which makes it unsustainable (See Smt. Ratnamani Dei v. Jaganath Sahu (1974) 40 Cut LT 1229).

This Court has also held in the case of Executive Engineer, Ganjam (Roads & Buildings) Division v. Sri Sankar Maharana, 45 Cut LT 443: (AIR 1978 Orissa 121) that it is well settled that when the arbitrator is the sole and final judge of any dispute between the parties, the parties bind themselves as a rule to accept the award as final and conclusive. The award is liable to be corrected, modified or set aside only under limited scope of the provisions made under Ss. 15 and 30 of the Act. Unless the mistake is evident on the face of the award or in some paper accompanying and forming part of the award, the court has no jurisdiction to touch the award. It has also been held in State of Orissa v. R. S. Das, (1977) 44 Cut LT 666, that if the mistake complained of does not appear on the face of the award, the award cannot be remitted or set aside and the court has no jurisdiction to enter into the merits of the case, or to examine the documents and oral evidence on record for the purpose of finding out whether or not the arbitrator has committed an error of law or of fact.

The Supreme Court has also held in Firm Madanlal Roshanlal Mahajan v. Hukumchand Mills Ltd., Indore, AIR 1967 SC 1030, that the award passed by the arbitrator both on law and facts is final and there is no appeal from his verdict and the court cannot review his award and correct any mistake in his adjudication, unless an objection to the legality of the award is apparent on the face of it. The Supreme Court has also observed that the court should approach the award with a desire to support it, if that is reasonably possible, rather than to destroy it by calling it illegal (See Smt. Santa Sila Devi v. Dhirendra Nath Sen, AIR 1963 SC 1677). This Court has also decided in Union of India v. Kalinga Construction Co. (Pvt.) Ltd., (1965) 31 Cut LT 412, to the above effect.

In the case of N. Chellappan v. Secy., Kerala State Electricity Board, AIR

1975 SC 230, the order was passed on consent of parties and it was held that in such a case where the parties submitted to the jurisdiction of the umpire and took part in the proceeding without any demur, the parties will be precluded by other acquiescence from challenging the award for lack of jurisdiction. So also it has been held by this Court in Union of India v. Radhanath Nanda, AIR 1961 Orissa 143, that where a party having submitted to the jurisdiction of the arbitrator subsequently challenges his jurisdiction on the ground that he did not possess the qualification required by the arbitration clause, it must be held that there was estoppel by conduct and that it was not open to the party to contend otherwise. So also in State of Orissa v. Bhagabat Prasad Bal, 1972 (1) Cut WR 951, it has been held that when parties submit to the jurisdiction of the arbitrator, it is no longer open to either of the parties to resile on the plea that the dispute does not come within the purview of the agreement clause and it is not open to challenge the validity of the award on the ground that the arbitrator had no jurisdiction to decide the dispute and to pass the award.

8. It is contended by the appellants that the arbitrator has awarded under item No. 2 (claim for dewatering — Rs. 6,37,517.88 and interest as against a claim of Rs. 3,54,375.00) and as such misconducted itself as the amount granted is in excess of the claim. Item No. 2 is in para 6 of the plaint filed by the plaintiff, which is as follows:—

"For the appreciation of the nature of the dispute involved part of the disputed claim under this head up to 2-1-68 is stated herein. Under this head further claims beyond this date are in dispute."

The claim as well as the award included the amount for the subsequent years under this head. It is thus clear that the disputes indicated in paragraph 6 are merely indicative of heads of claim without any reference to the monetary value. In the plaint, the valuation has been given as tentative. All the schedules of disputes excepting a portion of item No. 2 have not at all been valued and a part of the claim under item No. 2 has been valued only up to a particular time. This is not a case of claim of specific amount, but as would appear from the contents of the plaint the amount of claim of all the heads is to be decided by the arbitrator and the plaint also has been tentatively valued. Reliance has been placed by the appellants on the case of Orissa Mining Corporation Ltd. v. P. V. Rawalley, 45 Cut LT 246 : (AIR 1977 SC 2014) This case has no application to the present case, inasmuch as the heads of claim were specifically valued with exactitude in that case.

On the other hand, the facts and circumstances of this case come squarely under the case of Messrs. Ashok Construction Co. v. Union of India, 1970 SCD 530. In that case, the claims were not valued and the heads of disputes were merely set out without specifying the amount claimed under each head. The Supreme Court held that under such circumstances no inference can be raised because the claims made before the arbitrator did not aggregate the amount decreed. Considering the claims made by the plaintiff in the present case according to the dictum laid down by the Supreme Court, it cannot be said that the arbitrator has exceeded his jurisdiction in awarding the amount under item 2 of the schedule of claims.

9. It is contended by the appellants that the arbitrator has misconducted himself and has misconstrued the evidence in the present case. It is well settled that the arbitrator can arrive at his conclusion by use of his discretion and the court has no jurisdiction to go into the question of lack of evidence. It has been consistently held by the Supreme Court as well as this Court that the court has no jurisdiction to touch the award if the award is without reasons. The legal position is that the arbitrator is the final judge on facts and law and his decision is not open to scrutiny by the court. Where reasons have not been given, it is indeed difficult to sustain objections as to a mistake said to be apparent on the face of the award (See (1978) 45 Cut LT 443 : (AIR 1978 Orissa 121) (supra)).

The Supreme Court has also held in the case reported in AIR 1967 SC 1030, referred to above, that when arbitrator has given no reason for award, nor there is any legal position as basis of award, contention that there are errors of law on face of award must be rejected. In M/s. Allen Berry & Co. (Pvt.) Ltd. v. Union of India, AIR 1971 SC 696, it has been observed that even

when an arbitrator commits a mistake either in law or in facts in determining the matters referred to him, but such mistake does not appear on the face of the award or in a document appended to or incorporated in it so as to form part of it, the award will neither be remitted nor set aside notwithstanding the mistake and mere reference to the contract in the award is not to be held as incorporating it.

The Supreme Court has also held in Jivarajbhai v. Chintamanirao, AIR 1965 SC 214, that it is not open to the court to speculate, where no reasons are given by the arbitrator, as to what impelled the arbitrator to arrive at his conclusion. On the assumption that the arbitrator must have arrived at his conclusion by a certain process of reasoning, the court cannot proceed to determine whether the conclusion is right or wrong and it is not open to the court to attempt to probe the mental process by which the arbitrator has reached his conclusion where it is not disclosed by the terms of the award. What is an error of law on the face of the award has been described by the Supreme Court in AIR 1963 SC 1685, referred to above. It is observed :—

"It does not mean that if in a narrative a reference is made to a contention of one party that opens the door to setting first what that contention is and then going to the contract on which the the parties' rights depend to see if that contention is sound."

This Court also in State of Orissa v. Govinda Choudhury and Sons, 1974 (2) Cut WR 917, has held that it is not open to the court to interfere with the award on questions relating to appreciation of evidence by the arbitrator. Determination of these questions is exclusively within the jurisdiction of the arbitrator and unless there is an error of law apparent on the face of the record, the court is not entitled to substitue its own opinion for that of a private judge appointed by the parties. The Supreme Court has further observed in Union of India v. Kalinga Construction Co. (P) Ltd., AIR 1971 SC 1646, that in a proceeding to set aside award, the High Court cannot sit in appeal over the conclusion of the arbitrator by re-examining and reappraising the evidence considered by the arbitrator and hold that the conclusion reached by the arbitrator is wrong. In State of Orissa v. Gangaram Chapolia, (1977) 44 Cut LT 603, it has been held that in the absence of the award showing that an erroneous view of law has been taken, which is the basis of the decision, it cannot be said that there is a mistake in the award on the very face of it.

This position has been clarified by the Supreme Court in a recent decision reported in AIR 1975 SC 230 (supra). It has been observed that the umpire as sole arbitrator was not bound to give a reasoned award and if in passing the award he makes a mistake of law or of fact, that is no ground for challenging the validity of the award. It is only when a proposition of law is stated in the award and which is the basis of the award, and that is erroneous, can the award be set aside or remitted on the ground of error of law apparent on the face of the record. This question has been answered by quoting a portion from "Russell on Arbitration" 17th Edition. page 322, to the following effect :—

"Where an arbitrator makes a mistake either in law or in fact in determining the matters referred, but such mistake does not appear on the face of the award, the award is good notwithstanding the mistake, and will not be remitted or set aside.

The general rule is that, as the parties choose their own arbitrator to be the judge in the disputes between them, they cannot, when the award is good on its face, object to his decision, either upon the law or the facts."

The Supreme Court explained the meaning of the expression "error of law on the face of the award" as "You can find in the award or a document actually incorporated thereto, as, for instance, a note appended by the arbitrator stating the reasons for his judgment, some legal proposition which is the basis of the award and which you can then say is erroneous." The Supreme Court relied on Lord Dunedin in Champsey Bhara and Co. v. Jivraj Balloo Co., AIR 1923 PC 66 and Union of India v. Bungo Steel Furniture Pvt. Ltd., AIR 1967 SC 1032. The Supreme Court further observed that the civil court has no jurisdiction to investigate into the merits of the case and to examine the documentary and oral evidence on the record for the purpose of finding out, whether or not the arbitrator has committed an error of law.

10. In the instant case, the arbitrator has not appended any document, nor

he has stated that he has based his decision on any particular point of law. Therefore, it cannot be said by any stretch of imagination that the award suffers from any error of law or fact apparent on the face of record, so as to warrant interference by the court. The arbitrator has stated :—

"As the claimant-petitioner has formulated his claims itemwise under different heads, the O.Ps also filed their counter itemwise. The parties addressed elaborate arguments in support of their respective contentions and referred to the documents and other materials item by item of the claims made. During the course of arbitration I visited the site of work at Munduli along with both the parties, inspected both the up-stream and down-stream lock chambers, the lay-out and the general alignment of the area in which the work was originally intended to be executed and subsequently partially shifted to facilitate proper appraisal and appreciation of the claims and contentions of the respective parties and the documents referred to.

Having given my full and careful consideration to the claims and contentions contained in the respective written statements submitted by the parties, the documents and other evidence produced and the arguments advanced in detail in respect of each item of claim, I proceed to record my conclusions and findings as detailed below. For sake of convenience I record below the claims made by the claimant-petitioner itemwise and my findings thereon in respect of each item."

Thereafter, the arbitrator has dealt with each item of claim. From the records of the arbitrator, it appears that he has given ample opportunity to the parties to make their respective submissions. It is also contended by counsel for parties that written notes of arguments were also filed before the arbitrator. It is thus evident that the arbitrator has come to his conclusions having all necessary materials as well as notes of arguments with him. Simply because he has not assigned reasons for his conclusions, it cannot be said that the award suffers from error of law or fact apparent on record, in view of the principles discussed above.

The appellants have relied on M/s. Hindustan Construction Co. Ltd. v. State of Jammu and Kashmir, 1977 Kash LJ 162. That was case where the arbitrator had referred to certain documents and after considering those documents had come to a conclusion. Therefore, that case is not applicable to the present case. The consistent view of the Privy Council, the Supreme Court and of this Court has been mentioned above and in view of those principles, the award of the arbitrator does not suffer from any error of law or fact apparent on the face of record and, as such, it cannot be said that the award is made without any evidence in support of the finding and cannot be said to be vitiated on such ground.

11. The next point raised by the appellants is that on 20-12-73 the defendants directed the plaintiff to take recourse to arbitration by notice which was served on 11-1-74 and, as such, the application having been filed on 4-2-74, it was barred by limitation. It is well settled and beyond any pale of controversy that the question of limitation is for the arbitrator and non-dealing of the same in the award or even an erroneous decision is not amenable to the jurisdiction of this Court. In the aforesaid Chellappan case (AIR 1975 SC 230), the findings of the umpire did not show that the claims were barred by limitation. Therefore, the Court did not want to interfere on that ground. So also in Kanpur Nagar Mahapalika v. M/s. Narain Das Haribansh, (1969) 2 SCC 620: (1970 All LJ 740), it has been held that the arbitrator under agreement is to decide the questions which are within the province of his jurisdiction.

It cannot be said on the face of the award that the arbitrator has decided on any principle of construction which the law does not countenance. It is sufficient if the arbitrator gives the award on the whole case and he need not deal with each issue separately. It is open to the arbitrator to decide on the rival contentions of the parties as to limitation. In doing so, if the arbitrator makes a mistake either in law or on facts, and if such mistake does not appear on the face of the award, the award will not be bad notwithstanding any mistake. Relying on the aforesaid Kanpur Nagar Mahapalika case (1970 All LJ 740) and also Chellappan case (AIR 1975 SC 230), this Court also held in State of Orissa v. Gangaram Chhapolia, (1977) 44 Cut LT 603, that when the question of limitation has not been dealt with in the

decision of the arbitrator, and the award does not contain any erroneous proposition of law on the basis of which it has been made, the bar of limitation even assuming that it was raised before the arbitrator, might have been met by the arbitrator by referring to evidences led by parties.

For example, the arbitrator might have accepted the acknowledgment made by appellant to meet the plea of limitation. In the absence of the award showing that erroneous view of law has been taken which is the basis of the award, it cannot be said that there is a mistake in the conclusion on the very face of it. So also, relying on the Chellappan, (AIR 1975 SC 230), Shampsey Bhara (AIR 1923 PC 66) and Bungo Steel (AIR 1967 SC 1032) cases (supra), this Court has held that the court has no jurisdiction to investigate into the merits of the case and to examine the documentary and oral evidence on record for the purpose of finding out whether or not the arbitrator has committed an error of law. In view of the aforesaid position of law, the contention of the appellants is not sustainable.

12. The next contention of the appellants is that the arbitrator has no jurisdiction to award pendente lite and future interest till the date of the decree. Section 29 of the Act is clear on the point. This position is no longer res integra. It has been consistently held by the Supreme Court that it is within the jurisdiction of the arbitrator to award pendente lite and future interest till the date of the decree (See AIR 1967 SC 1032; 1979 SCD 530 and 1974 (2) CWR 917 (supra) and Secy. CPWD v. Smt. Janaki Dei, 46 Cut LT 171 : (AIR 1978 NOC 294)).

13. A question was raised by the appellants that there was no proper notice for initiation of the proceeding in court for arbitration. The argument is based on the contention that notice was given only to the Additional Chief Engineer. It is not disputed that after receipt of notice, Government agreed for appointment of arbitrator. After the application was filed by the respondent, arbitrator was also appointed. Before the Supreme Court, the arbitrator was appointed on agreement of parties. It is no longer open to the appellants to raise such a contention. This position has also been decided by this Court in Fertiliser Corporation of India Ltd. v. Ravi Kumar Ohri, (1978) 46 Cut LT 315 : (AIR 1979 Orissa 19).

14. On the aforesaid analysis, I hold that all the contentions raised by the appellants are not sustainable.

15. A cross-objection has been filed by the respondent claiming higher interest. No substantial material has been placed before me to warrant a finding on this point in favour of the respondent and, as such, the cross-objection has no merit. It is contended that the appeal being directed against an order under S. 30 of the Act and not being against a decree, this cross-objection is not maintainable. As on merits I find that there is no ground to allow the cross-objection, it is immaterial to go into the question of maintainability of the cross-objection, as it would be purely academic. It is contended by the respondent that as the appellants are deliberately delaying the matter of payment without any substantial reason, he is unnecessarily harassed.

In this connection, my attention was drawn to some correspondence between the parties (vide annexures to the petition by respondent dated 11-9-78 for payment of the decretal dues) that at one stage the appellants agreed to pay within a specific time a specific amount if the respondent would forego claim of interest and the respondent agreed to that. But the appellants did not make any payment even at that time and went on contesting. In this connection, it is stated on behalf of the respondent that the appellants are deliberately taking recourse to delaying tactics in making payment. It is now found that the objections raised by the appellants are not tenable. It is, therefore, appropriate that the appellants should see that delay is avoided in making payment of the decretal dues to the respondent.

16. In the result, the appeal has no merits and it is dismissed with costs. The cross-objection is also dismissed.

Appeal and cross-objection dismissed.

AIR 1979 ORISSA 47

R. N. MISRA AND N. K. DAS, JJ.

Amina Bibi, Petitioner v. Tahsildar-cum-Revenue Officer, Surada and others, Opposite Parties.

O. J. C. No. 1342 of 1976, D/- 12-9-1978.

Orissa Land Reforms Act (16 of 1960), S. 42 (2) (a) — Appeal — Limitation — Starting point.

In a suo motu proceeding started by the Revenue Officer under S. 42 for determination of the ceiling area the petitioner, land-holder, was required to file objection by 28-2-1976. No date for making of the order was indicated. On the footing that no objection was filed by 28-2-1976, on 29-2-1976, the Revenue Officer made an order confirming the draft statement and directed publication thereof as provided under S. 44 (1) of the Act, "29-2-1976" was not a date appointed in the proceeding for any purpose. Therefore, petitioner could not have had the occasion to take notice of that date. According to the petitioner, his knowledge of the impugned order was dated 15-6-1976. That fact has not been controverted.

Held that the date from which the limitation of thirty days provided under the Act for appeal would commence was 15-6-1976. The appeal had admittedly been filed within a period of six days therefrom and, therefore, it could not have been thrown out as being barred by limitation. (Case law discussed). (Para 7)

Cases Referred : Chronological	Paras
AIR 1975 SC 2085	6
AIR 1975 Orissa 209 : ILR (1975) Cut 291	6
AIR 1965 Raj 82	6
AIR 1961 SC 1500	6
AIR 1958 Ker 272	6
AIR 1954 Bom 419	6
AIR 1953 Orissa 23 : 18 Cut LT 288	6
AIR 1951 Mad 204 : 19 ITR 402	6
AIR 1930 Mad 490 : ILR (1930) 53 Mad 491	6
ILR (1911) 34 Mad 151	6

R. K. Mahapatra and A. Misra, for Petitioner; Addl. Govt. Advocate, for Opposite Parties.

R. N. MISRA, J.:— This writ application for certiorari was filed by a mother and her son who were petitioners 1 and 2 respectively. During the pendency of the application, the mother having died, the son has become the sole petitioner. The determination of the ceiling area in a suo motu proceeding under S. 42 of the Orissa Land Reforms Act (hereinafter referred to as the 'Act') and the decision of the appellate and the revisional authorities are assailed in this application.

2. It is unnecessary to examine the facts of the case as having heard learned counsel for parties at length we are inclined to take the view that the appeal preferred by the petitioners before opposite party No. 2 was within the period of limitation and the same should not have been thrown out as being barred by limitation and the appellate authority was obliged to dispose of the appeal on merit. We shall presently examine the question as to whether the appeal was barred or not barred by time.

3. The Revenue Officer (opposite party No. 1) initiated the proceeding by his order dated 22-2-1975 and Miscellaneous Case No. 113 of 1974 (O.L.R.) was registered. On 12-1-1976, the Revenue Officer directed issue of a revised draft statement. On 19-1-1976, the draft statement was signed and published. On 20th of Feb., 1976, the Revenue Officer directed re-issue of notice as he was not satisfied that the landholder had refused to accept notice as reported and required the objection to be filed on 28-2-1976. On the footing that no objection was filed by 28-2-1976, on 29-2-1976, the Revenue Officer made an order confirming the draft statement and directed publication thereof, as provided under S. 44 (1) of the Act. On 29-3-1976, he made the following order :—

"Appeal period is over. No intimation of appeal if any filed is received. Prepare and publish a copy of the confirmed statement for a period of 15 days....."

and posted the matter to 26-4-1976 on which date he recorded the following order :—

"Confirmed statement duly published on 7-4-76. Fifteen days, the period of publication, is over. Issue final statement. Ask R.I. to report the Government dues if any outstanding against the landholder....."

He directed the matter to be called on 18-5-1976. On 8-6-1976, he directed issue of notice to the petitioners as provided under S. 45-A (2) of the Act. The said notice was served on 15-6-1976 and

the appeal was filed on 21-6-1976. The appellate authority came to hold:—

"This appeal arises out of the order dated 29-2-76 passed by the Revenue Officer, Surada, in O.L.R. Case No. 113/74 confirming the draft statement under S. 44 (1) of the O.L.R. Act.

The appeal was filed on 21-6-76. Thus there has been delay of 113 days in preferring the appeal. No explanation has been offered why the appeal was not filed within the prescribed period of limitation as envisaged under S. 44 (2) (a) of the O.L.R. Act. Apparently the appeal is barred by limitation."

After saying so, the appellate authority casually referred to certain features relating to merit of the matter and dismissed the appeal. Petitioner's revision before the Revenue Divisional Commissioner was disposed of by saying:—

"Heard the Advocate for the petitioner on point of admission. Perused the judgment of the lower court. The appeal before the lower appellate court is barred by limitation. The learned Advocate stated that in the trial court the son of Ahmed Hussain had only appeared. Shri S.K.C. Das pleaded that under Mahammadan Law appearance of son does not amount to appearance for the mother. In any case there was adequate notice on the party and he has participated in the proceedings of the trial court. I, therefore, see no reason why the limitation should be condoned. The revision is rejected. Advocate informed."

4. Mr. Mohapatra for the petitioner has taken the stand that the petition of appeal was in time from the date of communication of the order of the Revenue Officer and both the appellate and the revisional authorities have, therefore, gone wrong in proceeding on the footing that the appeal was barred by limitation.

5. S. 44 (2) of the Act provides:—

"An appeal against the order of the Revenue Officer under sub-sec. (1) confirming the statement, if presented—

(a) by any person aggrieved by the order within thirty days from the date of the order; or

(b) .....

shall lie to the prescribed authority."

Undoubtedly, the order against which the appeal was filed is dated 29-2-1976 and the appeal was filed on 21-6-1976. Five days' time was available under S. 12 of the Limitation Act. Since the appeal has to be presented within thirty days from the date of order and the time requisite under S. 12 of the Limitation Act is five days, the appeal had to be filed within thirtyfive days from the date of the order. On the aforesaid basis, it has been the stand of the appellate and the revisional authorities and of learned Additional Government Advocate before us that the appeal had to be presented by 4th April, 1976. As the appeal was filed on 21-6-1976, it was out of time by 77 days.

Mr. Mohapatra for the petitioner, however, does not accept this position and maintains that "date of the order" as contemplated in S. 44 (2) (a) of the Act has to be construed to mean "the date of communication of the order". Reliance is placed on a series of authorities in support of the contention.

6. In the case of M/s. Bharat Sabaigrass Ltd., Calcutta v. Collector of Commercial Taxes, (1952) 18 Cut LT 288: (AIR 1953 Orissa 23) the question for consideration was whether an application for reference under the provisions of the Orissa Sales Tax Act was in time. S. 24 (2) of the Orissa Sales Tax Act as it then stood provided:—

"If, for reasons to be recorded in writing, the Revenue Commissioner refuses to make such reference the applicant may, within thirty days of such refusal, either—

(a) withdraw his application (and if he does so, the fee paid shall be refunded), or

(b) apply to the High Court against such refusal."

On 30th July, 1951, the Revenue Commissioner refused to make a reference. The application before the Court was filed on 28th Sept. 1951. Considering the question of delay, a Bench of this Court held (at p. 24):—

"It is contended by the petitioners that the period of limitation should commence not from the signing of the order but from the communication of such order to the petitioners. An affidavit has been filed by the petitioners which remains uncontroverted to the effect that the refusal was communicated by Officer of the Commissioner, Sambalpur, in his Office Letter No. 5750/GL, dated 9th Aug. 1951, which was received in the Office of the petitioner on 13th Aug. 1951. To us, it appears that the term refusal implies within itself communicated refusal. If the Commissioner signs the order and keeps it for himself without

communicating it to the person against whom refusal is meant, it cannot be taken to be a refusal as contemplated under S. 24. We, therefore, think that the limitation will start from the date of communication of the order or refusal and not from the date of signing of it....."

Reliance was placed on three Madras decisions. First is the case of Secy. of State for India in Council v. Gopi Setty Narayanaswami Naidu Garu, ILR (1911) 34 Mad 151 and next is the case of Swaminathan v. Latchumanan, ILR (1930) 53 Mad 491: (AIR 1930 Mad 490). The third one is the case of O.A.O.A.M. Muthiah Chettiar v. Commr. of Income-tax, Madras, 19 ITR 402: (AIR 1951 Mad 204), where Chief Justice Rajamannar speaking for the Division Bench observed (at p. 205 of AIR):—

"The only question on the merits which falls for decision is whether the one year has to be computed from the date when the order was signed by the Income-tax Officer, or the date when it was communicated to the petitioner, or the date, if there be any, on which the petitioner had the opportunity of coming to know of the order. The learned Advocate for the petitioner relied on a catena of decisions of this Court of which it is sufficient to refer to two, namely, Secy. of State for India in Council v. Gopi Setty Narayanaswami Naidu Garu, ILR (1911) 34 Mad 151 and Swaminathan v. Latchumanan, ILR (1930) 53 Mad 491: (AIR 1930 Mad 490), which support his contention that the date of the order does not mean the date when the officer passed the order but the date when it was pronounced or published in such a manner that the party must be deemed to have had notice of it on the date of such pronouncement or publication....."

In the case of Harish Chandra Raj Singh v. Dy. Land Acquisition Officer, AIR 1961 SC 1500, the question that fell for consideration was whether the application made to the Land Acquisition Collector under S. 18 (1) of the Land Acquistion Act, I of 1894, for a reference to the court, was barred by limitation. The section makes provision thus:—

"Provided that every such application shall be made—

(a) if the person making it was present or represented before the Collector at the time when he made his award, within six weeks from the date of the Collector's award;

(b) in other cases within six weeks of the receipt of the notice from the Collector under Section 12, sub-sec. (2), or within six months from the date of the Collector's award, whichever period shall first expire."

The Allahabad High Court took the view that the application having been made beyond six months from the date of the award, it was barred by limitation. The Supreme Court observed (at pp. 1502, 1503):—

"..... It has been held by the Allahabad High Court that since the application made by the appellant before respondent-1 was made beyond six months from the date of the award in question it was beyond time. The view taken by the High Court proceeds on the literal construction of the relevant clause. As we have already seen the award was signed and delivered in his office by respondent-1 on March 25, 1951, and the application by the appellant was made under S. 18 on Feb. 24, 1953. It has been held that the effect of the relevant clause is that the application made by the appellant is plainly beyond the six months permitted by the said clause and so respondent-1 was right in rejecting it as barred by time....."

The Court then formulated the proposition thus:—

"..... The question which arises for our decision is whether this literal and mechanical way of construing the relevant clause is justified in law. It is obvious that the effect of this construction is that if a person does not know about the making of the award and is himself not to blame for not knowing about the award his right to make an application under S. 18 may in many cases be rendered ineffective. If the effect of the relevant provision unambiguously is as held by the High Court the unfortunate consequence which may flow from it may not have a material or a decisive bearing....."

The Court concluded by indicating:—

"The knowledge of the party affected by the award, either actual or constructive, being an essential requirement of fairplay and natural justice the expression the date of the award used in the proviso must mean the date when the award is either communicated to the party or is known by him either actually or constructively. In our opinion, therefore, it would be unreasonable to construe the words from the date of the

Collector's award used in the proviso to S. 18 in a literal or mechanical way."

The Supreme Court approved the dictum of Rajamannar C. J. in the last of the Madras decisions 19 ITR 402 : (AIR 1951 Mad 204) and overruled a decision of the Bombay High Court in the case of Jahangir Bomanji v. C. D. Gaikwad, AIR 1954 Bom 419 and a decision of the Kerala High Court in the case of State of Travancore-Cochin v. Narayani Amma, AIR 1958 Ker 272, taking the contrary view.

A similar question arose before a Division Bench of the Rajasthan High Court in the case of Bajrang Singh v. State of Rajasthan, AIR 1965 Raj 82. S. 39 of the Rajasthan Land Reforms and Resumption of Jagirs Act, 1952, provided for appeals in the following manner:—

"(1) The Government or any person aggrieved by any decision of the Jagir Commissioner or the Collector, as the case may be, under S. 5, sub-sec. (2) of S. 23, S. 24, sub-sec. (2) of S. 25, S. 26A, sub-sec. (2) of S. 32, sub-sec. (3) of Section 35, S. 36, S. 37, S. 38 or S. 38B may within ninety days from the date of such decision, appeal to the Board.

(1A) Any person aggrieved by an order made by the Collector under S. 16 may appeal therefrom to the Commissioner for Khudkasht land within sixty days from the date of the order.

xx xx xx".

Speaking for the Court, the learned Chief Justice observed (at p. 83):—

"..... It appears to us that when the legislature provided ninety days' time for filing an appeal from the date of the decision under S. 39, it had in its mind the basic principles which have to be followed by a civil court in pronouncing its judgment and which are embodied in O. 20, R. 1 of the Civil P. C.

It is provided in that order that after the case has been heard, the Court shall pronounce judgment in open Court, either at once or, as soon thereafter as may be practicable, on some future day; and when the judgment is to be pronounced on some future day, the Court shall fix a day for that purpose, of which due notice shall be given to the parties or their pleaders. If a day is fixed by the court for the pronouncement of the judgment and the judgment is actually pronounced on that day, then the period of limitation would commence from that day whether any one of the parties cares to appear in the court or not.....

It could not have been envisaged by the legislature that the Jagir Commissioner, or for that matter, the Collector, would reserve his order and then would not inform the parties of the future date on which he proposes to announce his decision. The scheme of S. 33 seems to be that if the Jagir Commissioner does not announce his decision before the parties, or if he does not fix any day for pronouncing his decision, then he must communicate his final order to the Government, the Jagirdar and every other interested person as soon as practicable. In such a case, the period of limitation would commence from the date, the party concerned receives the communication under S. 33."

In the case of Madan Lal v. State of U. P., AIR 1975 SC 2085, the question for consideration was whether an appeal filed under the provisions of the Indian Forest Act of 1927 was barred by limitation. S. 17 of the Act allowed an appeal to be preferred by any person who had made a claim under the Act or any Forest Officer or other person generally or specially empowered by the State Government in that behalf against an order passed on such claim by the Forest Settlement Officer under Sec. 11 and the appeal had to be filed within three months from the date of the order. The order in that case had been made on 24-4-1956, but the impugned order was dated May 9, 1955. Dealing with the question of limitation, the appellate tribunal observed (at p. 2086):—

"Since the order dated 9-5-1955 was not delivered in the presence of the parties or after giving them any notice of date it cannot be said to have been delivered properly under the law. It is obvious that in case the Forest Settlement Officer had decided to pass an order determining the rights of the parties it was incumbent on him to have duly informed the parties concerned both of the date of the order and subsequently of its content. This was clearly not done."

The Court approved of the ratio in the decision reported in AIR 1961 SC 1500 and concluded by holding (at p. 2088):—

"The High Court in the case before us was, therefore, right in holding that the impugned order should be deemed to have been passed on April 24, 1956

when the Forest Department came to know of the order and the right of appeal granted to the Department should be determined on that very basis."

A Bench decision of this Court in the case of P. Appa Rao v. Additional District Magistrate, Koraput, ILR (1975) Cut 291: (AIR 1975 Orissa 209), adopted the ratio of the Supreme Court decision reported in AIR 1961 SC 1500 (supra).

7. We have already taken note of the fact that petitioner had been required to file an objection by 28-2-1976. No date for making of the order had been indicated. '29-2-1976' was not a date appointed in the proceeding for any purpose. Therefore, petitioner could not have had the occasion to take notice of that date. According to the petitioner, his knowledge of the impugned order is dated 15-6-1976. That fact has not been controverted. On the ratio of the several cases referred to above, it would follow that the date from which the limitation of thirty days provided under the Act for appeal would commence is 15-6-1976. The appeal has admittedly been filed within a period of six days therefrom and, therefore, it could not have been thrown out as being barred by limitation.

8. We would accordingly quash the order of the Revenue Divisional Commissioner as also the appellate order and would require the appellate authority to re-dispose of the appeal in accordance with law on the footing that the appeal had been presented in time and was to be disposed of on merit. Petitioner shall have his costs. Hearing fee is assessed at rupees one hundred.

N. K. DAS, J.:— I agree.

Petition allowed.

AIR 1979 ORISSA 51

N. K. DAS, J.

Harmohan Senapati, Appellant v. Smt. Kamala Kumari Senapati and another, Respondents.

Second Appeal No. 264 of 1975, D/- 29-8-1978.*

(A) Hindu Marriage Act (25 of 1955), S. 11 — Civil P. C. (1908), S. 9 — Specific Relief Act (1963), S. 34 — Suit for declaring a marriage void — Plaintiff not a party to marriage — Proper forum — Suit is governed by S. 9, C.P.C. read with S. 34, Specific Relief Act and not by S. 11 of Hindu Marriage Act.

The provisions of S. 11 of Hindu Marriage Act for declaration of a marriage as null and void and of S. 13 for divorce, require that a petition under those sections is to be presented by either the husband or the wife. Therefore where the first wife of a person seeks declaration as to nullity of marriage between her husband and some other lady, the suit shall not be governed by Hindu Marriage Act but shall be governed by S. 9 of Civil P. C. read with S. 34 of Specific Relief Act and as such the proper forum will be the proper Civil Court and not the Court of District Judge as prescribed by Hindu Marriage Act. Case law discussed. (Para 4)

Anno: AIR Comm. C.P.C. (9th Edn.). S. 9 N. 21; AIR Manual (3rd Edn.), Specific Relief Act, S. 34 N. 29; AIR Manual (3rd Edn.), Hindu Marriage Act, S. 11, N. 3.

(B) Evidence Act (1 of 1872), S. 101 — Burden of proof — Declaratory suit for nullity of marriage — Person claiming marriage to be void — Need not prove the fact of marriage beyond doubt — Principle of pre ponderance of probabilities ought to be applied. Case law discussed. (Para 6)

Anno: AIR Manual (3rd Edn.), Evidence Act, S. 101 Notes 46 and 75.

Cases Referred: Chronological Paras

AIR 1975 SC 1534 5, 6
1974 All LJ 139: ILR (1973) 2 All 853 4
AIR 1974 Orissa 107: (1973) 2 Cut WR 1108 6
AIR 1969 Cal 55: 1969 Cri LJ 164 5
AIR 1968 Andh Pra 107: 1968 Cri LJ 440 5
AIR 1965 SC 1564: 1965 (2) Cri LJ 544 5
(1964) 2 Andh WR 142 4
AIR 1963 Pat 311 4
AIR 1960 Mad 6 4
AIR 1959 Madh Pra 400 4
(1911) ILR 38 Cal 700 (PC) 6

M. N. Das, M. M. Das and D. P. Parija, for Appellant; A. Pasayat, D. P. Misra, K. C. Samantaray and B. B. Rath, for Respondents.

JUDGMENT:— Defendant No. 1 is the appellant against a confirming decision. The case of the plaintiff is that she and defendant No. 1 are husband and wife and their marriage took place in 1958

*(From decision of S. K. Behera, Sub. J., Puri, D/- 3-9-1975.)

according to Hindu rites. After she gave birth to a child, defendant No. 1 drove her out of his house. Subsequently, without dissolution of her marriage with defendant No. 1, the latter married defendant No. 2 on 8-2-66 and started living with her. So, she has prayed for a declaration that the marriage of defendant No. 1 with defendant No. 2 is null and void.

Defendant No. 2 did not contest, nor appeared in Court. Defendant No. 1 in his written statement contends that he has no connection with defendant No. 2 and the allegation of second marriage is not true. According to him, plaintiff left his residence to her parents' house in 1964 against his will and did not return in spite of several requests and when plaintiff came to know that defendant No. 1 was intending to file a case for judicial separation, she has filed this suit on false allegations.

2. Both the Courts below have concurrently found that plaintiff is the married wife of defendant No. 1. Defendant No. 1 married defendant No. 2 and the said marriage is null and void. Marriage of defendant No. 1 with plaintiff is not now disputed.

3. Two points have been canvassed on behalf of the appellant (defendant No. 1). Firstly, the suit was not maintainable in the Court of the Munsif and it should have been filed in the Court of the District Judge, or the Subordinate Judge, as provided in the Hindu Marriage Act; and secondly, the onus of proof of the second marriage being on the plaintiff, she has failed to discharge the onus, inasmuch as she has not established the ingredients required under law for proof of marriage of defendant No. 1 with defendant No. 2.

4. As regards the first point, the contention of the appellant is that S. 11 of the Hindu Marriage Act, 1955 envisages that a marriage can be declared to be null and void on a petition to be presented if there is contravention of any of the provisions specified in cls. (i), (iv) and (v) of S. 5 of the Act. Section 5 (i) provides that a marriage of a person can be performed according to law if neither party has a spouse living at the time of the marriage. Reference was made also to S. 19 of the Act which provides that every petition under the Act shall be presented to the district court within the local limits of whose ordinary original civil jurisdiction either the marriage was solemnised or the respondent, at the time of the presentation of the petition, resides, or the parties to the marriage last resided etc. 'District Court' has been defined in Section 3 (b) which means, in any area for which there is a city civil court, that court, and in any other area the principal civil court of original jurisdiction, and includes any other civil court which may be specified by the State Government, by notification in the Official Gazette, as having jurisdiction in respect of the matters dealt within this Act.

It is not disputed that petitions under the Hindu Marriage Act are to be filed either in the district court or in the Court of the Subordinate Judge, as notified by the State Government of Orissa. Appellant contends that the suit being for a declaration that the marriage of defendant No. 1 with defendant No. 2 is null and void, the petition should have been filed in the Court of the District Judge, or the Subordinate Judge. This contention has no force. S. 11 of the Act clearly states that any marriage solemnised after the commencement of this Act shall be null and void and may, on a petition presented by either party thereto, against the other party be so declared by a decree of nullity if it contravenes any one of the conditions specified in cls. (i), (iv) and (v) of S. 5. So also in case of divorce, as provided in S. 13 of the Act, a petition is to be presented by either the husband or the wife. It is clear from the above provisions that if the marriage between the plaintiff and defendant No. 1 is to be declared null and void, then either of them can file the petition, or if dispute arises between defendant No. 1 and defendant No. 2 regarding the marriage, then either of them can file a petition under S. 11. But plaintiff is not a party to the particular marriage which is sought to be declared as void. Therefore, when plaintiff files a suit for declaration that the marriage of defendant No. 1 with defendant No. 2 is void, the suit is to be filed according to the provisions of S. 9 of the Civil P. C. read with S. 34 of the Specific Relief Act (S. 42 of the old Act).

The aforesaid view of mine is fortified by the decisions of the Allahabad High Court, Andhra Pradesh High Court, Madras High Court, Patna High Court and Madhya Pradesh High Court. In Jokhan Prasad Shukla v. Lakshmi Devi, ILR (1973) 2 All 853, it has been held that a suit filed by the previous wife for declaration that the second marriage of

her husband was null and void is not barred by S. 19 of the Act. 'Either party thereto' clearly means either party to the marriage sought to be declared null and void. A petition by a person who is not a party to the marriage sought to be declared null and void, will not lie under S. 11. Reliance has been placed on the case reported in Lakshmi Ammal v. Ramaswami Naicker, AIR 1960 Mad 6. In the Madras case, it has also been held that the first wife cannot apply under S. 11 for declaring the marriage of the second wife as void and that the first wife can file a suit under the ordinary law for a declaration that the marriage of her husband with the second wife is illegal and void under the Hindu Marriage Act. The aforesaid Lakshmi Ammal case has also been followed by the Andhra Pradesh High Court in Rajeswar Reddy v. Lakshmi Bai, (1964) 2 Andh WR 142, wherein it has been held that under the Hindu Marriage Act, if the marriage of the 2nd defendant with the 1st defendant was performed after coming into force of the Act, it would be void and the plaintiff can file a suit in the Civil Court for a declaration to that effect. Her right to file such a suit is under S. 9, Civil P. C. read with S. 42 of the Specific Relief Act. So far as S. 11 of the Hindu Marriage Act is concerned, it is a special remedy given to either party to the marriage which was sought to be declared void. That remedy is not open to the plaintiff at all.

A Division Bench of the Patna High Court in Kedar Nath Gupta v. Sm. Supraya, AIR 1963 Pat 311, has also held that a petition for the annulment of second marriage under S. 11 can be presented only by the husband or his second wife, who were the parties to the marriage in question and the first wife, who is not a party to the second marriage, is not entitled to present such petition under the Act. She may seek her remedy, if any, under the general law. In this case, the decision reported in Lakshmi Ammal case (supra) has also been followed. A decision of the Madhya Pradesh High Court in Amarlal Goru v. Vijayabai, AIR 1959 Madh Pra 400, which is on the very same point, has also been followed by the Patna High Court.

On the aforesaid analysis, I hold that the suit was maintainable in the Munsif's Court by virtue of Section 9 of the Civil P. C. read with Section 34 of the Specific Relief Act.

5. As regards the second point, it is contended by Mr. Das, the learned counsel for the appellant, that plaintiff has not established the ingredients of marriage of defendant No. 1 with defendant No. 2 and, as such, the Courts below have erred in finding that the marriage has been proved. Reliance has been placed on Bhaurao Shankar Lokhande v. State of Maharashtra, AIR 1965 SC 1564. This is a case under Section 494 of the Indian Penal Code for punishment for bigamy. The appellant also relies on Rabindra Nath Dutta v. State, AIR 1969 Cal 55 and Venkata Subbarayudu Chetty v. Tanguturu Venkatiah Shresti, AIR 1968 Andh Pra 107. All the aforesaid cases are under S. 494 of the I.P.C. for punishment for bigamy, and were criminal cases. In a criminal case, the prosecution has to prove the offence beyond all reasonable doubts, but such position is not attracted in a civil suit where the allegations are to be proved by preponderance of probabilities. The Supreme Court in Dr. N. G. Dastane v. Mrs. S. Dastane, AIR 1975 SC 1534, while deciding a case of judicial separation under the Hindu Marriage Act, has distinguished the position relating to proof between a criminal case and a civil suit under the Hindu Marriage Act. The question that was answered in the aforesaid case is that though the burden lies on the party to establish the charge, what is the standard of proof to be applied in order to judge whether the burden has been discharged. The Supreme Court has stated (at pp. 1539, 1540):—

"The normal rule which governs civil proceedings is that a fact can be said to be established if it is proved by a preponderance of probabilities. This is for the reason that under the Evidence Act, S. 3, a fact is said to be proved when the court either believes it to exist or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists. The belief regarding the existence of a fact may thus be founded on a balance of probabilities. A prudent man faced with conflicting probabilities concerning a fact-situation will act on the supposition that the fact exists, if on weighing the various probabilities he finds that the preponderance is in favour of the existence of the particular fact. As a prudent man, so the court ap-

plies this test for finding whether a fact in issue can be said to be proved. The first step in this process is to fix the probabilities, the second to weigh them, though the two may often intermingle. The impossible is weeded out at the first stage, the improbable at the second. Within the wide range of probabilities the court has often a difficult choice to make but it is this choice which ultimately determines where the preponderance of probabilities lies. xx xx In civil cases this, normally, is the standard of proof to apply for finding whether the burden of proof is discharged.

xx xx xx

Proof beyond reasonable doubt is proof by a higher standard which generally governs criminal trials or trials involving inquiry into issues of a quasi-criminal nature. A criminal trial involves the liberty of the subject which may not be taken away on a mere preponderance of probabilities. If the probabilities are so nicely balanced that a reasonable, not a vacillating, mind cannot find where the preponderance lies, a doubt arises regarding the existence of the fact to be proved and the benefit of such reasonable doubt goes to the accused. It is wrong to import such considerations in trials of a purely civil nature."

6. Both the Courts below, after analysing the evidence available on record, both oral and documentary, have concurrently come to the conclusion that marriage of defendant No. 1 with defendant No. 2 has been proved by the plaintiff. P.W. 7 is the son of the tailor from whom the father of the appellant had learnt the trade of tailoring before the appellant's father became a rich man. This fact has not been disputed. His evidence is to the effect that he is close to the family of defendant No. 1 and accordingly he was invited to attend the marriage of defendant No. 1 with defendant No. 2 at Ladu Baba. He has given the details of the performance of marriage which took place in his presence. According to him, the priest from Puri attended the marriage, Homa was performed and fathers of defendant No. 1 and defendant No. 2 were also present and Kanyadan was done. His testimony is corroborated by the evidence of subsequent conduct of defendants 1 and 2 by P.W. 8, an advocate of Nayagarh and an admitted neighbour of defendant No. 1 at the relevant time. He has stated that he has seen defendant No. 1 and defendant No. 2 moving together and had the information that defendant No. 2 was the second wife of defendant No. 1 and the marriage took place in 1966. P. W. 5, a businessman of the locality has also deposed the similar effect. Though attempt has been made on behalf of defendant No. 1 to deny his marriage with defendant No. 2, there are glaring materials on record which go against this contention.

D. W. 3 is the father of defendant No. 1 and admittedly they are living together. From his evidence, it appears that he is suppressing the truth. He states that he cannot say if defendant No. 1 has married defendant No. 2. He is a man of proficiency and is having business. His testimony indirectly indicates that marriage of defendant No. 1 took place with defendant No. 2 and this supports the contention of P. W. 7. An attempt was made on behalf of the appellant to show that the priest said to have acted in the second marriage was dead and reliance was placed on a voter list. It has been rightly held by the Courts below that the voter list is of no help and by the time of the second marriage the priest was alive. P. W. 6 was a business associate of defendant No. 1 which is admitted. Undisputedly, this witness had fallen out from defendant No. 1 and entered into litigation with him. This witness has produced letters relating to the second marriage. He did not conceal the fact that he had played treachery and tricks to secure the letters for proof against defendant No. 1. He has stated that he is acquainted with the handwriting of defendant No. 1. For this, his evidence cannot be thrown out. He identifies Exts. 6 and 6/a to be the letters written by defendant No. 1. Ext. 6/a is an inland letter bearing postal seals. This letter has been written by defendant No. 1 to the father of the second defendant and the latter has been described as "father-in-law". Ext. 6 is in the letter pad of defendant No. 1 and the addressee is the brother of defendant No. 2. The handwriting expert compared these two letters with the admitted handwriting of defendant No. 1 in the Vakalatnama. Defendant No. 1 was asked to give his specimen handwriting.

A look at this specimen writing would give an impression that the writer la-

boured hard to suppress his mode of writing. Defendant No. 1 has admittedly read up to B.A. standard. But a look at the writing would clearly show that defendant No. 1 tried to write in a manner as if he has no experience in writing. The conduct of suppressing evidence, which he could have well supplied, would lead to the inference that he was under fear of presenting evidence would have gone against him had he supplied the same. The Courts below have examined this in detail and have rightly come to the conclusion that these were written by defendant No. 1. There are two other documents, Ext. 3 series, which are entries in the Admission Register of a school at Puri. It is in evidence that defendant No. 1 has got four children through defendant No. 2. One of the daughters was admitted by defendant No. 1 in the school and defendant No. 1 has been described as the father of the girl and has signed the same. After going through the evidence in detail, I am in agreement with the finding of the Courts below that defendant No. 1 has got her admitted in school as his daughter. On ultimate analysis and after going through the records, I am fully convinced that the evidence of P. W. 7 has been corroborated by the testimony of P. Ws. 5 and 8 as well as Ext. 3 series and Ext. 6 series. The evidence of D. W. 3 also to a great extent supports the testimony of P. W. 7.

If the evidence regarding second marriage is examined according to the dictums of the Supreme Court in Dr. N. G. Dastane case (supra), the findings of the Courts below appear to have been based on reasonable grounds and the contention of the appellant is without any force.

This Court has also held in Linga Malik v. Ajodhya Malikani, (1973) 2 Cut WR 1108 : (AIR 1974 Orissa 107) that it is well established that where a marriage in fact has been performed, it will be presumed that necessary ceremonies have also been duly performed and it is incumbent on him who challenges the legality of the marriage to rebut the presumption and to establish by evidence that the form of marriage is invalid in some respect or the other. It is not necessary that the witnesses to the marriage should prove all the details which taken together constitute a valid marriage under the Hindu Law. This Court relied on a decision of the Privy Council in Mouji Lal v. Chandrabati Kumari, (1911) ILR 38 Cal 700 (PC).

For the aforesaid reasons, I hold that plaintiff has discharged the onus of proving the second marriage of defendant No. 1 with defendant No. 2 and the finding of the Courts below on this point is sustained.

7. In the result, there is no merit in this appeal and it is accordingly dismissed. In the circumstances, I make no order as to costs.

Appeal dismissed.

AIR 1979 ORISSA 55

P. K. MOHANTI, J.

Sreedhar Pani and others, Petitioners v. State of Orissa and others, Opposite Parties.

Civil Revn. No. 252 of 1977, D/- 17-11-1978.*

Civil P. C. (5 of 1908), O. 1 R. 10 (2) — Applicability of sub-r. (2) — Suit against State and its officers for declaration of title to accreted land and injunction — Application by opposite parties for being impleaded as parties — Allegation that they had taken temporary lease of suit land from Government and were continuing in possession after expiry of lease — Opposite parties held not proper or necessary parties.

The sine qua non for any person being impleaded as a party to a suit under O. 1 R. 10 (2) is that he should have a direct or tangible interest in the subject matter. If the questions involved in the suit can be decided without the proposed party, the judicial discretion vested in the court to implead parties under Order 1, Rule 10(2) should not be exercised. Before directing a party to be impleaded, the court must be satisfied about the genuineness of his interest in the litigation. AIR 1963 Orissa 186, Rel. on. (Para 6)

As a rule the Court should not add a person as a defendant in a suit when the plaintiff is opposed to such addition. AIR 1969 Punj and Har 57, Foll. (Para 11)

In the instant case, the question involved in the suit for declaration of title to accreted land and injunction against the State of Orissa and its officers was

*(From order of S. C. Rath, Munsif, Jagatsinghpur, D/- 27-6-1977).

whether the suit land was an accretion to the raiyati holding of the plaintiffs (petitioners) and whether they were entitled to possess the same. The plaintiffs' contention was that they had been in continuous possession of the suit land as a part and parcel of their raiyati holding. The materials on the record showed that in a proceeding under Section 145, Cr. P. C. between the petitioners and the opposite parties 4 to 16, there was a final order of the criminal court in favour of the petitioners. The opposite parties 4 to 16 contended that the suit land belonged to the Government and they cultivated the same on the basis of an annual lease granted in their favour and that after expiry of the lease they had been continuing possession of lands:

Held that the decree that was to be passed against the defendants could not be rendered infructuous or inexecutable if the opposite parties 4 to 16 were not added as parties. Merely because the opposite parties 4 to 16 alleged that they were in possession of the land even after expiry of the annual lease, they could not be considered to be proper or necessary parties. The court had, therefore, no jurisdiction to add them as parties to the suit.

(Para 10)

Anno: AIR Comm. Civil P. C. (9th Edn.) O. 1 R. 10, N. 10, 27.

Cases Referred: Chronological Paras

AIR 1969 Punj and Har 57 11

AIR 1963 Orissa 186: ILR (1963) Cut 841 7

M. N. Das and M. M. Das, for Petitioners; Standing Counsel and P. Kar, for Opposite Parties.

ORDER:— This revisional application is directed against an order allowing an application under Order 1, Rule 10 Code of Civil Procedure filed by opposite parties 4 to 16 for being impleaded as defendants in the suit.

2. The petitioners as plaintiffs brought Title Suit No. 7 of 1977 against opposite parties 1 to 3 for declaration of title to the suit land and for a permanent injunction restraining them from interfering with their possession. It was alleged that by the alluvial action of the river Paika there was accretion to the rayati holding of the plaintiffs to an extent of 17 acres and the plaintiffs are entitled to the accreted land as an increment to their tenure. Opposite parties 4 to 16 filed an application under Order 1, Rule 10 Code of Civil Procedure for being impleaded as parties to the suit alleging that they had taken temporary lease of the suit land from the Tahasildar, Kujang and after expiry of the lease they have been continuing in possession of the land and have also constructed a house thereon. The application was opposed by the plaintiffs. They denied the allegation that the opposite parties 4 to 16 were continuing possession of the lands after expiry of the annual lease in their favour.

3. The learned Munsif came to hold that the petitioners and opposite parties 4 to 16 have been quarrelling over the possession of the suit lands since last few years; that it was just and proper to decide the suit in presence of opposite parties 4 to 16 so as to avoid multiplicity of proceedings and that prima facie the opposite parties 4 to 16 are necessary parties to the suit. Upon such findings, he directed the petitioners to implead opposite parties 4 to 16 as defendants in the suit.

4. It is urged on behalf of the petitioners that opposite parties 4 to 16 have no semblance of title or interest in respect of the suit lands and they are neither necessary nor proper parties to the suit.

5. Sub-rule (2) of Rule 10 of Order 1, Code of Civil Procedure provides as follows:—

"The Court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the Court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit, be added."

The sub-rule is applicable to two types of cases:—

(i) where a person ought to have been joined as a plaintiff or defendant and is not so joined and

(ii) where without his presence the question in the suit cannot be completely and effectually adjudicated upon.

6. The sine qua non for any person being impleaded as a party to a suit is that he should have a direct or tangible

interest in the subject matter. If the questions involved in the suit can be decided without the proposed party, the judicial discretion vested in the court to implead parties under Order 1, R. 10(2) Code of Civil Proceedure should not be exercised. Before directing a party to be impleaded, the court must be satisfied about the genuineness of his interest in the litigation.

7. In the case of Narahari v. Ghanashyam, ILR (1963) Cut 841: (AIR 1963 Orissa 186), it was laid down that two tests must be satisfied before a third party can be impleaded under O. 1, R. 10 (2) Code of Civil Procedure. It was laid down as follows (at p. 187):—

"Two conditions must, however, be satisfied before a party is considered to be a necessary party. They are: (i) there must be a right to some relief against the party not joined. This means that no decree can be passed without affecting the rights of the absentee-parties; and (ii) the presence of the absentee-party should be necessary in order to enable the Court to effectually adjudicate upon and settle all questions involved in the suit. This concept includes the idea that no decree should be passed by Court which would be rendered infructuous or would become ultimately inexecutable. If a case satisfies these tests, then the absentee-party is a necessary party and the suit cannot be effectually and completely adjudicated upon in respect of all questions involved without that party being impleaded in the suit."

8. In the instant case, the question involved in the suit is whether the suit land is an accretion to the rayati holding of the plaintiffs and whether they are entitled to possess the same as an increment to their tenure. The plaintiffs' contention is that they have been in continuous possession of the suit land as a part and parcel of their raiyati holding. The materials on the record show that there was a proceeding under Section 145, Code of Criminal Procedure between the petitioners and the opposite parties 4 to 16 and by the final order of the criminal court made on 28-7-1975, possession of the petitioners was declared. The petitioners have filed rent receipts and settlement parcha in proof of their possession of the suit lands. The opposite parties 4 to 16 contended that the suit land belongs to the Government and they cultivated the same on the basis of an annual lease granted in their favour by the Tahasildar, Kujang. It was also contended that after expiry of the annual lease they have been continuing possession of the lands.

9. As mentioned earlier, possession of the petitioners over the land in dispute was declared in a proceeding under Section 145, Code of Criminal Procedure on 28-7-1975. The contention of the opposite parties 4 to 16 that they have been continuing possession of the suit lands could not, therefore, be believed. If the question at issue between the petitioners and the State of Orissa can be worked out without anyone else being brought in, a stranger should not be added as party.

10. The plaintiffs have not asked for recovery of possession. They claim to be in possession after termination of the proceeding under Section 145 Code of Criminal Procedure. The dispute regarding possession, if any, between the petitioners and opposite parties Nos. 4 to 16 need not be gone into before any relief can be granted to the plaintiffs in the present suit filed against the State of Orissa and its officers. The decree that is to be passed against the defendants cannot be rendered infructuous or inexecutable if the opposite parties 4 to 16 are not added as parties. Merely because the opposite parties 4 to 16 allege that they are in possession of the land even after expiry of the annual lease, they cannot be considered to be proper or necessary parties. The court had, therefore, no jurisdiction to add them as parties to the suit.

11. I am in respectful agreement with the observations made by Sarkaria, J. in Banarasi Dass v. Panna Lal, AIR 1969 Punj and Har 57 that (at p. 60):—

"As a rule the Court should not add a person as a defendant in a suit when the plaintiff is opposed to such addition. The reason is that the plaintiff is the dominus litis. He is the master of the suit. He cannot be compelled to fight against a person against whom he does not wish to fight and against whom he does not claim any relief".

12. In the result, the civil revision is allowed and the order of the court below directing the plaintiffs to add opposite parties 4 to 16 as defendants in the suit is set aside. In the circumstances of the case, I make no order as to costs.

Revision allowed.

AIR 1979 ORISSA 58

R. N. MISRA AND B. K. RAY, JJ.

Arda Murari and another, Petitioners v. State of Orissa and others, Opposite Parties.

Original Jur. Cases Nos. 458 and 459 of 1978, D/- 2-11-1978.

(A) Orissa Land Reforms Act (16 of 1960), S. 42 — Orissa Land Reforms (General) Rules (1965), Rr. 32(3) and 30(2) — Notice of publication of draft statement — Notice not served — Confirmation of draft scheme is illegal.

In the absence of notices contemplated in Rules 30(2) and 32(3), it must be held that the entire proceeding is vitiated and the rights to property of landholder have been prejudicially affected without complying with the requirements of the rules which are in consonance with the principles of natural justice. Given an opportunity, the landholder would have been in a position to file his objection against the draft statement and could have preferred the appeal provided under Section 44 of the Act. The Revenue Officer had no jurisdiction to confirm the draft statement and proceed to take action under Sections 45 and 45-A of the Act.

(Para 4)

(B) Orissa Land Reforms Act (16 of 1960), Ss. 37(b) and 19 Ceiling area — Determination of — Widowed mother cannot be a member of the family.

The Revenue Officer while examining the matter would certainly take into consideration the words "separated by partition or otherwise" appearing in the definition of 'family' in Section 37(b) of the Act and would not be wholly guided by Section 19(1) of the Act.

(Para 4)

S. S. Basu, for Petitioners; Addl. Govt. Advocate, for Opposite Parties.

R. N. MISRA, J.:— Both the applications seek to quash proceedings taken under the Orissa Land Reforms Act for determination of ceiling surplus lands. Arda Juria died around 1961 leaving behind his widow (petitioner in O. J. C. No. 459 of 1978) and a son (petitioner in O. J. C. No. 458 of 1978) and a total area of about seventeen acres of land. After the mother and son lived together for some time, disputes arose between the mother and her daughter-in-law and petitioners maintain that on 10th of March, 1968 they effected an amicable partition in terms of Annexure-1. A suo motu proceeding was initiated under Section 42 of the Orissa Land Reforms Act (hereinafter referred to as the 'Act') for determining ceiling surplus lands and the draft statement was published on 30-11-1974. Petitioners maintain relying upon the order-sheet (Annexure-6) that by 31-12-1974, service return of the notice of publication of the draft statement had not been received. The Revenue Officer, therefore, ordered:—

"..... It will be expedient if the notice would be issued on him through the P. S. ..... Invite objection from the O. P. giving 30 days' time, stating that the draft statement was published on 5-1-75. Put up on 4-2-75."

On 4-2-1975, the Revenue Officer recorded the following order:—

"The notice on the O. P. was issued on 15-1-75. No objection was received during the stipulated period. Therefore, the draft statement published earlier is confirmed with the alteration regarding the number of family members. In the draft statement mother of the O. P. was included as a member of his family. But according to the recent clarification from the Board of Revenue, she should not be included. Therefore, the total number of family members of the O. P. is 3. There is no alteration in the land schedule. Publish the confirmed draft statement tomorrow in the office notice board for 30 days."

Petitioners allege in their respective writ applications that by 4-2-1975, the notice of publication of the draft statement had not been served and without satisfying himself about such service, the Revenue Officer confirmed the draft statement. The fact of publication of the confirmed statement together with a certified copy of such statement as required under Rule 32(3) of the Orissa Land Reforms (General) Rules (hereinafter called the 'Rules') had not been sent to Murari in whose name the confirmed statement was ordered to be published. Having come to know about the development in the matter on 24-9-1975, petitioner in each of the cases applied for review. On 1-12-1975, the applications for review were rejected and appeal carried by each of the petitioners was dismissed on the ground of limitation such appeals having been filed beyond thirty days from the date of the original adverse order.

2. It is contended on behalf of each of the petitioners that (i) in the absence

of the statutory notice of publication of draft statement and in the further absence of compliance of R. 32 (3) of the Rules, the entire proceedings are vitiated; (ii) certain alienations made prior to 1970 have not been taken note of and the ceiling area was determined taking such lands into consideration as belonging to Murari; (iii) partition having taken place prior to the relevant date, it was not open to the Revenue Officer to determine the ceiling area taking the entire extent into account; and (iv) the determination of classification of lands is erroneous and if opportunity had been given to the petitioners or at least to Murari, he would have been able to satisfy the Revenue Officer that the basis of classification was wrong and, therefore, the result was vitiated.

3. A counter-affidavit has been filed on behalf of the opposite parties by the Superintendent of Land Records of the Collectorate. It has been pleaded that the claim of partition advanced in the writ petition was not placed before the Revenue Officer. In fact, no objection was filed to the draft statement. In paragraph 9 of the counter-affidavit, it has been averred that Murari was aware of the proceeding as he had filed a petition on 31-12-1973 and had furnished a list of the members of the family on 4-7-1974 for the purposes of disposal of the proceeding. Notice of publication of the draft statement is claimed to have been served on 15-1-1975. In para 16 of the counter-affidavit, it has been asserted that before notice in the present proceeding and the order of stay were communicated from this court, the surplus lands on the basis of the impugned orders had been already distributed to some people whose names have not been disclosed.

4. As already indicated, the order dated 4-2-1975 states that the notice on the opposite party was issued on 15-1-75. There is no indication in the order-sheet of service of notice. The assertion in the counter-affidavit by the Superintendent of the Collectorate that notice was served on 15-1-1975 does not fit in with the order-sheet. No document showing service of notice of publication of the draft statement has been furnished along with the counter-affidavit. The assertion made in para 13 of the writ petition that R. 32 (3) of the Rules had not been complied with has not at all been challenged in the counter-affidavit. In fact, paragraph 10 of the counter-affidavit which seeks to deal with para 13 of the writ petition does not at all advert to the matter. In the absence of notices contemplated in Rr. 30 (2) and 32 (3), it must be held that the entire proceeding is vitiated and the rights to property of Murari have been prejudicially affected without complying with the requirements of the rules which are in consonance with the principles of natural justice. Given an opportunity, the landholder would have been in a position to file his objection against the draft statement and could have preferred the appeal provided under S. 44 of the Act. The Revenue Officer had no jurisdiction to confirm the draft statement and proceed to take action under Ss. 45 and 45-A of the Act. In the circumstances, we would quash the orders of the Revenue Officer as also the appellate orders and direct that the Revenue Officer shall proceed with the matter from the stage of draft publication. He shall issue fresh notice to Murari giving him an opportunity to file objection against the said statement in accordance with law. So far as the widow is concerned, in view of the definition of 'family' in S. 37 (b) of the Act, when the ceiling area is being determined in the hands of Murari, she would not be a member of his family and as such she would not be shown as a member of Murari's family in the records. If, however, either Murari or she appears before the Revenue Officer of own accord after notice is given and is able to satisfy the Revenue Officer that there had been a partition before the "relevant date", the lands of the widow would certainly be not taken into account in regard to the ceiling surplus area. We are sure that the Revenue Officer while examining the matter would certainly take into consideration the words "separated by partition or otherwise" appearing in the definition of 'family' in Section 37 (b) of the Act and would not be wholly guided by S. 19 (1) thereof.

5. The writ applications are allowed in the manner indicated above. There would be no order for costs.

B. K. RAY, J.:— I agree.

Order accordingly.

AIR 1979 ORISSA 60

S. ACHARYA, J.

Kastura Sahuani, Appellant v. Das Seth and another, Respondents.

Second Appeal No. 118 of 1976, D/- 24-7-1978.*

Hindu Succession Act (30 of 1956), Sections 6, 8, 9, 10 and 19 — Mitakshara Coparcenary property of Father and Son — Death of father after Act leaving behind son, widow and daughters — Devolution of father's interest on his heirs — They take as tenants-in-common and not as joint tenants — Sale of small area of undivided land by son as Karta — Validity. (Hindu Law — Joint Mitakshara family — Partition.)

The suit property was only a portion of Mitakshara Coparcenary Lands of L, father and his son. L died after coming into force of Hindu Succession Act, 1956, leaving behind his widow (deft. 2), son (deft. 1) and daughters. Defendant 1 sold a small portion of the lands to the plaintiff by a registered sale deed but the widow deft. 2 having regained its possession through proceedings under S. 145, Cr. P. C., the plaintiff brought a suit to establish his title and for possession.

Held: (i) on the rules laid down in Ss. 6, 8, 9 and 10 of the Act, only the undivided interest or share of L devolved by succession on his son, widow and daughters, if any. The undivided interest or share of the deceased coparcener in a case of this nature has to be ascertained on the footing of a notional partition immediately before the death of the deceased. The persons who would be entitled to a share on the notional partition would be ascertained according to the Hindu law of joint family and partition in force on the date of the death of the coparcener, and their share has to be computed according to the law of partition applicable to the parties on the date of the death of the deceased. In the present case, if a partition had in fact taken place immediately before the death of L, he would have been entitled to 1/3rd share in the said property, equal to that of deft. 1 and deft. 2 and that distinct share only will devolve by succession on L's son (D. 1), widow (D. 2) and other heirs under the Act, if any. By the application of S. 19, such heirs of L succeed together only to the said 1/3rd interest as tenants-in-common and not as joint tenants. AIR 1971 Andh Pra 363 (FB) and AIR 1975 Mad 51, Foll. (Para 10)

(ii) Though defendant No. 1 was the Karta of the family he could not exercise the powers of a karta in respect of that 1/3rd share of deceased L as the heirs under the Act would succeed to that portion of the property as tenants-in-common and there was no coparcenary between the son and the female heirs of L. Therefore, in the facts of the case the sale of the suit land (which was only 2.16 acres of the entire 60 acres of lands) by him to the plaintiff could not be declared to be illegal or invalid merely because defendant 1's distinct portion in that property has not been carved out by actual partition by metes and bounds. That being so, the plaintiff had acquired valid right, title and interest in the suit property, but he could not obtain exclusive possession of the same at present as the entire property was still in joint possession of defendants 1 and 2. The plaintiff could recover possession of the suit property when defendant No. 1's distinct share in the entire property was carved out by partition or otherwise. (Paras 11, 12 and 13)

Anno: AIR Manual (3rd Edn.), Hindu Succ. Act, S. 6, N. 1; S. 8, N. 4; S. 9, N. 1; S. 10, N. 1, S. 19, N. 1.

Cases Referred:	Chronological	Paras
AIR 1975 Mad 51		10, 11
AIR 1971 Andh Pra 363 (FB)		10, 11

B. R. Rao and B. L. N. Swamy, for Appellant; S. K. Dey and M. Misra, for Respondents.

JUDGMENT:— Defendant No. 2 has preferred this appeal against the decision of the District Judge, Bolangir-Kalahandi in so far as it relates to Title Appeal No. 47 of 1973.

2. One Laxman Sahu died after coming into effect of the Hindu Succession Act, 1956. Defendant No. 1 is the son and defendant No. 2 is the widow of the said Laxman Sahu. Defendant No. 1 executed the registered sale deed Ext. 1 dated 10-1-1966 in favour of the plaintiff in respect of Ac. 2.16 of land out of the properties which devolved on him and his mother, defendant No. 2, on the death of his father. The above facts are not disputed.

3. The plaintiff's case in short is that:

*(From decision of M. J. Rao, Dist. J., Bolangir, D/- 2-4-1976.)

Defendant No. 1 succeeded to the properties of his father after the death of Laxman and he (D. 1) remained in possession of the same and was functioning as the karta and manager of the said joint family properties. Defendant No. 1, for legal necessity of the family as well as for the benefit of the estate, sold the suit land (Ac. 2.16), described in the schedule attached to the plaint, by a registered sale deed dated 10-1-1966 for a consideration of Rs. 3,500/- to the plaintiff. Since after the execution of the sale deed possession of the suit land was delivered to the plaintiff and he continued to cultivate the same on his own right. In 1967 defendant No. 2 initiated a proceeding under S. 145, Cr. P. C. and in accordance with the incorrect decision in that proceeding she is in possession of the suit land. Hence this suit.

4. Defendant No. 1 did not contest the suit and he has been set ex parte.

The case put forward by defendant No. 2 is that:

Defendant No. 1 was a minor on the date of the execution of the sale deed Ext. 1 in favour of the plaintiff; no consideration was paid by the plaintiff to defendant No. 1 for the said sale; the said sale was not for any legal necessity or benefit of the family or the estate; after the death of Laxman, defendant No. 2 became the manager of the joint family; defendant No. 1 was not managing the family affairs or the properties of Laxman; possession of the suit property was never delivered to the plaintiff and that defendant No. 2 was and is all through in possession of the entire family property including the suit property as the manager of the family and its properties.

5. The trial court held that defendant No. 1 was not a minor at the time he executed the sale deed Ext. 1; defendant No. 1 was the karta of the family and he was managing the family properties and its affairs at the time of the execution of the sale deed Ext. 1; the said sale deed was executed on receipt of due consideration and that the said sale was for legal necessity and benefit of the estate. Having arrived at the aforesaid findings that court however held that as defendant No. 2 was not a coparcener of defendant No. 1, the question of legal necessity or benefit of the estate in respect of the said sale would not arise in this case, and so defendant No. 1 could validly sell his own interest in the suit property without even any legal necessity or benefit of the estate. But it held that defendant No. 1 was not competent to sell away defendant No. 2's interest in the joint properties and so the plaintiff under the sale deed Ext. 1 could acquire title to the suit property only to the extent of defendant No. 1's undivided half interest in the suit property and to no more. It also decided that as the plaintiff acquired half interest in the undivided suit property he could recover possession of half of the suit property from defendant No. 2. The plaintiff's prayer for mesne profits was disallowed.

6. Against the aforesaid findings and decision of the trial court, the plaintiff preferred Title Appeal No. 47/73, and defendant No. 2 preferred Title Appeal No. 48/73 in the court below. Both these two appeals were heard together, and at that stage only the following two points were agitated for decision:

(i) Whether the suit is maintainable and whether the decree can be executed, though admittedly the daughters of defendant No. 2 were not made parties; and

(ii) Whether defendant No. 1 was minor at the time of the suit sale deed, and if so, whether any title passed to the plaintiff?

The first question was not allowed to be agitated in view of that court's earlier decision dated 4-7-1975 by which defendant No. 2's prayer for amending the written statement by adding the daughters of Laxman Sahu as parties to the suit and the appeal was disallowed on contest.

With regard to the second question, the court below has decided that defendant No. 1 was not a minor but was a major at the time of the execution of the sale deed Ext. 1; he was the Karta of the joint family consisting of defendants Nos. 1 and 2 at the time of the said transaction; the sale was for legal necessity, and hence the plaintiff acquired good right, title and interest to the entire suit property covered by the sale deed Ext. 1. The plaintiff's title in the entire suit property has been declared and his suit has been decreed with costs. It has also directed that the plaintiff would recover possession of the entire suit property without any partition suit, and that he could institute a separate suit against defendant No. 2 for mesne profits. Accordingly Title Appeal No. 47/73 was allowed and Title Appeal No. 48/73 was dismissed.

7. Against the decision of the court below, two second appeals, being the present one and Second Appeal No. 129/76, were filed by defendant No. 2. Second Appeal No. 129/76, which was in respect of the matters agitated in Title Appeal No. 48/73, was dismissed before its admission. The present second appeal, therefore, is in respect of only the questions agitated in Title Appeal No. 47/73 and the findings thereon.

8. Mr. Dey, the learned counsel for the respondent No. 1 (plaintiff in the suit), at the outset challenged the maintainability of this appeal by saying that the questions agitated by the appellant (defendant No. 2) in Title Appeal No. 47/73 having been decided against her and her Second Appeal No. 129/76 against the findings in that first appeal having been dismissed by this Court, this appeal was not maintainable, as any decision in this appeal might give rise to two conflicting decrees in the same suit. In course of hearing on this point, Mr. Dey, however, concedes that in this appeal the question, as to whether the sale of the suit property as per Ext. 1 was binding on defendant No. 2 in its entirety or only of a portion thereof, can be agitated and decided in this appeal.

9. Mr. B. R. Rao, the learned counsel for the appellant, concedes that the concurrent findings of fact of the courts below that defendant No. 1 was not a minor at the time of the execution of the sale deed Ext. 1; that he was the Karta of the family and was managing the family affairs at the time of the said sale; that the said sale deed was for consideration and it was for legal necessity and benefit of the estate, cannot be challenged in this appeal in view of the dismissal of Second Appeal No. 129/76. Mr. Rao, however, contends that the property recorded in the name of Laxman, of which the suit property is only a portion, was admittedly Mitakshara coparcenary property of Laxman and defendant No. 1, and Laxman died leaving behind him his son (D. 1), widow (D. 2) and daughters. So the entire property devolved by succession on the said heirs under the provisions of the Hindu Succession Act, 1956 (hereinafter referred to as the 'Act'), and under the provisions of Section 19 (b) of that Act the heirs succeed to that property as tenants in common and not as joint tenants. Therefore, defendant No. 1 was not entitled to deal with the said coparcenary property as Karta thereof from the moment of Laxman's death. It is further submitted that as defendants 1 and 2 were and are in joint possession of the said property, defendant No. 1 was not entitled to dispose of a portion thereof, which is the suit property, without carving out his share in the same by partition as defendant No. 2 has interest equivalent to her share in every bit of the said property.

10. It is not correct to say that the son (D. 1), the widow (D. 2), and daughters, if any, succeeded to the entire property as tenants in common. On the rules laid down in Sections 6, 8, 9 and 10 of the Act, only the undivided interest or share of Laxman devolved by succession on his son, widow and daughters, if any. The undivided interest or share of the deceased-coparcener in a case of this nature has to be ascertained on the footing of a notional partition immediately before the death of the deceased. The persons who would be entitled to a share on the notional partition would be ascertained according to the Hindu law of joint family and partition in force on the date of the death of the coparcener, and their share has to be computed according to the law of partition applicable to the parties on the date of the death of the deceased. In the present case, if a partition had in fact taken place immediately before the death of Laxman, he would have been entitled to 1/3rd share in the said property, as defendant No. 2 would have become entitled to get a share equal to that of defendant No. 1, and so the property would have been divided in three equal shares. On the coming into effect of the Hindu Succession Act, only the said 1/3rd interest of Laxman shall be deemed to have been carved out of the entire property and that distinct share would cease to form a part of the coparcenary property from the moment of the death of Laxman. That distinct share only will devolve by succession on Laxman's son (D. 1), widow (D. 2) and other heirs under the Act, if any. By the application of Section 19, such heirs of Laxman succeed together only to the said 1/3rd interest of Laxman, and they take that property as tenants in common and not as joint tenants. On the application of the proviso to Section 6 of the Act, the joint family may continue but the interest of the deceased in the coparcenary property is carved out of the entire property, and that distinct share

ceases to form a part of the coparcenary property from the moment of the death of the coparcener, and that separate and carved out interest vests in the different heirs of the deceased coparcener as per the provisions of the Act from the time of the death of the coparcener.

My above view gets direct support from the Full Bench decision reported in AIR 1971 Andh Pra 363 (P. Govinda Reddy v. G. Obulamma) and the Division Bench decision reported in AIR 1975 Mad 51 (Veerasekhara v. Amirthavalliammal). Therefore, it is not correct to say that defendants 1 and 2 and the daughters of Laxman if any succeed together as tenants in common to the entire property recorded in the name of Laxman.

11. However, Mr. Rao's contention, that after the death of Laxman defendant No. 1 could not exercise the power of a Karta in relation to the share of defendant No. 2 and her daughters in the aforesaid property, has some force and substance. Defendant No. 2, or her daughters if any were not coparceners along with defendant No. 1, and they succeed to Laxman's distinct 1/3rd interest in the aforesaid property along with defendant No. 1 as tenants in common. So, though defendant No. 1 was the Karta of the family he could not exercise the powers of a Karta in respect of that 1/3rd share of deceased Laxman, as the heirs under the Act would succeed to that portion of the property as tenants in common and there is no coparcenary between the son and the female heirs of Laxman.

In the Full Bench decision reported in AIR 1971 Andh Pra 363 it has been held that (at p. 374):—

"xx xx xx If the proviso of Section 6 of the Act applied on account of the existence of the heirs referred to therein, there will be of course no disruption of joint family status but the coparcenary property will not include the interest of the deceased coparcener by reason of succession under the Act and it will not then be available to the coparceners and heirs as coparcenary property and the Kartha in relation thereto therefore cannot exercise his powers as a Kartha. The interest having devolved on various heirs in specified shares and such heirs being tenants in common in relation to that property, the Kartha of the joint family property to which the coparceners belong cannot represent the female heirs who are not coparceners."

In the decision reported in AIR 1975 Mad 51 a Division Bench of that Court held (at p. 57):—

"xx xx xx the joint family or coparcenary continues, but the interest of the deceased coparcener in the coparcenary property is carved out from the entire joint family property and it ceases to form part of the coparcenary property from the moment of the death of the coparcener concerned and that separate and carved out interest vests in different heirs of the deceased coparcener as per the provisions of the Act at the moment of the death of the coparcener. Consequently, the kartha will have no right to deal with that property thereafter. Since the right of the Kartha to deal with the property is dependent upon the property being joint family property, once the particular interest ceases to be part of the joint family or the coparcenary property, the right of the Kartha with reference thereto automatically and inevitably comes to an end."

12. In the present case though defendant No. 1 has no right to act as a Karta in respect of Laxman's interest in the aforesaid property, in the facts and circumstances of this case the sale of the suit property (which is only Ac. 2.16 out of the said entire lands) by him cannot, as urged by Mr. Rao, be declared to be illegal or invalid. True it is that actually there has been no partition of the entire property by metes and bounds between defendants 1 and 2, and so defendant No. 1's distinct portion in that property has not as yet been carved out. But merely because of that the right of disposition of one of the heirs of his or her own interest in the said property is not affected or fettered. But such disposition will hold good only to the extent of his or her share in that property, and the alienee can have possession of the same only when partition of the property is effected.

13. In this case, from the deposition of defendant No. 2 herself and D.W. 2, her another witness, it is evident that Laxman has left behind about 50 to 60 acres of land. Defendant No. 1 has certainly a major share out of the said 50 to 60 acres of land. So, undoubtedly defendant No. 1 could sell only Ac. 2.16 decs. of land out of his aforesaid share in the said property. This sale of course will

not affect in any way the interest or share of the other heirs in the property.

By the sale deed Ext. 1 defendant No. 1 has of course sold distinct parcels of land out of the said property though his portion out of the same has not yet been carved out by partition and the entire property is in the joint possession of defendants 1 and 2. There is also nothing on record to show that the suit property was or is somehow in the exclusive possession of defendant No. 1. But merely because of that, the sale of only Ac. 2.16 decs. of the suit land by defendant No. 1 in favour of the plaintiff cannot be declared invalid, in view of the fact that defendant No. 1 has a major share in the said 50 to 60 acres of land, and the suit land being only a small fraction of the same, can easily be carved out of his portion. By purchasing the said property by a valid sale deed on payment of consideration the plaintiff has stepped into the shoes of defendant No. 1 in respect of the suit property. That being so, the plaintiff has acquired valid right, title and interest in the suit property, but he cannot obtain exclusive possession of the same at present as the entire property is still in joint possession of defendants 1 and 2. The plaintiff can recover possession of the suit property when defendant No. 1's distinct share in the entire property is carved out by partition or otherwise. Mr. Dey, the learned counsel for the respondents, is not able to contest the above conclusion.

14. On the above considerations, the ultimate conclusion of the court below that the plaintiff has acquired right, title and interest in the suit property, measuring Ac. 2.16 decs., is confirmed. But the direction of the court below to deliver possession of the suit property in favour of the plaintiff has to be and is hereby set aside. The other directions and orders of the court below are confirmed.

The appeal is allowed only to the extent stated above. The decree be modified accordingly. In the circumstances, there will be no order as to costs of this appeal.

Decree modified.

AIR 1979 ORISSA 64

R. N. MISRA AND B. K. RAY, JJ.

Pandab Panigrahi and others, Appellants v. Mst. Laxmi Misrani and others, Respondents.

First Appeal No. 28 of 1970, D/- 14-7-1978.*

Hindu Women's Right to Property Act (18 of 1937) S. 3(2) — Property of separated male descends to his widow and not to his separated son. AIR 1949 Nag 108, Dissented from.

Where the male owner had separated from his son and subsequently died leaving behind his widow, and the provisions of Hindu Women's Right to Property Act 1937 apply, the separated son would not be entitled to any share and the entire property will go to the widow by application of Section 3(2). AIR 1955 Orissa 160; AIR 1958 Bom 346; AIR 1969 Bom 77; AIR 1968 Madh Pra 172; AIR 1964 Mad 58 and AIR 1964 Pat 261 (FB) Foll.; AIR 1949 Nag 108, Dissented from. (Para 5)

Cases Referred: Chronological	Paras
AIR 1969 Bom 77	5
AIR 1968 Madh Pra 172	5
AIR 1964 Mad 58	5
AIR 1964 Pat 261 (FB)	5
AIR 1961 Mad 90	5
AIR 1958 Bom 346	5
AIR 1955 Orissa 160	5
AIR 1949 Nag 108	5

B. K. Pal, for Appellants; R. N. Sinha and S. N. Sinha, for Respondents.

R. N. MISRA, J.:— Defendants have appealed against the decree given by the learned Subordinate Judge of Sambalpur declaring plaintiff's title to the 'B' Sch. property and recovery of possession through court thereof.

2. One Banamali was the common ancestor of the parties. He has three sons being Basudeb, Durga Prasad and Debi Prasad. Basudeb died sometime in 1928 while the other two died in 1952 and 1953 respectively. On 5-7-1933 under a registered deed of partition to which Kali Prasad, Durga Prasad and Debi Prasad were parties, each party was given one-third share in Banamali's properties. In the same partition, the one-third share allotted to Durga Prasad was sub-divided between himself and (his) only son Bhabani (defendant No. 12) each getting one-sixth share. The one-

*(From decision of N. P. Mohapatra, Sub. J., Sambalpur, D/- 29-10-1969).

sixth share allotted to Durga Prasad is the 'Kha' schedule property of the partition deed and the property in Bhabani's share was shown in 'Ga' schedule thereof. After the partition, Durga Prasad acquired certain more properties. Defendant No. 12 looked after the properties of the plaintiff as she had become disabled on account of old age. Plaintiff came to learn that the said defendant No. 12 had allowed defendants 1 and 2 to be in possession of certain properties and those two defendants in their turn had allowed defendants 5 to 11 also to possess properties along with them. She maintained that defendant No. 12 was not entitled to any share in the properties left behind by Durga Prasad and plaintiff was the only legal heir.

3. Defendants 1, 2 and 6 to 11 filed a joint written statement and disputed plaintiff's claim to the property. Defendants 15 and 20 also filed separate written statements on the same line.

4. The point that arose for consideration was essentially one of law, namely, where the property belonged to a male owner who had a widow and a son and in a partition, the male owner and his son were allotted a moiety share each with no share for the widow, whether after the death of the male owner, the separated son would be entitled to a share or the widow would succeed. The learned Subordinate Judge has decreed the suit holding that the widow was entitled to the entire property to the exclusion of the separated son. In this appeal by the defendants that position of law is assailed.

5. There is no dispute that the property that fell to Durga Prasad in the partition of 5-7-1933 was divided between him and his son (defendant No. 12). Durga Prasad died in 1952 and the property in dispute is admittedly Durga Prasad's. Plaintiff is also admittedly the widow of Durga Prasad. The provisions of the Hindu Women's Rights to Property Act of 1937 apply to the facts of the case. Relying on a Bench decision of the Nagpur High Court in the case of Bhaoorao v. Chandrabhagabai. AIR 1949 Nag 108, it has been contended that defendant No. 12 was entitled to the entire property to the exclusion of the widow. Hidayatullah, J, as the learned Judge then was, spoke for the Division Bench thus :—

"The dispute here is not between divided and undivided sons but between the widow of the father and a separated son who is now represented by his sons. Further the dispute is not about the self-acquired property of Pandurang but about the separate property in the sense of the share allotted to a coparcener on partition. The position of a widow vis-a-vis a separated son is discussed by Mulla in Sections 340 and 341 of his book. According to the learned author, the effect of a partition is to dissolve the coparcenary with the result that the separating members hold their respective shares as their separate property and the share of each member passes on his death to his heirs. The position of the divided son is superior to that of the widow. The learned author says that if there be no undivided son, the divided son is entitled to succeed to the self-acquired property in preference to his father's widow. No distinction is made between self-acquired property and property obtained on partition as a separate share ....."

The ratio in the Nagpur decision was considered by a Bench of this Court in the case of Visalamma v. Jagannadha Rao, AIR 1955 Orissa 160. The Division Bench differed from the ratio and held that the property which came on partition to the male owner and after him was held by the widow was joint family property and Section 3(2) of the 1937 Act applied. The Court, therefore, concluded that the disputed properties were joint family properties within the meaning of Section 3(2) of the said Act and after the death of the male owner, the widow was entitled to the same interest therein which the male owner had, i.e. the entire sixteen annas interest. The separated son had no share therein.

Counsel for the appellants tried to distinguish the Bench decision of this Court by contending that the Orissa decision dealt with a case to which the Madras School of Hindu Law applied. We do not think, the distinction asked to be drawn has any basis. In the case of Smt. Jana v. Smt. Parvati, AIR 1958 Bom 346, the ratio in the Orissa case was applied without any reservation. The self-same view has been taken in a later Bombay case being Parwati v. Janabai, AIR 1969 Bom 77. The Nagpur decision (AIR 1949 Nag 108) was not followed by the Madhya Pradesh High Court in the case of Jhangalu Shivcharan v. Pancho Bai Shivcharan, AIR 1968 Madh Pra 172. It was pointed out that the application of Section 3(2) of the 1937 Act had not at all been considered in the Nagpur

case and, therefore, an erroneous conclusion had been reached. In the cases of Onnamalai Ammal v. Seethapathi Reddiar, AIR 1961 Mad 90 and Commr. of Income-tax, Madras v. S. S. Thiagarajan Shivali, AIR 1964 Mad 58, the Bench decision of this Court has also been approved. A Full Bench of the Patna High Court in the case of Mt. Khatrani Kuer v. Smt. Tapeshwari Kuer, AIR 1964 Pat 261, followed the ratio in the Orissa case. We are inclined to hold that the Nagpur view is not in consonance with the judicial opinion of different High Courts on the point and the distinction attempted to be drawn by appellants' counsel that the Bench of this Court had come to its conclusion by applying the Madras School of Hindu Law is not a correct one. The ratio has been applied by different High Courts where the special rules of the Madras School of Hindu Law are not in vogue. The observation quoted by Hidayatullah, J. as the learned Judge then was, from Mulla's Hindu Law, therefore, does not represent the correct state of the legal position. Where the male owner had separated from his son and left behind a widow, and the provisions of Hindu Women's Rights to Property Act, 1937, apply, the separated son would not be entitled to any share and the entire property will go to the widow by application of Section 3(2) of the Act of 1937. Plaintiff, therefore, has been rightly given a decree and defendant No. 12 or the other defendants claiming through him have no share in Durga Prasad's property. There is no merit in the appeal. It is accordingly dismissed with costs throughout.

B. K. RAY, J.:— I agree.

Appeal dismissed.

AIR 1979 ORISSA 66

R. N. MISRA AND B. K. RAY, JJ.

Gangadhar Sahu and others, Petitioners v. Akhapati Ram Murty Patro and others, Opposite Parties.

O. J. C. No. 118 of 1976, D/- 29-8-1978.

(A) Civil P. C. (5 of 1908), O. 1, R. 3 (prior to amendment) — Joining of different parties as defendants — Suit for eviction of 5 tenants — Common grounds — Common questions of law or facts involved — Held all the persons can be proceeded against in one proceeding.

Two alternative situations have been indicated by the Rule. First, several defendants could be joined in case against them where any right to relief in respect of or arising out of the same act or transaction or series of acts or transaction is alleged to exist. Alternatively if separate suits were brought against such persons and common questions of law or fact arose, they could also be sued jointly. (Para 6)

Where all the tenants of the same house by same landlord are being proceeded against in a proceeding before Rent Controller which involves common grounds for eviction as also common points of contest, such tenants can be jointly proceeded against in one proceeding as it involves common question of law or fact and thus it comes within the ambit of second alternative situation envisaged in O. 1, R. 3. (Para 6)

Anno: AIR Comm. (9th Edn.), Civil P. C., O. 1, R. 3, N. 13A.

(B) Orissa House Rent Control Act (4 of 1968), S. 7 (2) (i) — Wilful default — Tenants paying rent regularly to landlord till 1965 — Dispute arose between the heirs of landlord as to ownership — Tenants stopping payment of rent and instituting interpleader suit to know the real landlord — They also undertaking repairs and paying municipal taxes which was to be adjusted towards rent — Held, the tenants were not guilty of wilful default in paying rent. (Para 7)

(C) Orissa House Rent Control Act (4 of 1968), S. 7 (4) — Personal requirement — Landlord selling house situated in same town — Sale not proved to have been made earlier to the institution of eviction proceedings for personal need — Evidence showing house not suitable for residential accommodation — Landlord's need for personal business not positively proved — Held personal need not established. (Para 8)

R. K. Mohapatra, for Petitioners; S. C. Mohapatra, S. Rath, R. C. Patnaik and P. K. Misra, for Opposite Parties.

R. N. MISRA, J.:— This is an application for a writ of certiorari at the instance of the landlords and is directed against the affirming appellate order of the Additional District Magistrate (Judicial) (opposite party No. 11) upholding the rejection of the petition for eviction of the opposite parties 1 to 9 series.

2. The disputed house is situated in the town of Berhampur and once upon a time constituted the joint asset of a

trading family of Nimakhandi. Title Suit No. 23 of 1943 in the Court of the Subordinate Judge at Berhampur was filed for partition of the joint family assets. On 13-5-1958, a partial final decree was passed in which inter alia the disputed house fell to the share of the petitioners. In Execution Petition No. 16 of 1961, the decree-holders asked for possession of the properties including the house and their application was resisted by opposite parties 1 to 5 and some others. As possession of the house had not been obtained when the execution petition was dismissed on part satisfaction, a fresh execution proceeding being E. P. No. 74 of 1965 was started for obtaining delivery of possession of the premises. Opposite parties 1 to 5 along with another filed objection, but they took the stand that they had been admitted as monthly tenants by late Damodar Sahu who had been appointed receiver in the suit. The objection was overruled and symbolical possession was taken on 12-7-1970. The tenants, however, did not pay any rent but opposite parties 1, 2 and 3 filed interpleader suits being Title Suits Nos. 67, 68 and 69 of 1970. During the pendency of the suits, petitioners along with the late Kasinath Sahu applied to the House Rent Controller for eviction of opposite parties 1 to 5 on the allegation that petitioners and opposite paries 6 to 9 were entitled to possession of the house on the basis of being owners thereof and the tenants were wilful defaulters, they had damaged the house and had sublet parts thereof without the consent of the landlords and the premises were necessary for personal occupation both for business as also residential purpose of the owners. Opposite parties 4 and 5 did not enter contest and were set ex parte. Opposite parties 1 to 3 while admitting their status as tenants under the petitioners disputed the allegations of damage, subletting and bona fide requirement of the owners to be in possession. They also disputed the allegation that they were wilful defaulters in the matter of payment of rent and maintained that they had been repairing the house and paying the municipal taxes therefor. As to who would be the owner of the property, was uncertain and, therefore, they had filed interpleader suits. In that view of the matter, they cannot be held to be defaulters.

3. The Controller came to find, (i) the opposite parties 1 to 3 had come to know during 1970-71 that the disputed house fell to the share of the petitioners. In Jan., 1970, in E. P. No. 74 of 1965, the executing court had directed these opposite parties to deposit the rent in court; (ii) these opposite parties had been paying monthly rent to late Damodar Sahu and after his death to his son and had been obtaining rent receipts. Therefore, it could not be said that they were defaulters; (iii) alterations made in the premises were with the consent of Damodar; (iv) the municipal taxes had been paid on the clear understanding that the same would be adjusted out of rent; (v) there was no evidence of damage to the house; (vi) a joint application for eviction of different tenants on different terms of tenancy was not maintainable. The prayer for eviction of all the opposite parties 1 to 5 was rejected notwithstanding the fact that the opposite parties 4 and 5 did not enter contest.

4. On appeal by the petitioners, the Chief Judicial Magistrate upheld the order of the Controller by holding that Damodar and after him his son Somanath had been looking after the management of the disputed house and rent had been collected from opposite parties 1, 2 and 3 by him. Exts. C, D and E series establish that the tenants were paying municipal taxes for the tenanted premises in their occupation. Cost of repairs incurred by the tenants was being adjusted out of rent on the basis of an oral agreement and the endorsement on the back of Exts. A and B supported the stand of the tenants. It would involve detailed calculations to find out whether the tenants were in arrears, but it could not be held that they were wilful defaulters in such circumstances. There was no convincing evidence to accept the claim of the landlords that they require the house for business and residential purposes. He affirmed the finding that one common proceeding against five tenants was not maintainable, inasmuch as the tenancies were different.

5. Mr. Mohapatra for the petitioners challenges the findings of the statutory authorities on the question of maintainability of the eviction proceeding as also the findings relating to the tenants being defaulters and the claim of bona fide requirement of the premises by the landlords.

6. Admittedly, petitioners are the landlords of the premises. The entire subject-matter of the dispute is one house and portions thereof had been separately tenanted out to the five oppo-

site parties. The historical background is common in respect of each of the tenancies. Similarly the grounds of eviction in respect of each tenant are common. The points of contest as would appear from record were also common. The only difference is about the commencement of tenancy, the rate of rent and the period of default. Reliance is placed on behalf of the petitioners on the provision of O. 1, R. 3 of the Civil P. C. which before its recent amendment read thus:

"All persons may be joined as defendants against whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative, where, if separate suits were brought against such persons, any common question of law or fact would arise."

There is no dispute before us that the provisions of O. 1 of the Code would be applicable to the proceeding before the Controller. The statutory authorities in accepting the objection of the tenants have lost sight of the second part of the Rule. Two alternative situations have been indicated by the Rule. First, several defendants could be joined in case against them where any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist. Alternatively if separate suits were brought against such persons and common questions of law or fact arose, they could also be sued jointly. The present case is one where the second alternative directly applied. We are, therefore, inclined to agree with petitioners' counsel that one joint proceeding was maintainable and the forums below went wrong in holding against the petitioners on that score.

7. There is no serious dispute before us that rent has remained unpaid after 1965. There is force in the submission of Mr. S. C. Mohapatra for the tenants that there was litigation over the properties of the family of the landlords and the tenants had been included by the receiver. They were, therefore, not in a position to know who actually their landlord was until the executing court made an order in 1970. As there was still dispute, the contesting tenants were obliged to file suits for determining as to who the real landlord was. Before these interpleader suits were disposed of, the proceeding for eviction was initiated. In the circumstances, there seems to be justification for the finding in the forums below that petitioners are not wilful defaulters. If the Controller and the appellate authority took the view that a combined proceeding was maintainable, they would certainly have exercised their jurisdiction under the Act to direct payment of the arrear rent within fifteen days as provided in the House Rent Control Act, failing which only eviction could have been directed. We accordingly hold that the tenants are not wilful defaulters for the reasons already indicated, but on their own admission, they have been in default from 1965. It would be appropriate, therefore, to require the tenants to pay the entire arrears. Admittedly there have been payments of municipal taxes by the tenants. It being the case of the landlords that it was a term of the tenancy that the municipal taxes would be borne by the tenants, the tenants are entitled to claim adjustment against rent to the extent they have borne the liability of municipal taxes. So far as the question of repairs is concerned, the evidence is indeed very shaky. As early as 1956, there was some oral agreement for repairs, but that is not relevant for the present purpose. As tenants have failed to establish that they were entitled to effect repairs and claim adjustment of rent, we are inclined to agree with the counsel for the petitioners that no adjustment on the ground of repairs can be claimed and allowed. It would, therefore, follow that out of the rent due, if the tenants have paid any municipal taxes, the same are liable to be adjusted. The Statute requires payment to be made within fifteen days. To give such a direction in this case might prejudice the tenants, inasmuch as rent for about thirteen years subject to the deduction of municipal taxes is outstanding. Again, the exact amount which the tenants have to deposit is yet to be ascertained. By consent of parties, we direct that the Controller shall within one month from receipt of the records by him, proceed to quantify the outstanding house rent against each of the tenants. In doing so, he will adjust the amounts of municipal taxes paid by the respective tenants from out of the arrears of rent. Once the liability is quantified, each of the tenants shall be entitled to pay the amount within three months either in a single instalment or in any such instalments as the Controller may allow. In the event of failure to satisfy the entire

rental due on the basis of the determination of the Controller within three months from the date of quantification, the defaulting tenant or tenants shall be liable to be evicted and the Controller shall proceed to evict them on the footing that they are wilful defaulters. In case the rent is paid, the tenancy shall subsist and there will be no order for eviction.

8. Coming to the question of personal requirement, we are inclined not to take a view different from the one that has prevailed with the statutory authorities. Admittedly the petitioners had a house within Berhampur town. The evidence is not clear as to when the same was sold away. It is quite possible that the alienation was made after the proceeding was initiated. In the absence of clear evidence, the authorities below were entitled to find against the petitioners. There is also evidence to show that the house is not suitable for residential accommodation. In regard to requirement for personal business, the evidence is indeed not very positive.

9. The writ application is accordingly allowed in part. The Controller is directed to quantify the arrear dues and allow time to the tenants to satisfy the same in the manner indicated above and on their failure to satisfy the direction regarding payment of the rent, to pass an order for eviction against the defaulting tenant on the ground that he is wilful defaulter in the matter of payment of rent. There will be no order for costs.

B. K. RAY, J.:— I agree.

Writ petition allowed in part.

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S. K. RAY, C. J. AND
J. K. MOHANTY, J.

Radhika Charan Banerjee, Petitioner v. Sambalpur Municipality and others Opposite Parties.

Original Jur. Case No. 1887 of 1975, D/- 17-8-1978.

Orissa Municipal Act (23 of 1950), Sections 273-A, 274 — Appeal against order under S. 273-A to Municipal Council — Appeal disposed of without giving appellant an opportunity of being heard — Validity — Natural justice — Compliance — Necessity. (Constitution of India, Art. 226; Appeal — Opportunity of being heard — Necessity).

A right of appeal wherever conferred includes a right of being afforded an opportunity of being heard, irrespective of the language used in conferring such a right. That is a part and parcel of the principle of natural justice. Where an authority is required to act in a quasi-judicial capacity it is imperative to give the appellant an adequate opportunity of being heard before deciding the appeal. Opportunity of hearing does not always necessarily mean giving a personal hearing. A written representation, if complete and elaborate in all respects fully explaining the points of view of the appellant, when accepted, may, in some cases, amount to affording effective opportunity of hearing. What particular rule of natural justice should apply to a given case must also depend to a great extent on the facts and circumstances of that case. (Para 3)

Where no effective opportunity of being heard has been given to the appellant in disposing of his appeal in spite of his express request that his counsel should be heard, the order must be quashed. (Para 4)

S. S. Basu and S. C. Basu, for Petitioner; S. C. Mohapatra and L. D. Rath, Opposite Parties.

S. K. RAY, C. J.:— The petitioner obtained lease of Nazul plot No. 1434/11 measuring Ac. 0.06d. from the Collector of Sambalpur for the purpose of construction of a house subject to the condition that he should complete construction of his house within three years from the date of the lease, i.e., 14-9-68. Within the stipulated period, the petitioner made an application to the Executive Officer, Sambalpur Municipality with a blue print plan of his proposed building and after obtaining necessary sanction and approval of his plan, completed his building. In due course the building was allotted a holding number and was assessed to municipal tax. The petitioner is paying holding tax and other taxes with effect from 1-1-1972.

2. On 21-10-74 the petitioner received a notice from opposite party No. 2 that the latter accompanied by the Municipal Engineer would make a joint inspection of his building on account of an objection filed by one R. K. Biswal D/- 3-5-74, that the petitioner had, in constructing the septic pits of his latrine, encroached upon the objector's portion

of the sweeper's passage of 3 ft. width in between the house of the petitioner and of Dr. Gour Mohan Biswal. Thereafter, opposite party No. 2 served a provisional order under S. 273-A of the Orissa Municipal Act (hereinafter called the Act) (Annexure-8) calling upon the petitioner to show cause why a part of his construction which had been unlawfully constructed being beyond the site plan sanctioned should not be demolished. The petitioner showed cause by asserting that there was no joint passage of the petitioner and the objector and that the sweeper's passage of 3'-3" entirely appertained to his plot. Without however, affording the petitioner any opportunity of hearing on his show cause, the opposite party No. 2 confirmed the provisional order by his final order dated 15-1-75 (Annexure 10). The petitioner thereupon preferred an appeal to the District Magistrate who was then discharging the functions of the Municipal Council. This appeal was ultimately dismissed without fixing a date of hearing and without affording adequate opportunity to the petitioner to substantiate his grounds in the memo of appeal (Annexure-11). An intimation was sent to the petitioner that his appeal had been rejected by the Council in its resolution No. 11 dated 31-5-75 which barely stated that the appeal memo was read and rejected (Annexure-12). There is no indication whatsoever that the grounds of appeal were considered and no reasons for rejecting the appeal have been set out. There is no controversy and, in fact, it has been admitted by opposite party No. 2 in paras 18 and 19 of his counter that the petitioner had not been given any opportunity of being heard by the Council. Opposite party No. 2 similarly admits that he did not hear the petitioner on his show cause while confirming his provisional order under S. 273-A of the Act. The petitioner, therefore, has prayed for quashing Annexures 10 and 11 and Annexure-12.

3. The first point canvassed is that the petitioner is entitled to be given an opportunity of being heard by the Municipal Council on his memorandum of appeal and as that appeal has been disposed of without affording him such opportunity, Annexure-11 and the consequent intimation of the order (Annexure-12) are bound to be quashed and the Municipal Council should be directed to rehear the appeal after giving him an opportunity to canvass his points before it. Mr. Mohapatra for the opposite parties, on the other hand, contends that though S. 274 of the Act confers a right of appeal on the petitioner, it does not provide for personal hearing of the appellant by the Council. In this connection he has compared the language of S. 153 (4) with the language of S. 274 and argued that where the Legislature intended to confer a right of being heard it has said so, as in S. 153 (4), but where no right of hearing is conferred on the appellant, except a right of appeal, as in cases of Ss. 274, 322 and 334, similar language as in S. 153 (4) expressly conferring right to be heard has been omitted. This contention can have no validity. The expression used in S. 153 (4) of the Act is "opportunity of being heard" not "personal hearing". A right of appeal wherever conferred includes a right of being afforded an opportunity of being heard, irrespective of the language used in conferring such a right. That is a part and parcel of the principle of natural justice. Where an authority is required to act in a quasi-judicial capacity it is imperative to give the appellant an adequate opportunity of being heard before deciding the appeal. Opportunity of hearing does not always necessarily mean giving a personal hearing. A written representation, if complete and elaborate in all respects fully explaining the points of view of the appellant, when accepted may, in some cases, amount to affording effective opportunity of hearing. What particular rule of natural justice should apply to a given case must also depend to a great extent on the facts and circumstances of that case.

4. A writ of certiorari will, indeed, be issued to quash Annexures 11 and 12 if the Municipal Council which was discharging its quasi-judicial function in disposing of the petitioner's appeal is found to have acted in breach of principles of natural justice or decided the appeal without giving the petitioner an opportunity to be heard.

The appellant in his appeal memo, a copy of which was produced before us by the learned counsel for the opposite parties, just stated his grounds without elaborating upon them or explaining them in detail and it is really difficult to appreciate them without assistance of the petitioner or his counsel. The appeal memo, therefore, cannot be considered to be a written representation of

the appellant's grievances fully explaining his points. In fact, the petitioner had specifically prayed in his appeal memo that his advocate be permitted to be heard in the matter. What happened in this case was that the appeal memo was simply read by the Municipal Council and rejected. In the circumstances, there is no manner of doubt that the appellant has not been afforded effective opportunity of meeting relevant allegations made against him before the Executive Officer acting under S. 273-A of the Act, nor an opportunity of adequately representing his part of the case before the Muinicipal Council was afforded, specially when his appeal memo, besides stating the grounds laconically, did not contain a full and complete representation of his part of the case on a bare reading of which the Municipal Council could apprehend or understand his entire case. Further, when the appellant had asked for being afforded opportunity to be heard while exercising his right of appeal under S. 274 of the Act, it was obviously erroneous to refuse him that opportunity. By making such a prayer the appellant obviously in tended to say that his memo of appeal was not a complete representation of his part of the case and that there were matters which required to be explained orally.

There is no doubt in our mind that no effective opportunity had been afforded to the petitioner by the Municipal Council in disposing of his appeal without acceding to the petitioner's express request to allow his counsel to represent his case. For these reasons Annexure-11 and consequentially Annexure-12 are liable to be quashed. In view of the order which we are going to pass, it is not necessary to decide the prayer of the petitioner for quashing the other annexures.

5. In the result, a writ of certiorari be issued quashing Annexures 11 and 12 and directing opposite party No. 1 to rehear the petitioner's appeal after giving him an effective opportunity of hearing, that is to say, by giving him an opportunity to address the Council either personally or through his Advocate.

The writ petition is, accordingly, allowed, but there will be no order as to costs.

J. K. MOHANTY, J.:— I agree.

Petition allowed.

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R. N. MISRA AND
P. K. MOHANTI, JJ.

Babaji Charan Sahu, Appellant v. Netrananda Sahu and others, Respondents.

Second Appeal No. 145 of 1976, D/- 17-8-1978.*

(A) Civil P. C. (5 of 1908), Sec. 21 — Suits Valuation Act (1887), S. 11 — Objection to pecuniary jurisdiction of Court raised in trial Court — Court not deciding the point — Objection can be raised in the appellate Court. (Para 4)

Anno: AIR Comm. C. P. C. (9th Edition) S. 21 N. 1; AIR Manual (3rd Edn.) Suits Valuation Act, S. 11 N. 3.

(B) Suits Valuation Act (7 of 1887), S. 8 — Suit for partition — Valuation for purposes of jurisdiction.

In a simple suit for partition, the value of the entire property to be partitioned determines the pecuniary jurisdiction of the court. (Case law discussed). (Para 9)

Anno: AIR Manual (3rd Edn.), Suits Valuation Act, S. 8 N. 4.

Cases Referred : Chronological Paras

AIR 1977 Orissa 85 : (1976) 42 Cut LT 1247 — 3, 5
AIR 1977 Orissa 161 : (1976) 2 Cut WR 949 — 3, 5
(1962) 28 Cut LT 433 — 3, 5
AIR 1962 Bom 4 — 3, 8
AIR 1953 Pat 342 — 3, 5, 6
AIR 1947 Mad 273 — 3, 7
AIR 1944 PC 65 — 6
AIR 1925 Cal 320 — 3, 5
AIR 1923 Pat 342 — 5
AIR 1921 Pat 78 — 5

B. C. Sahu, for Appellant; B. R. Rao, for Respondents.

R. N. MISRA, J.:— Defendant No. 1 in a suit for partition has carried this appeal against the affirming judgment and decree of the learned Subordinate Judge.

2. Plaintiff filed the suit on 17-12-1973 in the court of the Munsif at Anandapur alleging that Abhimanyu Sahu died leaving behind him four sons, namely, Bikala, Gananath (defendant No. 2), Raghu and Netrananda (plaintiff). Bikala is dead and his son Babaji is defendant No. 1. Raghu died leaving his widow (defendant No. 3) and two daughters, namely, Hadiani and Pal-

*(From decision of P. K. Ghosh, Sub J. Keonjhar, D/- 2-3-1976.)

uni. Plaintiff demanded his share in the joint family properties and as defendants have not partitioned the same in spite of demand, he instituted the suit asking for one-fourth share in the property. In the plaint he valued the entire property at Rs. 12,000/- and his one-fourth share at Rs. 3,150/- though on the total valuation of Rs. 12,000/- the one-fourth share should have been calculated at Rs. 3,000/- net (see para 8 of the plaint).

3. Paras. 4 and 5 of the written statement of the defendants challenge the valuation and maintain that the suit was beyond the pecuniary jurisdiction of the court. No issue on the question of jurisdiction was, however, framed. Defendant No. 1 lost in both the courts below. When the second appeal came for hearing before a learned single Judge the question of want of pecuniary jurisdiction of the trial court to entertain the suit was agitated. The learned single Judge observed :—

".....Mr. Sahu contends that the valuation of this suit for the purpose of jurisdiction is Rs. 35,000/- and odd, which is the valuation of the entire suit property, and not the valuation of the share claimed by the plaintiff. But Mr. Rao, the learned counsel for the respondents, submits that the valuation of the suit for the purpose of jurisdiction would be the valuation of the share claimed by the plaintiff and not the value of the entire property for which the partition is sought. On the above question divergent views have been expressed in the decisions of this Court reported in (1962) 28 Cut LT 433 (Chadhai Behera v. Parbati); (1946) 2 Cut WR 949 : (AIR 1977 Orissa 161), (Smt. Nakhyatramali Debi v. Chandrasekhar Pattnaik) and the decision reported in (1976) 42 Cut LT 1247 : (AIR 1977 Orissa 85), Smt. Durga Deo v. Smt. Pirobati Dei). There is also divergence of opinion on this point in the decisions of some other High Courts. The decision reported in AIR 1925 Cal 320 (Rajani Kanta Bag v. Raja Bala Dasi) supports the contention of Mr. Sahu for the appellant, whereas the decisions reported in AIR 1953 Pat 342 (Bhairab Chandra Rao v. Sat Narain Sarkar); AIR 1947 Mad 273, (Kalander v. Kunhipakki) and AIR 1962 Bom 4 (Sabastian Antonio Texeira v. Rodolf Minguel Texeira) support the view contended by Mr. Rao for the respondents. Certain other important questions are also involved in this case. I, therefore, deem it fit and proper to refer this second appeal to a Division Bench of this Court for its disposal in accordance with law." That is how the Second Appeal has been placed before us.

4. Mr. Rao for the respondents maintained that the question of want of pecuniary jurisdiction could not for the first time be raised in the second appeal. S. 21 of the Civil P. C. barred objection as to the place of suing being raised at a later stage in the suit or in the appellate court. Until insertion of sub-sec. (2) of S. 21 by the Amending Act of 1976, there was no provision regarding a similar power with reference to pecuniary limits of court's jurisdiction. There is no dispute that the amending provision would not apply to the present appeal. There is a similar provision in the Suits Valuation Act in S. 11 thereof which provides :—

"(1) Notwithstanding anything in Section 578 of the Civil P. C. 14 of 1882, an objection that by reason of the over-valuation or under-valuation of a suit or appeal a Court of first instance or Lower Appellate Court which had not jurisdiction with respect to the suit or appeal exercised jurisdiction with respect thereto shall not be entertained by an Appellate Court unless—

(a) the objection was taken in the Court of first instance at or before the hearing at which issues were first framed and recorded, or in the Lower Appellate Court in the memorandum of appeal to that Court, or

(b) the Appellate Court is satisfied, for reasons to be recorded by it in writing that the suit or appeal was over-valued or under-valued, and that the over-valuation or under-valuation thereof has prejudicially affected the disposal of the suit or appeal on its merits."

In the instant case, as we have already noticed, objection was taken in the court of first instance in the written statement. An appropriate issue was, however, not framed by the court and the question does not appear to have been examined. In the circumstances, we are inclined to agree with counsel for the appellant that the appellant cannot be precluded from raising a contention at this stage, particularly when, the argument is based upon the facts disclosed by the plaint itself.

5. There are three decisions of this Court relevant to the point. The first one is the case of Chadhai Behera v. Parbati, (1962) 28 Cut LT 433, where

Misra, J. as the learned Judge then was approved the dictum laid down by a Division Bench of the Patna High Court in the case of Bhairab Chandra Rai v. Sat Narain Sarkar; AIR 1953 Pat 342 and observed :—

".....Law is well settled that where there is dispute over the plaintiff's share and the plaintiff seeks adjudication of his title and for partition after such adjudication, it is the value of the plaintiff's share which will determine the jurisdiction of the Court and not the value of the entire property....."

The second is the case of Mst. Dura Deo v. Smt. Pirobati Dei, (1976) 42 Cut LT 1247 : (AIR 1977 Orissa 85). where one of us (Mohanti, J.) has relied upon the aforesaid decision of this Court and observed (at p. 86 of AIR):—

"In a simple suit for partition it is the value of the whole property which determines the jurisdiction of the Court and not the value of the plaintiff's share only. In such a suit, the Court has to deal with the entire property. It may on the application of the defendants effect partition of their shares. Therefore the valuation of the suit for the purpose of the jurisdiction cannot be the value of the plaintiff's share only. I am fortified in this view by a Bench decision of the Patna High Court reported in AIR 1923 Pat 342, (Ranjit Sahi v. Maulavi Quasim). Their Lordships held that there is a distinction between suits for partition pure and simple where the plaintiff is in joint possession of his share and there is no dispute as to the title or share, and suits where the plaintiff seeks for an adjudication of his title or extent of share and for partition after such adjudication. It was clearly laid down that in the latter case it is the value of the plaintiff's share which would determine the jurisdiction of the Court and not the value of the entire property. But if there is no dispute regarding the title of the plaintiff and the only question before the Court is as regards partition, the value of the whole property sought to be partitioned must be the value for the purpose of jurisdiction. In the case of Rajani Kante Beg v. Raja Bala Dasi, AIR 1925 Cal 320, it was also held by a Division Bench that a suit for partition is triable by the Court which is competent to try the suit valued at the entire value of the property and not at the value of the plaintiff's share."

The third and the last decision of this Court on the point is the case of Smt. Nakhyatramali Debi v. Chandrasekhar Pattnaik, AIR 1977 Orissa 161. The learned Judge in para 6 of the judgment has observed (at p. 164):

".....In a suit for simple partition, where the plaintiff does not allege dispossession but there is dispute as to the quantum of share, the value for the purpose of jurisdiction would be the value of the share claimed by the plaintiff and not the value of the whole property of which the partition is sought (See Dukhi Singh v. Harihar Shah, AIR 1921 Pat 78, Ranjit Sahi v. Maulavi Quasim, AIR 1923 Pat 342 and Chadhai Behera v. Parbati, (1962) 28 Cut LT 433). There is no dispute in the present case that the value of the plaintiff's share is Rs. 1,250/- and, as such, the appeal to the Additional District Judge was maintainable."

The learned Judge while indicating the facts had stated:

"It is clear from the averments of the plaint that the plaintiff's quantum of share was in controversy and she wanted adjudication of the same....."

There is thus no divergence of opinion on the point in issue in this Court.

6. In the Patna decision (AIR 1953 Pat 342) the placitum is misleading. The facts of the case clearly indicate that the plaintiffs had asked for a declaration of their title to the share claimed and for partition and separate possession of their shares in the properties as there was dispute over their right. The aforesaid Patna decision relied upon the decision of the Privy Council in the case of Shevantibai v. Janardhan Raghunath, AIR 1944 PC 65. From the report of the decision of the Judicial Committee it is clear that the assignee of the purchaser from a member of a joint family of a share in the joint family property sued for partition obviously asking for title in the purchase. The Privy Council, therefore, rightly indicated that the valuation of the share was the valuation of the suit.

7. Two other decisions have been relied upon for the contrary proposition. The first is the Bench decision of the Madras High Court in the case of Kalander v. Kunhipakki, AIR 1947 Mad 273. The learned Judges referred to the Privy Council decision which we have already noticed and came to hold relying on Section 4 of the Suits Valuation Act:

"It is clear from this section that for purposes of jurisdiction it is the plaintiff's interest in the property that must be valued. The plaintiff's suit was for partition of their half share in the suit properties. In other words, they asked that their undivided half share in the properties should be converted into a divided half share. This relief could not be valued; and court-fee had to be calculated according to the provisions of Article 17 of Sch. II, Court-fees Act. The matter in dispute in the suit was however whether the plaintiffs had a half share in the plaint schedule properties or not. According to their claim, they had an undivided half share in the suit properties, which they sought to have divided; and so it seems clear to us that the suit related only to a half share of the plaint schedule properties."

From what has been said above, it is clear that the plaintiffs were also asking for declaration of their half share. If that be so, the aforesaid ratio is not divergent to the principle laid down in this Court.

8. The last case which has been placed before us for consideration is the decision of a learned single Judge of the Bombay High Court in the case of Sabastian Antonio Texeira v. Rodolf Minguel Texeira, AIR 1962 Bom 4. After referring to certain authorities, the learned Judge concluded by saying (at p. 7):

".....Thus, there is no doubt that in a suit for partition it is the value of the share which the plaintiff claims in the joint family property or the property of which partition is sought, which determines the pecuniary jurisdiction of the Court and not the value of the entire property. If, therefore, this suit is held to be a suit for partition, then this Court will have no jurisdiction to entertain it, because, as pointed out in the earlier part of the judgment, the value of the plaintiff's share does not exceed Rs. 10,000/-. In other words, it is very much less than what is necessary for this Court to have the pecuniary jurisdiction."

The parties were Christians and on a reading of the facts there appears to have been disputes as to the share. In view of the settled position of law in this Court as also in the Patna and the Calcutta High Courts, we are not inclined to take a different view. All the three single Judge decisions of this Court correctly stated the legal position.

9. The present suit was one for simple partition and, therefore, the valuation of the entire property was the valuation of the suit for the purpose of jurisdiction. In the plaint, the valuation was put at Rs. 12,000/-. On the said valuation, the trial Court had no pecuniary jurisdiction. Therefore, the entertainment and disposal of the suit by the trial Court is contrary to law.

10. The appeal is allowed. The decision of the trial Court as affirmed in appeal is vacated and the learned Munsif is directed to return the plaint to the plaintiff for presentation in proper court in accordance with law. Parties are directed to bear their respective costs throughout.

P. K. MOHANTI, J.:— I agree.

Appeal allowed.

AIR 1979 ORISSA 74

R. N. MISRA AND P. K. MOHANTI, JJ.

Ch. Seetharam Swamy, etc., Petitioners v. A. Satyanarayana and others etc., Opposite Parties.

O. J. Cs. Nos. 634 of 1977 and 131 of 1978, D/- 17-8-1978.

Orissa Land Reforms Act (16 of 1960), S. 36-A — Application by tenant for becoming raiyat — No power to appoint receiver — Sub-section (3) as added by Amending Act of 1975 does not equate Proceeding under S. 36-A with that under S. 15 of the Act.

Section 36-A cannot be equated with a proceeding under S. 15 of the Act. Sub-section (3) of S. 36-A which was introduced by the Amending Act of 1975, authorises the Revenue Officer while disposing of a proceeding under S. 36-A of the Act to determine the dispute as regards the existence of relationship of landlord and tenant. That, however, does not make the proceeding under Section 36-A of the Act relatable to one under S. 15 thereof, nor does it confer the powers provided for under S. 15 to be exercised while disposing of a proceeding under S. 36-A of the Act. Thus an order of the appellate authority appointing a receiver in proceedings under S. 36-A relying upon the insertion of sub-section (3) thereof, is without authority of law. (1977) 19 OJD 214, Rel. on. (Para 3)

Cases Referred: Chronological Paras
(1977) 19 OJD 214 3

Y. S. N. Murty (in O. J. C. No. 634 of 1977) and R. K. Mohapatra and A. N. Misra (in O. J. C. No. 131 of 1978), for Petitioners; C. V. Murty and Addl. Standing Counsel, for Opposite Parties in both the Cases.

R. N. MISRA, J.:— Petitioner in O. J. C. 634 of 1977 is opposite party No. 3 in the connected writ application. He is admittedly owner of about 7½ acres of land in village Chakaguda of Rayagada area in the district of Koraput. Opposite party No. 1 in O. J. C. 634 of 1977 made an application purporting to be under S. 36-A of the Orissa Land Reforms Act (hereinafter referred to as the 'Act') to the Revenue Officer of Rayagada which came to be registered as O. L. R. Case No. 10 of 1976. Therein an application was made on 5-4-1976 for appointment of a receiver. On behalf of the owner, it was contended that in a proceeding under S. 36-A of the Act there was no provision for appointment of a receiver. The Revenue Officer clearly indicated that there was no application under S. 15 of the Act and prayer for appointment of receiver by invoking sub-section (7) of S. 15 thereof could not be made. He accordingly rejected the application. The applicant under S. 36-A of the Act carried an appeal to the Sub-Divisional Officer in O. L. R. Appeal No. 26 of 1976. He allowed the appeal and appointed a receiver relying upon the insertion of sub-section (3) to S. 36-A of the Act by the Amending Act of 1975. Petitioner carried a further revision before the Revenue Divisional Commissioner who, however, dismissed the same and sustained the appellate order. The land-owner-petitioner, therefore, has filed O. J. C. No. 634 of 1977 challenging the appellate and the revisional orders.

2. Petitioner in O. J. C. No. 131 of 1978 is a mortgagee under a registered possessory mortgage deed dated 10-5-1970 in respect of a part of the disputed property. In Aug., 1970, opposite party No. 2 who is opposite party No. 1 in the connected writ petition and who had made the application under S. 36-A of the Act entered upon the property and claimed that he was a tenant under the original land-owner. A proceeding under S. 144 of the Cr. P. C. was initiated and the land came under attachment. That proceeding was converted into one under S. 145 of the Code and became the subject-matter of M. C. 23 of 1973. A receiver was appointed. On 25-2-1975, the proceeding terminated in favour of the mortgagee in respect of the lands which formed the subject-matter of mortgage. The receiver was directed to deliver possession to the party in whose favour possession was found. Petitioner of the second writ application alleges that he had grown cotton crop in 1976-77 season and plucked the same. In 1977-78 he had also grown cotton crop and the same was almost ready for harvest when the receiver was appointed. Petitioner was not aware of the proceeding under S. 36-A of the Act but on knowing of the pendency of the dispute from the stay order passed in the other writ application, petitioner came with the writ application.

3. Both the petitioners in the writ applications take the same stand and contend that there is no power to appoint a receiver in a proceeding under S. 36-A of the Act. It is not necessary to deal with the provisions of the Act at any length because there has already been a Bench decision of this Court in the case of Hema Chand Banarji v. Revenue Officer, Salipur, (1977) 19 OJD 214, where it has been held:

".....Order XL of the Civil P. C. is not made applicable to a proceeding before the Revenue Officer. It has always been held that appointing a receiver substantially affects the right of enjoyment of the property and a receiver would not be appointed unless adequate grounds are given and it is found absolutely necessary. Such an appointment would only be possible provided power is available under the Statute to appoint a receiver." Section 36-A cannot be equated with a proceeding under S. 15 of the Act. Sub-section (3) of S. 36-A which was introduced by the Amending Act of 1975, authorises the Revenue Officer while disposing of a proceeding under S. 36-A of the Act to determine the dispute as regards the existence of relationship of landlord and tenant. That, however, does not make the proceeding under Section 36-A of the Act relatable to one under S. 15 trereof, nor does it confer the powers provided for under S. 15 to be exercised while disposing of a proceeding under S. 36-A of the Act. We are, therefore, satisfied that in a proceeding under S. 36-A of the Act, there is no provision for appointment of a receiver. The Revenue Officer, in our view, had taken the correct decision and the appellate authority fell into an error. The appointment

of receiver has, therefore, got to be vacated as an act without authority of law. It is not necessary to examine any other question, as both the parties had come before this Court on account of the appellate authority making such an order.

4. Both the writ applications are accordingly allowed. So far as O. J. C. No. 634 of 1977 is concerned, the appointment of receiver is vacated and the application under S. 36-A of the Act has now to be disposed of in accordance with law. So far as O. J. C. No. 131 of 1978 is concerned, now that we have vacated the order of appointment of receiver, the order made in Annexure-8 by the Revenue Officer must stand quashed and petitioner in the said application should be free to be in possession of the property as a mortgagee. It is not necessary at this stage to indicate anything more in regard to his rights over the disputed property. Each of the petitioners shall have his costs which we assess at rupees fifty.

P. K. MOHANTI, J.:— I agree.

Order accordingly.

AIR 1979 ORISSA 76

N. K. DAS, J.

Ghanashyam Das and others, Appellants v. Muralidhar and others, Respondents.

Misc. Appeal No. 57 of 1977, D/- 16-8-1978.*

Civil P. C. (5 of 1908), O. 39, R. 1 — Injunctive relief — Matters to be considered — Burden of proof.

It is well settled that the following propositions are to be established in order to invoke the jurisdiction of the Court to get the interlocutory order of injunction under O. 39, Rr. 1 and 2, C. P. C.:— (1) Plaintiff has to establish a prima facie case; (2) That balance of convenience is in favour of the plaintiff; and (3) That plaintiff will suffer irreparable injury if injunction is refused. In considering the question of irreparable injury, the Court has to see that the plaintiff will sustain such injury which cannot possibly and adequately be remedied by way of damages and the damages would be inadequate in case of success of the plaintiff. In considering the question of balance of convenience, the Court has to consider the comparative mischief or inconvenience of both the parties. (Para 3)

The ingredients, are to be established by the party who seeks injunction in his favour. The grant of injunction being a discretionary relief, the party should come with clean hands and place all materials before the Court, so that the Court will be satisfied about the prima facie case in favour of the party seeking the order. (Para 4)

R. C. Patnaik, P. K. Misra and M. N. Mohanty, for Appellants; S. S. Basu, J. K. Mitra, D. K. Jethi, B. Rath and R. K. Harichandan, for Respondents.

JUDGMENT:— Defendants Nos. 1, 15 and 16 are the appellants here against an order under O. 39, R. 1, C. P. C. Respondent No. 4 filed a suit for declaration of title, confirmation of possession, in the alternative for recovery of possession and also alternatively for partition and allotment of 'A' schedule property. Defendants 1 to 3 are the sons of one Mansaram, since deceased. Plaintiff claims as the widow of said Mansaram and her claim is based on a deed of gift and a will executed by Mansaram in her favour. After filing of the suit, plaintiff prayed for injunction restraining defendant No. 3 from collecting rent from the persons who have stacked logs of wood at Mangalabag, Cuttack. It is stated that all the defendants except defendant No. 3 have stacked wood on the land at Mangalabag which is a part of the suit property and defendant No. 3 has been collecting rent from them. She prayed that defendant No. 3 should be restrained from collecting rent from those persons. The trial Court passed order under O. 39, R. 1, C. P. C. restraining defendant No. 3 from collecting any rent from other defendants. Thereafter, another petition was filed by the plaintiff in Court for directing those other defendants to deposit the rent in Court. The learned trial Court has passed order directing those defendants to deposit the rent in Court. The present appeal is directed against this order. Defendant No. 3 who has been restrained from collecting any rent from other defendants does not dispute the order. But out of the other five defendants, three have come up in appeal. Defendant No. 1 is one of the sons of late Mansaram and he is also an appellant here.

2. The learned Court below has found a prima facie case in favour of the

*(From order of R. S. P. Patnaik, Sub-J. Cuttack, D/- 19-2-1977.)

plaintiff on the basis of a registered deed of gift executed by Mansaram in her favour. He has held that though defendant No. 3 denies to have made any collection of rent from other defendants, those defendants do not say that they have got licence either from defendant No. 3 or from the plaintiff. If the collections are made from various tenants by defendant No. 3, it would cause prejudice to the plaintiff, and, as such, the balance of convenience is in favour of the plaintiff and the plaintiff would sustain irreparable loss.

3. It is well settled that the following propositions are to be established in order to invoke the jurisdiction of the Court to get the interlocutory order of injunction under Order 39, Rr. 1 and 2, C. P. C.:

(1) Plaintiff has to establish a prima facie case;

(2) If balance of convenience is in favour of the plaintiff; and

(3) Plaintiff will suffer irreparable injury if injunction is refused.

In considering the question of irreparable injury, the Court has to see that the plaintiff will sustain such injury which cannot possibly and adequately be remedied by way of damages and the damages would be inadequate in case of success of the plaintiff. In considering the question of balance of convenience, the Court has to consider the comparative mischief or inconvenience of both parties.

4. From the materials available on record, it appears that an ad interim injunction was issued against defendant No. 3 prohibiting him from collecting any rent from other defendants. On 22-6-1976 an application was filed by the plaintiff for deputing a Commissioner for local inspection of lot No. 5 of Sch. A of the plaint and to report as to the structures standing thereon and the logs stacked on the land and detain the same till the ownership is proved to the satisfaction of the Court by any of the opposite parties in the Misc. Case. In the body of the petition, in para 2 it has been stated that the Misc. Case under O. 39, Rr. 1 and 2, C. P. C. has been filed and ex parte order of injunction has been passed against defendant No. 3. In paras 6 and 7 it is contended that defendant No. 3 has taken a stand that other defendants are not monthly tenants who are occupying any portion of the property and since 1972 defendant No. 1 is occupying the entire lot No. 5 by stacking logs thereon under possession of his father. But as a matter of fact, defendants 1 and 14 to 17 have made an unholy combination and are out to cheat the plaintiff, and as a matter of fact all the persons alleged in the plaint are in possession of lot No. 5. In pursuance of this application, a pleader commissioner was deputed and he has submitted his report. This report is on record. In the counter by opposite parties 2 to 5, namely, defendants other than defendant No. 3, it is stated that defendants 14 to 17 do not pay any rent to defendant No. 3 as alleged by the petitioner. In the counter by defendant No. 3 which is supported by an affidavit, it is stated that both the brothers, namely, defendants Nos. 1 and 3, having been separate since long, it is false to say that there has been connivance between the two brothers and monthly rent is being realised from other defendants and those defendants are not at all occupying any portion of the suit property as monthly tenants nor they are paying any monthly rental. Defendant No. 3 is not realising any rent from them and the amount as mentioned in the schedule of the petition is imaginary, baseless and concocted. It is further stated in the affidavit that no tenant is occupying any portion of the said land (vide para 10).

The learned Court below has not at all taken these averments into consideration. Mr. Basu, the learned counsel for the respondents, states that there has been affidavit by the petitioner stating the amount of rent being paid by other defendants to defendant No. 3. But defendant No. 3 in his affidavit has denied this fact. Though the objection of the other defendants has not been supported by affidavit, yet they have asserted that they are not paying rent. The question, therefore, is whether the other defendants are occupying the land as tenants and if they are paying rent to defendant No. 3. There is apparently no material on record excepting the bald affidavit of the plaintiff. The plaintiff does not state in the affidavit as to her source of information about the quantum of rent said to have been paid by other defendants to defendant No. 3. Mr. Basu refers to a letter that in 1974 defendant No. 3 had written to his father (since deceased) that he was collecting rent. From this, it cannot be definitely said that defendants are occupying the land in question as tenants and are paying rent therefor. This has to be gone into by the Court be-

low in order to find out the real facts. The Commissioner was deputed for local inspection and his report will also reveal certain facts which have been alleged by the plaintiff or the stand taken by the defendants. But the learned Court below has not taken into consideration these facts. Consideration of the above materials would place the Court in a position to assess the irreparable injury as well as the balance of convenience.

The ingredients, namely, existence of prima facie case; irreparable injury that cannot be repaired or compensated in terms of money; or tilting the balance of convenience on the side of a party, are to be established by the party who seeks injunction in his favour. The grant of injunction being a discretionary relief, the party should come with clean hands and place all materials before the Court, so that the Court will be satisfied about the prima facie case in favour of the party who seeks the order. Unfortunately, the trial Court has not considered the materials in their proper perspective, keeping in view the facts and circumstances of the case.

5. On the aforesaid analysis, I hold that the order of the Court below is not sustainable.

6. In the result, the appeal is allowed and the order of the Court below is set aside. The case is remitted back to the lower Court for fresh disposal of the application of the plaintiff for injunction as against the petitioner according to law, keeping in view the observations made above.

7. In the circumstances of the case, I make no order as to costs.

Appeal allowed.

AIR 1979 ORISSA 78

P. K. MOHANTI, J.

Salicharan Bisi, Petitioner v. Sukanti Pujhari and another, Opposite Parties.

Civil Revn. No. 372 of 1977, D/- 17-11-1978.*

Civil P. C. (5 of 1908), O. 8, R. 9 — Plaint amended to include prayer for possession — Additional written statement held should be allowed.

Where the plaint was amended to include prayer for possession, refusal to allow defendant's prayer for amending the written statement alleging that the lands having been converted into rayati in his name the defendant had acquired fresh title to it violated provision under O. 8, R. 9, Civil P. C. The application to amend written statement filed immediately after the amendment of the plaint and before the parties went to trial held ought to have been allowed. AIR 1949 Orissa 77 and AIR 1969 SC 1267, Rel. on. (Paras 8, 10 and 11)

Anno: AIR Comm. Civil P. C. (9th Edn.), O. 8, R. 9, N. 1

Cases Referred: Chronological Paras

AIR 1969 SC 1267 9A

AIR 1949 Orissa 77 7

S. C. Mohapatra and L. D. Rath, for Petitioner; P. K. Misra, for Opposite Parties.

ORDER:— This Civil revision is directed against an order refusing leave to amend the written statement.

2. Opposite party No. 1 filed Title Suit No. 7 of 1974 in the Court of Subordinate Judge, Sonepur for a declaration that the petitioner is not his adopted son and that the adoption, if any, is invalid. Although no relief for declaration of title or recovery of possession was sought for, a passing reference was made in the body of the plaint that the defendants had no right, title or possession over the lands described in the plaint schedule and that the petitioner fraudulently got his name recorded in the settlement record of rights as the adopted son of the opposite party No. 1.

3. Petitioner filed written statement asserting that he was the adopted son of the opposite party and that at the time of his adoption, his natural father Mrutunjaya had gifted away the suit lands to him and had got the same recorded in his name.

4. The plaint was presented on the 12th March, 1974 and the written statement of the petitioner was filed on 18th August, 1975. On 14-4-1977 the opposite party amended the plaint by adding a relief for recovery of possession of the suit lands by evicting the defendants therefrom or in the alternative for partition, alleging that the defendants had forcibly occupied the suit lands and were in wrongful possession of the same. After amendment of the plaint the plaintiff opposite party was called upon to pay the deficit court-fee of Rs. 351-75. But he filed an application under O. 33,

*(Against order of B. N. Goud, Sub-J., Sonepur, D/- 20-9-1977.)

R. 1, Code of Civil Procedure for leave to sue in forma pauperis. The application was dismissed on 20-8-1977 and the deficit court-fee was paid on 2-9-1977. Then the suit was posted to 19-9-1977 for hearing. On that date, the petitioner applied for leave to amend his written statement by adding the following paragraph :—

"The suit Bhogra lands have been converted into rayati in the name of the defendant No. 1 by the order of the Collector, Bolangir and he has acquired fresh title to the same which cannot be challenged in this Court."

5. The proposed amendment was opposed by the plaintiff. The learned Subordinate Judge refused to grant leave to amend the written statement on the ground that the proposed amendment was sought for at a late stage though the plea sought to be introduced by the proposed amendment was available to the petitioner at the time when he filed the original written statement.

6. It is urged in this civil revision that the learned Subordinate Judge illegally exercised his jurisdiction in refusing leave to amend the written statement.

7. Order 8, Rule 9, Code of Civil Procedure enables the Court to require written statement from any of the parties at any time. After the plaint was amended it was the duty of the Court to have given an opportunity to the defendant No. 1 to file additional written statement. (See AIR 1949 Orissa 77; Chandra Kishore Das v. Babulal Agarwala).

8. It would appear from the above narration of facts that in the original plaint the plaintiff only asked for the relief of declaration that defendant No. 1 was not his adopted son. Subsequently he amended the plaint by introducing the relief for recovery of possession or in the alternative for partition. No opportunity was given to the defendant No. 1 to file additional written statement. The plaintiff paid the deficit court-fee on the amended plaint on 2-9-1977 and on that very day the suit was posted to 19-9-1977 for hearing. On 19-9-1977 the petitioner applied for amendment of his written statement before commencement of the trial. It cannot, therefore, be said that there was any delay on the part of the petitioner in applying for amendment.

9. As mentioned earlier, the petitioner in his original written statement had claimed title to the suit lands on the basis of a gift by his natural father. But in his counter to the petition for temporary injunction he had specifically alleged that the suit lands were originally Bhogra lands and that the same had been settled in his favour in a Bhogra conversion proceeding. Thus it will be seen that long before the amendment of plaint the petitioner had taken the plea that the suit lands had been settled in his favour in a Bhogra conversion proceeding. It is only after this plea was taken by the petitioner that the opposite party came up with the prayer for amendment of plaint. It is, therefore, futile to contend that the plaintiff-opposite party was taken by surprise by the proposed amendment.

9A. In the case of Jai Jai Ram Manohar Lal v. National Building Material Supply, Gurgaon, AIR 1969 SC 1267 the Court observed (at p. 1269):—

"Rules of procedure are intended to be a handmaid to the administration of justice. A party cannot be refused just relief merely because of some mistake, negligence, inadvertence or even infraction of the rules of procedure. The Court always gives leave to amend the pleading of a party, unless it is satisfied that the party applying was acting mala fide, or that by his blunder, he had caused injury to his opponent which may not be compensated for by an order of costs. However, negligent or careless may have been the first omission, and, however, late the proposed amendment, the amendment may be allowed if it can be made without any injustice to the other side."

10. The petitioner applied for amendment before commencement of the trial. As the parties had not entered the witness-box, it could not be said that if the amendment was allowed, it would, in any way, cause prejudice to the plaintiff. This is not a case where it can be said that a vested right had accrued to the plaintiff-opposite party by lapse of time.

11. The object of the courts is to decide rights of the parties and not to punish them for the mistakes committed in the conduct of their cases. Any kind of error or mistake which if not fraudulent or intended to over-reach the court, ought to be corrected if it can be done without injustice to the other party.

The learned Subordinate Judge disallowed the amendment without keeping in view the established principles of law.

12. For the reasons stated above, I have no hesitation in holding that the learned Subordinate Judge acted illegally and with material irregularity in refusing to allow the application for amendment.

13. In the result, the revision petition is allowed. Leave to amend the written statement is granted. In the circumstances of the case, I make no order as to costs.

Petition allowed.

AIR 1979 ORISSA 80

R. N. MISRA AND B. K. RAY, JJ.

Harikishandas Bajoria and another, Petitioners v. M/s. E. I. D. Parry Ltd. and others, Opposite Parties.

Civil Revn. No. 28 of 1977, D/- 2-11-1978.*

Limitation Act (36 of 1963), Art. 98 — Attachment before judgment — Application for release, on ground of purchase of property prior to attachment — Aggrieved party filing revision alleging transaction of purchase fraudulent — Revision dismissed with direction to file separate suit for fuller consideration of allegation — Separate suit under O. 21 R. 63 filed — Limitation of one year period from the "date of final order" shall be counted treating the date of dismissal of revision as "date of final order". (Case law discussed). (Civil P. C. (5 of 1908), O. 21, R. 63 (Since repealed)).

(Paras 2, 8, 9)

Anno: AIR Comm. Limitation Act (5th Edn.), Art. 98, N. 22.

Cases Referred : Chronological Paras

(1977) Second Appeal No. 55 of 1974, D/- 9-9-1977 (Orissa), M/s. Krishnagopal Jethmal Firm v. Kamala Kanta Das 9
AIR 1974 All 44 : 1973 All LJ 937 9
AIR 1973 Orissa 144 8, 9
(1971) 2 Mad LJ 369 5
AIR 1970 SC 1 9
AIR 1963 Ker 137 (FB) 4, 9
AIR 1963 Pat 62 4
AIR 1961 SC 1170 6
AIR 1952 SC 369 6
AIR 1951 Pat 325 8
AIR 1949 Pat 293 (FB) 4
1947 Trav LR 484 4, 5
AIR 1943 Mad 633 4, 5
AIR 1941 Pat 372 8
AIR 1938 Cal 577 4, 9
AIR 1931 Nag 17 4
AIR 1920 PC 181 6
AIR 1916 Mad 883 : ILR 39 Mad 1196 4

*(From order of K. M. Subudhi Addl. Sub. J., Cuttack, D/- 12-1-1977).

AW/BW/A290/79/AMG/DVT

R. Mohanty, S. C. Ghose, U. N. Sahu, S. K. Mohanty and B. C. Pradhan, for Petitioners; C. V. Murty, C. A. Rao, and G. P. Rao, for Opposite Parties.

R. N. MISRA, J.:— Defendants 1 and 2 in Title Suit No. 53 of 1974 have carried this revision application against the order of the learned Trial Judge finding the suit under O. 21, Rule 63 of the Civil P. C. to be within the period of limitation, the issue relating to limitation having been adjudicated as a preliminary one. When the revision application was placed before one of us for hearing, it was directed to be placed before a Division Bench for final disposal.

2. On 13-5-1970, plaintiff (opposite party No. 1) filed Money Suit No. 339 of 1970 in the court of the Subordinate Judge at Cuttack for recovery of the dues on promissory notes executed by opposite parties 2 to 5 and obtained an ex parte ad interim order of attachment before judgment. Petitioners had purchased a house from opposite parties 3 to 5 under a registered sale deed dated 20th of March, 1970, for valuable consideration and when they found that the order of attachment covered this property also, they asked for lifting of the attachment. Their application being Miscellaneous Case No. 255 of 1970 was allowed on 21-12-1971 and the property was directed to be released from attachment. Plaintiff-opposite party No. 1 filed Civil Revision No. 93 of 1972 in this Court on 30th of March, 1972, and that application was ultimately dismissed on 22nd of March, 1973, with the following observations :—

"Mr. C. V. Murty, on behalf of the petitioner contends that the claimants have no right to the properties as the sale in their favour is a fraudulent transaction. The finding of the Court below is otherwise and the only remedy for Mr. Murty's client is to institute a regular suit where this point of fraud and similar other points can get fuller consideration. I cannot interfere with the conclusions of fact arrived at by the court be-

low as it does not involve any question of lack of jurisdiction or illegal exercise of jurisdiction.

In the circumstances, I find there is no merit in the revision, which is accordingly dismissed."

Plaintiff filed Title Suit No. 53 of 1974 on 21-3-1974. The defendants, inter alia, contended that the suit was barred by limitation. Issue No. 3 was raised in regard to the plea of limitation. The defendants wanted the said issue to be examined preliminarily and when the learned Trial Judge refused to do so, this Court in Civil Revision No. 303 of 1975 called upon the trial court by its Order dated 7-7-1976, to examine Issue No. 3 preliminarily. The learned Additional Subordinate Judge having examined the question has come to hold that the suit is not barred by limitation. That finding is assailed in this revision application.

3. Limitation for a suit of this type is prescribed under Art. 98 of the Limitation Act of 1963 and that Article runs thus :—

"By a person against whom an order referred to in rule 63, or rule 103, of Order XXI of the Code of Civil Procedure, 1908 (5 of 1908) or an order under S. 28 of the Presidency Small Cause Courts Act, 1882 (15 of 1882) has been made, to establish the right which he claims to the property comprised in the order.	One Year.	The date of the final order."

This Article admittedly corresponds to the earlier Arts. 11 and 11-A of the Limitation Act of 1908. Both these Articles were merged into one. Under the old Act, limitation ran from the date of the order and under the new Act, limitation runs from the date of the "final" order. The cause of action for the suit contemplated in Art. 98 arises when an order adverse to the interest of the plaintiff under the appropriate provision of law is made and the suit has to be filed within one year therefrom. Prior to the amendment of the Code of Civil Procedure by the Amending Act of 1976, Rules 58 (as amended in this Court) and 63 of the Code of 1908 read thus :—

"58. (1) When any claim is preferred to any property, the subject-matter of execution proceedings, or any objection is made to the attachment thereof, on the ground that the applicant has an interest therein which is not bound under the decree, or that such property is not liable to attachment, the Court shall proceed to investigate the claim or objection with the like power as regards the examination of the claimant or objector, and in all other respects, as if he was a party to the suit :

Provided that no such investigation shall be made where the Court considers that the claim or objection was designedly or unnecessarily delayed.

(2) .....

63. Where a claim or an objection is preferred, the party against whom an order is made may institute a suit to establish the right which he claims to the property in dispute, but, subject to the result of such suit, if any, the order shall be conclusive."

By the amendment of 1976, the order under Rule 58 is open to appeal and against the appellate decision right of suit has been conferred.

Mr. Mohanty for the petitioners contends that limitation commences to run from the date of the final order rejecting or allowing the claim and Rule 63 having made the order conclusive subject to the result of a suit, the conclusiveness of the order except when disturbed in a suit cannot be taken away. According to counsel, therefore, a revision application under Sec. 115 of the Code against the order on the claim petition is not a remedy provided by law and the filing of a civil revision would in no way affect the running of the limitation and the disposal of the civil revision would not give a new cause of action. Otherwise stated, if limitation started running from the date of the order in the claim case, its running would not be arrested by the filing of the revision or pendency thereof and the disposal of the revision would not give a new cause of action. Mr. Mohanty further contends that even if the period during which the Civil Revision was pending before this Court is excluded under Section 14 (4) of the Limitation Act in the matter of computing the period of limitation of one year, in the instant case, the suit would still be barred by limitation. It is his contention that the learned Trial Judge has clearly gone wrong in holding that the commencement of limitation is from the date of the dismissal of the civil revision.

4. Reliance is placed on a series of authorities of different High Courts by Mr. Mohanty in support of his proposition that the limitation of one year

would run from the date of the original adverse order and the abortive civil revision would not make any difference in the matter of computation of limitation. We propose to refer to some of these authorities.

In the case of Sm. Meghmala Debi v. Saday Parhya, AIR 1938 Cal 577, B. K. Mukherjea, J., as the learned Judge then was, was dealing with computation of limitation in a suit under Order 21, Rule 103 of the Code of Civil Procedure and observed :—

"Now, so far as the first point is concerned, Mr. Banerjee relies upon a decision of the Madras High Court in ILR 39 Mad 1196 : (AIR 1916 Mad 883); (Venugopal Mudali v. Venkatasubbiah). That decision held, and in my opinion rightly, that the word order in Art. 11-A Limitation Act should be construed as meaning the final or subsisting order in the case. In that case, however, there was a judgment in the claim case pronounced by a single Judge of the High Court against which an appeal was taken under the Letters Patent. The Court held that the period of one year did run under Art. 11, Limitation Act from the time when the Appellate Court passed its order. The learned Judges in that case pertinently pointed out that a somewhat different consideration would apply if a revision petition presented by an unsuccessful party in a claim proceeding is rejected by the superior Court. If the High Court in the exercise of its powers under S. 115, Civil P. C. refuses to interfere in a claim case, it merely amounts to an abstention from exercising jurisdiction and the only final order that remains subsisting is the order passed by the trial Court. It may be otherwise where the High Court interferes in revision with the original decision. In the present case, if the plaintiff had succeeded in the revisional petition which she presented to this Court, the time so far as the defendants are concerned, would certainly have run from the date when this Court passed its order. In my opinion, the only subsisting order against the plaintiff was the order that was passed by the trial Court on 25th July 1933, and as the suit was not commenced within a period of one year after that, it is barred by limitation under Art. 11-A, Limitation Act." Niyogi, A. J. C. in the case of Laxmandas v. Chunnilal, AIR 1931 Nag 17, took the view that Art. 11-A did not contemplate computation of the period of limitation from the date of the revisional order. A Full Bench of the Patna High Court in the case of Lal Bihari Lal v. Bani Madhava Khatri, AIR 1949 Pat 293 (FB) took the view that limitation was to be computed from the original adverse order, but the plaintiff was entitled to the advantage of Section 14 (1) of the Limitation Act and, therefore, to deduction of time spent in prosecuting in good faith and with due diligence an abortive civil revision.

A Division Bench of the Patna High Court in the case of Mt. Bibi Aziman v. Mt. Saleha, AIR 1963 Pat 62, while dealing with limitation under Art. 11-A of the old Limitation Act prescribing the limitation for the suit under Order 21, R. 103, Code of Civil Procedure, observed :— (at p. 69)

"Mr. Chatterji for the appellants submitted that there was no justification for the view that if the High Court interfered in revision, then the order of the High Court was the subsisting order but in case, it refused to interfere, then the order of the executing Court was the subsisting and final order. According to him, when a petition in revision was either dismissed or allowed, in both the cases it was the order of the High Court which was the subsisting order and not the order of the executing Court. In other words, there was no distinction between the two orders of the High Court.

.....

The argument of Mr. Chatterji is no doubt ingenious and plausible, but on a closer scrutiny it is not sustainable and we have to consider the wordings themselves of Art. 11-A of the Indian Limitation Act. The statute does not include the words either original or final before the word 'order' in that Article, but it has to be seen as to which is the order by which one is aggrieved for seeking another remedy to get that order either reversed or modified. There can be applications of various kinds as enumerated in column 1 of Art. 11-A and we are concerned here with the application of persons who alleged to have been dispossessed of their property by reason of the delivery of possession obtained by the other party. On such an application, an order was passed by the executing court against the plaintiffs. The plaintiffs were aggrieved by that order and all persons coming with-

in that category and who made applications under O. 21, R. 100 would be aggrieved by adverse orders passed against them in one case or the other. In other words, that order is the order passed against the person making an application under O. 21, R. 100.

.....If the revision is dismissed, either summarily or after final hearing the person aggrieved can institute a suit, but he has to do it within one year of the date of the order passed by the executing court, inasmuch as that was the adverse order against him which gave him a cause of action for a suit. He can in proper cases take the benefit of sec. 14 (1) of the Indian Limitation Act and get an extension of time which he may have spent in proceeding with his application in revision in High Court."

A Full Bench of the Kerala High Court in the case of Thycattuseri Church v. Sicillyamma, AIR 1963 Ker 137 (FB) approving the view taken in the case of Laxmandas v. Chunnilal, AIR 1931 Nag 17 and in the case of Meghmala Debi v. Saday Parhya, AIR 1938 Cal 577, by majority came to hold that limitation for a suit under Order 21, Rule 63, Code of Civil Procedure would run from the date of the order of the executing court on the claim petition and not from the date of the order on an infructuous application for revision thereof. The majority also took the view that the plaintiff can claim exclusion of the period which began with the filing of the revision petition and ended with the passing of the order therein. One of the learned Judges constituting the Full Bench, however, took a different view and came to hold following the ratio of the decision in the case of Narayanan Pisharodi v. Pathoo, 1947 Trav LR 484 and of the case reported in AIR 1943 Mad 633 (Venkataswami v. Sara Bai) that limitation started to commence from the date of the order in the revision application.

5. Most of the High Courts have taken the view that the period of limitation under Arts. 11 and 11-A of the Lim. Act of 1908 would run from the date of the original order though in a few cases, as represented by the decisions in the cases reported in AIR 1943 Mad 633, 1947 Trav LR 484 as also in the case of P. Narayanasami Reddiar v. K. M. Jayarama Reddiar, (1971) 2 Mad LJ 369, it had been held that under Art. 11, the starting point should be taken to be the date of the final order where that order was passed on an appeal or where it was passed in a civil revision petition against the order of the executing court. There appears to be unanimity of judicial opinion to a large extent except a few exceptions that where a revision has been filed, benefit of Section 14 of the Limitation Act could be given for extending the period of limitation and the period during which the civil revision was pending could be asked to be excluded.

6. The provision under the new Limitation Act, however, is different. Old Arts. 11 and 11-A have been put together into the new Art. 98. The commencement of limitation now is from the date of the final order. In the old Limitation Act, time ran from the date of the order and the new Limitation Act has introduced the term "final". The House of Lords in the case of Quebec Rly. Light, Heat and Power Co. Ltd. v. Vendry, AIR 1920 PC 181, pointed out that the Legislature is deemed not to waste its words or to say anything in vain. Das Gupta, J. speaking for the Court in the case of J. K. Cotton Spinning and Weaving Mills Co. Ltd. v. State of Uttar Pradesh, AIR 1961 SC 1170 observed (at p. 1174):—

".....In the interpretation of statutes the courts always presume that the legislature inserted every part thereof for a purpose and the legislative intention is that every part of the statute should have effect. ... ."

When in the Limitation Act of 1908, the corresponding word was only 'order' in using the adjective 'final' it would not be proper to hold that nothing different from the position under the 1908 Act was intended. Patanjali Sastri, C. J., in the case of Aswini Kumar Ghose v. Arabinda Bose, AIR 1952 SC 369, pointed out:— (at p. 377)

"..... It is not a sound principle of construction to brush aside words in a statute as being in apposite surplusage, if they can have appropriate application in circumstances conceivable within the contemplation of the statute."

We are inclined, therefore, to hold that the Legislature intentionally introduced the word 'final' into the third column of the new Article 98.

7. Computation of limitation with reference to a final order was known to the Legislature from before. Article 47 of the old Limitation Act ran thus:—

"By any person bound by an order respecting the possession of immoveable property made under the Code of Criminal Procedure, 1898 (V of 1898) or the Mamlatdars' Courts Act, 1906 (Bom. II of 1906), or by anyone claiming under such person, to recover the property comprised in such order.	Three years.	The date of the final order in the case:"

In Art. 182, the phrase 'final order' had also been used in juxtaposition to 'original order'. There is good authority for the view that where by the time a Legislature enacts a statute clear legal concepts are in vogue, the Legislature must be credited with the intention of using the terms in the sense and for conveying the meaning given to the terms.

8. Article 47 of the old Limitation Act which uses the same phrase as in Art. 98 of the new Act came to be interpreted in several cases. A Bench of the Patna High Court in the case of Rampal Singh v. Mansukh Rai, AIR 1941 Pat 372, observed :—

".....Whether the High Court ultimately interferes in revision or not, its order is nonetheless the final order. Where, as in the present case, the Sessions Judge in exercise of his power under S. 435 makes a reference to the High Court under S. 438 with the recommendation that the order of the Magistrate be set aside, the matter remains sub judice so long as it is not finally determined by the High Court. The order of the High Court passed under Section 439 will be the final order in the case. In this view the period of limitation under Art. 47 in the present case must be computed from the date of the High Court's order."

Another Bench of the Patna High Court in the case of Pitambar Chaudhury v. Achoki Choudhury, AIR 1951 Pat 325, adopted the earlier Patna decision and stated (at p. 326):—

".....If this Court had been so moved whether the orders passed by this Court, after hearing the parties or otherwise, were against the plaintiffs they would have had the advantage of the extended period of limitation, in view of the decision of a Division Bench of this Court in the case of Rampal Singh v. Mansukh Rai, ILR 20 Pat 735 : (AIR 1941 Pat 372). In that case, their Lordships took the view that the orders passed by the High Court in its revisional jurisdiction against an order passed in a proceeding under S. 145, Criminal P. C., are the final orders within the meaning of Art. 47, Limitation Act. We are bound by that decision. But, as already indicated, the plaintiff-respondents did not move this Court in its revisional jurisdiction and, therefore, deprived themselves of the benefit of the orders of this Court and of the extended period of limitation in the event of any orders being passed by this Court." The view taken by the two Patna cases has been directly approved by a Bench of this Court in the case of Bingi Kurmayya v. Woona Bhimayya Subudhi, AIR 1973 Orissa 144 and we feel bound by the decision in the said case, where with reference to the phrase "final order" in Art. 47 of the old Limitation Act, it has been said that it would refer to the order of the High Court in a revision application. In view of the fact that under the new Limitation Act, the phrase in Art. 98 is 'final order', we are inclined to agree with the submission made before us by counsel for the opposite parties that the view taken by the Patna High Court in the two cases indicated and by a Bench of this Court should be adopted.

9. We may now refer to an unreported judgment of this Court in Second Appeal No. 55 of 1974 (M/s. Krishnagopal Jethmal Firm v. Kamalakanta Das) disposed of by one of us on 9-9-1977, where this very question directly came up for consideration. The use of the words "the date of the final order" in the third column of Art. 98 of the new Limitation Act came to be emphasised upon in juxtaposition to the 'date of the order' in Art. 11 of the old Limitation Act. My learned Brother Ray, J. took note of the Calcutta decision (AIR 1938 Cal 577), the Full Bench case in AIR 1963 Ker 137 and the Bench decision of this Court reported in AIR 1973 Orissa 144 and came to hold (at pp. 147, 148):—

".....When the aid of the High Court is invoked on the revisional side it is done because it is a superior court and it can interfere for the purpose of rectifying the error of the court below. Section 115, C.P.C. only circumscribes the limits of that jurisdiction, but the jurisdiction which is being exercised is a part of the general appellate jurisdiction of the High Court as a superior court. It is only one of the modes of exercising power conferred by the statute, Basical-

ly and fundamentally it is the appellate jurisdiction of the High Court which is invoked and exercised in a wider and larger sense under S. 115, C.P.C. That being the position, there is not much of difference between an order passed by a revisional authority in exercise of its powers of revision and the powers of an appellate authority exercising its appellate powers. According to the view expressed in that decision (AIR 1970 SC 1) whether it is the final order passed in a revision or one passed in an appeal, the original order merges in it. When the aid of the High Court is invoked on the revisional side, it is done because it is a superior court and it can interfere for the purpose of rectifying the error of the court below. According to their Lordships of the Supreme Court there is no existence of the original order after a final order is passed by the High Court in a revision application against the original order, because the original order merges in the revisional order."

There is one more decision of a learned single Judge of the Allahabad High Court taking the same view. In the case of Gopal Lal v. Ram Karan Singh, AIR 1974 All 44, a learned single Judge has emphasised on the words "final order" used in the Article and has taken the view that where a revision has been filed and rejected, the date of the order of rejection of the revision is the date from which limitation runs. The learned Judge has taken the view relying upon the decision of the Supreme Court in the case of Shankar Ram Chandra v. Krishnaji Dattatraya, AIR 1970 SC 1, that the order of the executing court merges in the revisional order.

In our view, the change brought about in the law is sufficient enough to dispose of the matter and it is unnecessary to examine the matter any further. We would accordingly in agreement with the learned Trial Judge hold that the issue of limitation has been correctly decided, as the suit has been filed within one year from the date of the final order, i.e. the order made by this Court dismissing the Civil Revision.

10. The revision application must accordingly be dismissed. We make no order for costs in the facts and circumstances of the case.

B. K. RAY, J.: — I agree.

Petition dismissed.

AIR 1979 ORISSA 85

R. N. MISRA AND B. K. RAY, JJ.

Rabindranath Barik, Appellant v. Smt. Pramila Bala Barik, Respondent.

A. H. O. No. 69 of 1976, D/- 5-12-1978.*

(A) Hindu Marriage Act (25 of 1955), Ss. 9, 3 (b) — Restitution of conjugal rights — Decree passed by subordinate Judge — Appeal — Forum — District Court — Appeal filed in High Court — No objection to its jurisdiction raised — Decree rendered in appeal cannot be held to be a nullity — (Civil P. C. (5 of 1908) S. 21). AIR 1978 Orissa 163, Ref. **(Para 4)**

Anno: AIR Manual (3rd Edn.), Hindu Marriage Act, S. 9 N. 7; S. 3 N. 2; AIR Comm. Civil P. C. (9th Edn.), Sec. 21 Notes 3, 3A.

(B) Hindu Marriage Act (25 of 1955), S. 9 — Husband's petition for restitution of conjugal rights — Habitual nagging of wife by husband's parents, though no cruelty was ascribable to husband — Wife could not be asked to return to the family home to stay with husband and his parents. (1790) 1 Hag Con 35; 1897 AC 395, (1974) 1 Cut WR 593, Rel. on; AIR 1977 Orissa 132, Affirmed. (Paras 5, 6)

Anno: AIR Manual (3rd Edn.) Hindu Marriage Act, S. 9, Notes 3, 4.

Cases Referred : Chronological Paras

AIR 1978 Orissa 163 : 45 Cut LT 558 4
(1974) 1 Cut WR 593 5
1897 AC 395, Russell v. Russell 5
(1790) 1 Hag Con 35 : 161 ER 466, Evans v. Evans 5

K. N. Jena and B. P. Chandgotia, for Appellant; P. Palit, J. Patnaik and R. N. Mohanty, for Respondent.

R. N. MISRA, J.:— It is a husband's appeal under Art. 4 of the Orissa High Court Order read with Cl. 10 of the Letters Patent and is directed against the reversing judgment of our learned brother Acharya, J.

2. In March, 1967, the appellant married the respondent. They lived together till July, 1969, when the wife went away to her father's house and did not return. On 17th March, 1970, the husband applied for restitution of conjugal rights to the learned Subordinate Judge at Balasore. The wife resisted the claim by contending that her mother-in-law was an ill-tempered lady and she very

*(Against judgment of S. Acharya J. reported in AIR 1977 Orissa 132).

often used to hurl abuses at the defendant in very filthy and objectionable language on some pretext or other as also on the ground that the defendant's parents had failed to pay the dowry as promised. The husband who was working as a teacher at a place away from home was occasionally coming home and the mother-in-law was poisoning his ears against the defendant. She pleaded that on account of such constant rebukes and abuses, she suffered from nervous debility and ultimately became ill. At the trial, plaintiff examined himself and 3 other witnesses and the defendant examined herself and 2 other witnesses including her brother. The learned trial Judge proceeded on the footing that the wife had a legal duty to live with her husband and the defendant had failed to substantiate the plea of cruelty, and being satisfied that the husband was keen to have the company of the wife granted a decree for conjugal rights.

3. Upon wife's appeal to this Court, the learned single Judge has come to hold:

"On the oral and documentary evidence on record I am inclined to believe the case put forward by the defendant-appellant that during her stay in her father-in-law's house, her mother-in-law ill-treated her and made her stay in that house a miserable proposition. From the tone of the husband's letter to his wife it is quite evident that the mother-in-law of the defendant was also successful in poisoning the ears of his son, the plaintiff, against his wife. On the above premises one cannot find fault with the defendant's disinclination to go back to her father-in-law's house, especially when her husband was not staying at that place. On the materials on record I am also inclined to take the view that the plaintiff instead of being particular about leading a matrimonial life with his wife, the defendant-appellant, was only insisting on the defendant to return to her father-in-law's house possibly only to satisfy the wishes of the plaintiff's parents. Consideration to satisfy the wishes of the parents without expressing and/or indicating a sincere and genuine desire for restitution of conjual rights. with all its legal trappings, obligations and duties, cannot enable a person to get a decree as prayed for in this suit."

As it appears from the judgment of the learned single Judge, an attempt for reconciliation was made and the wife seems to have agreed to return to the husband in case the husband was able to arrange a separate residence for the couple where she could live in peace in the company of the husband. The husband, however, pleaded inability even when several adjournments were granted and the learned single Judge, therefore, ultimately reversed the decree and dismissed the suit. The judgment is reported in AIR 1977 Orissa 132, Pramilabala v. Rabindranath. This appeal has been carried by the husband against the said reversing decree.

4. Counsel for the appellant wanted leave of the Court to raise a question which had not been mooted in the first appeal, namely, that the appeal was not maintainable in this Court. Reliance is placed on a Bench decision of this Court in the case of Nrusingh Charan Nayak v. Smt. Hemant Kumari Nayak, 45 Cut LT 558 : (AIR 1978 Orissa 163), to support that plea. In the instant case the suit was valued at Rs. 10/- and the first appeal was given the same valuation. The decree being of the learned Subordinate Judge, the appeal, it is contended, should have been filed in the District Court and not in this Court as per the provisions of the Bengal, Agra and Assam Civil Courts Act. A Bench of this Court in that case indicated that (at p. 166 of AIR):

"Courts other than the principal Civil Court of original jurisdiction which by notification made under S. 3 (b) of the Hindu Marriage Act are conferred with jurisdiction to entertain proceedings under the Act are not 'District Court proper' and irrespective of valuation an appeal would not lie against decree of such Courts to the High Court;

The appellate forum has to be determined in accordance with the provisions of the Bengal, Agra and Assam Civil Courts Act. Where the dispute is valued up to Rs. 5,000/-, the appeal would lie to the District Judge when the impugned decree is of a Court other than the principal Civil Court of original jurisdiction....."

In view of what has been stated by this Court in that case, undoubtedly the appeal in the instant case against the decree of the learned Subordinate Judge should have been laid before the District Court But such an objection having not been raised and the present appellant having allowed the appeal to be heard by the learned single Judge, we do not think it

would be appropriate to vacate the decree of the learned single Judge on that lone ground. We would like to point out that in the memorandum of letters patent appeal no such contention has been raised and there is force in the contention of the counsel for the respondent that the learned single Judge was not a Court having no jurisdiction and the decree rendered in the first appeal cannot be held to be a nullity. We would not, therefore, entertain the argument of counsel for the appellant that the appellate decree should be vacated on the ground that the first appeal did not lie to this Court.

5. There is clear evidence that appellant's mother was of a nagging type and she was in the habit of hurling abuses in filthy language frequently. "Cruelty" has not been defined in the Hindu Marriage Act. Lord Stowell in Evans v. Evans, (1790) 1 Hag Con 35 observed:

"What is Cruelty? In the present case it is hardly necessary for me to define it; because the facts here complained of are such as fall within the most restricted definition of cruelty; they affect not only the comfort, but they affect the health and even the life of the party. This, however, must be understood, that it is the duty of the Courts to keep the rule extremely strict. The causes must be grave and weighty, and such as to show an absolute impossibility that the duties of married life can be discharged. In a state of personal danger no duties can be discharged; for the duty of self-preservation must take place before the duties of marriage which are secondary both in commencement and obligation; but what falls short of this is with great caution to be admitted."

With approval, Lord Hobhouse pointed out in Russell v. Russell, 1897 AC 395:

"Cruelty has never been confined to cases of personal danger but has been judged by a wider and more reasonable criterion expressed by Lord Stowell, namely, whether or no conjugal duties have become impossible between the litigant husband and wife."

In the case of Ramesh Chandra Roy v. Smt. Nandita Roy, (1974) 1 Cut WR 593, one of us pointed out:

"What exactly would amount to cruelty in a given case would depend upon facts. But the usual test to be applied to a set of facts in a given case seems to be to find out whether the consortium has become absolutely impossible. When a man and a woman hitherto known or not known come to live together in a home as man and wife, a lot of adjustment becomes necessary. The two may have different aptitudes, varying likes and dislikes, opposite interests, conflicting hobbies, incompatible outlook and non-coalescing temper. In some cases the two minds may soon have fusion and in others there would soon grow indifference, neglect and aversion. Every unpalatable behaviour of the other spouse is not necessarily 'Cruelty', physical or mental, so as to afford a ground under S. 10 (1) of the Act. Most of the spouses — particularly in this country — have no occasion to prepare for marital life. Marriage comes as an event — like any other — in life. Nature provides a lot of assistance to begin with physical attraction, biological need, love, etc. Sometimes, however, parties to a marriage soon forget that married life is a joint adventure and they are not prepared to 'bear and forbear', differences occur and if they are not resolved amicably, they give rise to misunderstandings, and, if either spouse lacks the force of character and the art of tact and patience, the misunderstandings aggravate, and occasionally aggravate to such an extent that the parties begin to feel hostile to each other. Their problems are converted from molehills into mountains. What was hitherto being yearningly looked for as a manifestation of love and overture now appears to be a challenge, a humiliating attack and an act of mental or physical torture. The relationship between the spouses is indeed very tender and has to be nourished with care, attention, love, understanding and mutual respect."

Ordinarily every Court is expected to uphold the institution of marriage and since the wife is bound to live in the consortium of the husband during the subsistence of marriage, the wife should be asked to return to the husband. In the instant case, however, as has been found by the learned single Judge, the nagging was of habitual type and was too frequent to be tolerated. To live under constant dissatisfaction and mental torture is bound to give rise to a situation where it would become difficult to satisfy the test indicated by Lord Stowell in the decision referred to above. In the peculiar facts of this case, we are not in a position to take a view different from what has appealed to our learned brother.

We would accordingly affirm the decree of the learned single Judge that the plaintiff is not entitled to ask for restitution of conjugal rights.

6. Counsel for the appellant brought before us a changed circumstance, namely, that the appellant who is a teacher has now been transferred to a school of Raj Nilgiri located at a short distance from the family home. It is submitted that the husband can now stay on permanent basis at home and go to the school in the morning and return in the evening after working hours. It is again stated that the appellant's parents have become old and they require nursing and constant attention. The appellant, therefore, is not in a position to abandon them and stay away in a different establishment along with his wife. We, however, do not think, these are circumstances which have brought about such a change that would justify the variation of the judgment of the learned single Judge. We would, however, like to point out that there has been a finding that the husband is not guilty of any act of cruelty and, therefore, as and when the huband is in a position to create a situation where he can live separately from his parents — whether it is at the family home or at some other place, he is entitled to renew his prayer for restitution of conjugal rights unaffected by the present refusal to give him a decree.

7. The appeal fails and is dismissed. We direct that parties do bear their own costs throughout.

B. K. RAY, J.:— I agree.

Appeal dismissed.

AIR 1979 ORISSA 88

R. N. MISRA, J.

M/s. Tata Iron and Steel Co. Ltd., Appellant v. M/s. Rajrishi Mineral Industries, Respondent.

Misc. Appeal Nos. 280 and 281 of 1977, D/- 5-7-1978.*

(A) Arbitration Act (10 of 1940), S. 20 — Appointment of arbitrator under — Application for — Maintainability.

Unless there can be an existing dispute, no application for appointment of arbitrator under S. 20 is maintainable. (Para 5)

Where the agreement between the firm and the company for which the former was extracting minerals contained an escalation clause and the Company had turned down the demand of the firm under that clause and the Company did nothing but to give a reply after three months to the renewed demand after the expiry of the contract for extraction and then did nothing for six weeks, the Court would be justified, on an application for appointment of arbitrator by the firm under S. 20, in holding that the firm was entitled to proceed on the footing that the Company had no intention of mutually settling the claim under the escalation clause. (Para 6)

Anno: AIR Manual (3rd Edn.), Arbitration Act, S. 20, N. 1.

(B) Arbitration Act (10 of 1940), Section 8 (1) (b) — Filling up of vacancy in the post of arbitrator — Jurisdiction of Court as to.

Unless a negative intention is indicated in the arbitration clause regarding the filling of the vacany in the post of arbitrator, S. 8 (1) (b) would be applicable and under the provisions of S. 20 (4) which confers power on the Court to appoint arbitrator or umpire, jurisdiction would be vested in the court to make the appointment and thus fill up the vacancy. AIR 1971 SC 2298, Foll. (Para 8)

Anno: AIR Manual (3rd Edn.), Arbitration Act, S. 8, N. 4.

Cases Referred:	Chronological Paras
AIR 1976 SC 2257	7
AIR 1971 SC 2298	8
(1971) 1 Cut WR 521	8
AIR 1964 Pat 468	8
AIR 1948 Cal 230	8

S. Patnaik, A. S. Naidu and S. Mohanti, for Appellant; G. Rath, R. K. Rath and N. C. Panigrahi, for Respondent.

JUDGMENT:— These two appeals under S. 39 (1) (iv) of the Arbitration Act of 1940 (hereinafter referred to as the 'Act') are directed against two separate decisions of the learned Subordinate Judge of Cuttack allowing the applications under S. 20 of the Act and directing the defendant-appellant to file the Arbitration Agreement for a reference of the disputes to arbitration.

2. Messrs. Tata Iron & Steel Co. Ltd. (hereinafter referred to as the 'Company') are holders of a chromite mine located at Sukinda and a dolomite mine in the district of Sundergarh — both within the State of Orissa. Plaintiff-respon-

*(From order of R. S. P. Patnaik, Sub-J., Cuttack, D/- 15-11-1977.)

dent in these appeals is a firm of contractors registered under the Indian Partnership Act of 1932 (hereinafter referred to as the 'Firm'). On 8-2-1969, an agreement was entered into between the Company and the Firm (Ext. H) initially for a period of 13 months from February, 1969, but the same had been extended up to Feb., 1973, whereunder, the Firm undertook to do mining, sorting, cleaning, trimming, blending, transport and stacking of chromite from the chromite mine at Sukinda and to transport the same to rail-head. A similar agreement was entered into on 1-11-1969 between the parties whereunder the Firm undertook to perform similar acts in the dolomite mine of the Company located within the district of Sundergarh. Initially the contract was for one year, but was extended on the same terms and conditions up to February, 1973. Both these agreements contain an escalation clause and an arbitration clause on similar terms. The Firm pressed for enhancement of the rates under the escalation clause in the two contracts in Dec., 1972, but it was turned down on 9-2-1973 (Ext. 1) and the Firm was informed:

"With reference to your letter No. RMI/BSP/72/659 dated 5th Dec., 1972, the question of increasing your rates under the escalation clause for your work at Gomardih and Sukinda mines was examined by the Accounts Division.

2. It has been pointed out to you earlier that—

(a) the agreements for your work at Sukinda and Gomardih were entered into by our Company with you from 1-2-1969 and 1-1-1970 respectively and have since been renewed on annual basis. Since renewals of the agreements have been made 'under the same terms and conditions of the original Agreement', a revision of rate cannot now be considered;

(b) moreover, none of the cost increases have arisen on account of the factors specified in the 'escalation clause' contained in the agreements.

3. In the circumstances, we regret our inability to accede to your request for any increase over the prevailing rates."

On 20th January, 1975, the Firm renewed its claim reiterating that the claims were genuine and appeared to have been not entertained in the absence of supporting materials. For the chromite contract, the Firm claimed Rs. 5,98,671.66 and for the other, claimed Rs. 12,35,562.11. On 16-4-1975, the Company intimated the Firm:

".....We have looked into the matter and are prepared to pay to you the amount of Rs. 3,01,554.80 as per settlement arrived at, in full and final settlement of your claim under the mining contracts at Gomardih and Sukinda but without prejudice to your claim for escalation which has since been received by us under cover of your letter..... dated 20-1-1975. Kindly note that no interest as claimed by you in your letter No. .....of 13-2-1975 will be paid. On receipt of your acceptance, we shall let you have our cheque for the aforesaid amount of Rs. 3,01,554.80 p. The escalation claim is receiving our attention and will be dealt with on its own merits."

After waiting for about six weeks, the Firm sent a notice on 2nd June, 1975, saying:

"Your are fully aware that certain disputes have arisen regarding our claims of Escalation and the outstanding payments and the interest accrued thereon, as advised to you in our various letters. As these have not been mutually settled, therefore, these are to be determined by an arbitrator in terms of the arbitration clause 23 of the contract.

It is learnt that you have made certain changes in your Raw Materials Division and as a result of which the arbitrator named in the arbitration clause of the contract by virtue of his designation in office is incapable of functioning as an arbitrator. As arbitration clause still subsists, therefore, in order to determine our claims you are called upon to please concur in the appointment of Shri B. D. Dhawan,..... as sole arbitrator and to join in the reference of the disputes to him for adjudication within a period of fifteen days from the receipt of this notice....."

The Company in spite of receipt of the aforesaid communication, sent no reply. The Firm thereupon filed two separate applications under S. 20 of the Act: one in the court of the Subordinate Judge, Jaipur, in regard to the dispute relating to the chromite contract on 26-6-1975 which came to be registered as Title Suit No. 17 of 1975 and the other in the court of the Subordinate Judge at Sundergarh on 28-6-1975 which came to be registered as Title Suit No. 14 of 1975. This Court directed both the disputes to be

transferred to the court of Subordinate Judge, Cuttack and that is how both the cases came to be dealt with by the learned Subordinate Judge at Cuttack.

3. The Company resisted the applications contending that there was no dispute existing at the time the two applications were made and keeping the terms of the arbitration clause in view, there could be no cause of action for making the applications. It was further pointed out that there was no merit in the Firm's stand that the named Arbitrator was not available and in case he was not available, the arbitration clause became inoperative and since parties did not intend to fill up the vacancy, no arbitrator could be appointed.

4. In view of these defences, the learned Subordinate Judge framed identical issues in the two cases being:

1. Is there a dispute between the parties to be adjudicated through arbitration as per the arbitration clause in the agreement?

2. Is the named arbitrator available to arbitrate the disputes?

3. Has the court authority to appoint an arbitrator to adjudicate the disputes between the parties?

Before the learned Subordinate Judge, both parties produced some documents and the Company examined a witness. On each point, the learned Subordinate Judge found against the Company and allowed the applications. Therefore, the Company has come in appeal against the two decrees drawn up in the two suits. Miscellaneous Appeal No. 280 of 1977 relates to the dispute arising out of the chromite contract while the other is from the dolomite contract. As parties are the same and common questions arise and counsel chose to advance one set of arguments, both the appeals are being disposed of by a common judgment.

5. On the arguments advanced before me, three questions arise for determination:

(i) Was there an existing dispute on the date the respective applications were made?

(ii) Is the named contractor available? and

(iii) In case he is not, is the court entitled to appoint another in the vacancy?

The arbitration clause in the two contracts being common is to the following effect:

"Any question, dispute or difference that shall arise in regard to the Agreement, which is not settled mutually between the parties hereto, shall be referred to arbitration of the Divisional Manager (Raw Materials Division) of the Company. The arbitration shall be governed by the provisions of the Arbitration Act 1940."

There is no dispute at the Bar that unless there be an existing dispute, no application under S. 20 of the Act is maintainable. On the facts of the case, Mr. Mohanti for the Company contends that there was no dispute while Mr. Rath for the Firm takes a different stand and argues that there were existing disputes. This, therefore, becomes a factual dispute and has to be determined on the basis of the facts on record.

6. As already noted, both the contracts were in force up to Feb., 1973. In Dec., 1972, the Firm had represented for escalation and on the 9th of Feb., 1973 the Company had refused to entertain such a claim. After the contracts were over and the relationship of principal and agent between the parties had terminated, the Firm renewed its claim under the escalation clause. Almost three months after the claim was laid, the Company indicated to the Firm that the claim was receiving attention (the entire letter has already been extracted). The Firm waited for full six weeks and on 2-6-1975, issued the notice relating to appointment of arbitrator. It is not the stand of the Company that this notice was not duly received by it. There was, however, no response. As already noted, on the 26th and the 28th respectively of the month of June, 1975, the two applications were filed in the respective courts.

Mr. Mohanti for the Company contends that the claims were huge and required investigation and, therefore, until there was a definite rejection of the claim by the Company, the Firm should not have rushed to the court. Relying on the terms of the arbitration clause, Mr. Mohanti contends that the referable disputes are those which are not settled mutually between the parties and when the claims raised by the Firm were under consideration of the Company, the claims could not be treated to be disputes. The submission seems to be that until there is a failure on the part of the Company to make a reference of an existing dispute, the Court does not come into the picture for appointing an arbitrator. Mr. Rath, however, emphasises on two features. The Company had almost three month's time i. e. from 20th of Jan.

till 16th of April of 1975 when it sent its reply that the claim was receiving attention. Six weeks' time intervened between the Company's reply and the Firm's notice. In case the time thus taken was not sufficient to examine the claims and the Company was anxious to settle the claims but wanted further time for scrutiny of the claims, nothing stood in its way of informing the Firm that its claims were still under examination and as no dispute had arisen within the arbitration clause, the Firm should not proceed to the court. The contention of Mr. Rath is cogent and reasonable and the indifferent silence on the part of the Company has been rightly utilised by the learned Subordinate Judge against it. In the setting of things, particularly when the contracts had terminated by efflux of time and the claim had been laid for over five months and no definite communication was being given as to whether the same was going to be accepted and even though a notice had been given, no reply was being sent, I do not think, the learned Subordinate Judge was wrong in holding that the Firm was entitled to proceed on the footing that the Company had no intention of mutually settling the claim.

Two other arguments of Mr. Rath are also in support of this proposition, namely (i) The Company had earlier turned down the same claim and (ii) though the case was pending for more than two years in the court below, at no stage the Company made an attempt to tell the trial Court that it was going to negotiate the differences and, therefore, no arbitration was necessary. In fact, in the written statement in the present case, the Company again denied the claim. I find no justification to take a different view from the learned Subordinate Judge's conclusion. The first point, therefore, be determined against the Company and in favour of the Firm.

7. Under the arbitration clause, the dispute was to be referred to the named arbitrator — the Divisional Manager (Raw Materials Division) of the Company. On 11th of January 1972, as per Ext. E, the Divisional Manager came to be re-designated as Director, Raw Materials. On 5th of Oct. 1973 (Ext. F), the post of Director, Raw Materials was abolished and one Mr. S. S. Manjrekar, then General Superintendent (Mines), was redesignated as Divisional Manager (Mines). In the written statement, the Company had contended:

".....In any event, the functions of Divisional Manager (Raw Material Division) have now been taken over after the abolition of the office of the Divisional Manager (Raw Material Division) by the Divisional Manager (Mines) of the Defendant....."

The Company's witness stated in his evidence-in-chief:

"In the year 1969 there was a post designated as 'Divisional Manager (Raw Materials)'. He was in-charge of technical operations, production, costs and other administrative matters. The Divisional Manager (Mines) is in over-all charge of the Mines for its entire operation. Sri S. S. Manjrekar is the Divisional Manager (Mines) now....."

In cross-examination, this witness stated:

".....It is true that on the date of this contract there was a post of Divisional Manager (Raw Material Division) which is not there now. This post has undergone a change by re-designating as Director, Raw Materials and in respect of Mines, it is Divisional Manager (Mines). The functions of the Divisional Manager (Raw Materials Division) have been divided amongst Director of Raw Materials and Divisional Manager (Mines) redesignated as such. The Director of Raw Materials assumes charge of the post of Divnl. Manager (Raw Material Division) by change of designation....."

In view of the aforesaid evidence and with reference to the two office orders already referred to, there is no doubt that the named arbitrator by designation no more exists. Here is a case where a person had not been named but a holder of an office had been nominated arbitrator by common consent. The office has now been so divided that it is not possible to identify some other existing office to be the substitute of the office the holder of which by consent of parties had been appointed arbitrator. In this connection, the learned counsel for both sides had placed reliance on the decision of the Supreme Court in the case of Union of India v. D. N. Revri & Co., AIR 1976 SC 2257, wherein the partnership firm (respondent in the appeal) had entered into a contract with the Union of India for the supply of 30,000 tons of East German sugar under certain terms and the agreement had an arbitration clause to the following effect (at p. 2259):—

"All questions, disputes or differences whatsoever which may at any time arise between the parties to the agreement touching the agreement or the subject-matter thereof, arising out of or in relation thereto and whether as to construction or otherwise shall be referred to a single arbitrator for decision. Such a single arbitrator shall be nominated by the Secretary to the Government of India in the Ministry of Food and Agriculture in his absolute discretion and the decision of such arbitrator shall be final and binding upon the parties....."

On 27th of February, 1958, the Secretary, Department of Food in the Ministry of Food and Agriculture nominated an arbitrator. The said arbitrator gave an award and the Union of India proceeded to take steps to make the award a rule of the court. The respondent resisted the application and asked for setting aside of the award on two grounds, one of which was that the arbitrator had not been validly appointed, inasmuch as the Ministry of Food and Agriculture envisaged in the arbitration clause had been bifurcated and two separate Ministries had come into existence by the Presidential Order from 19th of Oct., 1956, one being of Food and the other of Agriculture. Even after reintegration of the Ministries of Food and Agriculture into one single Ministry, the arbitration agreement could not be given effect to since there came into existence two Secretaries in the Ministry. On the facts of the case and taking into account the conduct of the respondent in participating before the arbitrator, the court came to the conclusion that the appointment of the arbitrator was not open to attack. I am inclined to think that the ratio of the decision has no application to the case in hand.

On the facts already discussed, the learned Subordinate Judge seems to have come to the correct conclusion on this aspect of the matter that the named arbitrator is not available and thus there has been a vacancy in the office of arbitrator. The second aspect of the matter must also be decided against the appellant.

8. The last point is on the basis of the contention advanced by learned counsel for the appellant that parties have not intended to fill up the vacancy and, therefore, it is not for the court to make an appointment now and the arbitration clause must be held to have become unenforceable. The relevant part of S. 8 of the Act provides :—

"(1) In any of the following cases :—

(a) .....

(b) if any appointed arbitrator or umpire neglects or refuses to act, or is incapable of acting, or dies, and the arbitration agreement does not show that it was intended that the vacancy should not be supplied, and the parties or the arbitrators, as the case may be, do not supply the vacancy; or

(c) .....

any party may serve the other parties or the arbitrators as the case may be, with a written notice to concur in the appointment or appointments or in supplying the vacancy.

(2) ....."

Examining this aspect of the matter, S. R. Das, J., as the learned Judge then was, in the case of Governor-General in Council v. Associated Live-stock Farm (India) Ltd., AIR 1948 Cal 230, observed :—

".....I am inclined to agree with Mr. Chaudhuri. I do not find anything in the arbitration clause suggesting that the parties agreed that any vacancy in the office of arbitrator should not be filled up. In the absence of any such agreement the vacancy can be easily supplied and there is no reason to think that the arbitration will be infructuous at all. If the particular officer sanctioning the contracts refuses to act or is incapable of doing so by reason of his absence or otherwise there are provisions in the Indian Arbitration Act for the appointment of another arbitrator in his place and the arbitrator so appointed will be quite competent to proceed with the arbitration....."

This principle was followed by a Division Bench of the Patna High Court in the case of Hindustan Steel Ltd. v. Engineers and Contractors, AIR 1964 Pat 468 and by the learned Chief Justice of this Court in the case of State of Orissa v. Modern Construction Co., (1971) 1 Cut WR 521. The dictum of the Calcutta case was specifically approved by the Supreme Court in the case of Prabhat General Agencies etc. v. Union of India, AIR 1971 SC 2298. There it was pointed out (at p. 2300) :—

"Section 20 is merely a machinery provision. The substantive rights of the parties are found in Sec. 8 (1) (b). Before S. 8 (1) (b) can come into operation it must be shown that (1) there is an

agreement between the parties to refer the dispute to arbitration; (2) that they must have appointed an arbitrator or arbitrators or umpire to resolve their dispute; (3) any one or more of those arbitrator's or umpire must have neglected or refused to act or is incapable of acting or has died; (4) the arbitration agreement must not show that it was intended that the vacancy should not be filled and (5) the parties or the arbitrators as the case may be had not supplied the vacancy."

The Court further pointed out :—

".....Therefore the only question is whether the agreement read as a whole shows either explicitly or implicitly that the parties intended that the vacancy should not be supplied. It may be noted that the language of the provision is not that the parties intended to supply the vacancy but on the other hand it is that the parties did not intend to supply the vacancy. In other words if the agreement is silent as regards supplying the vacancy, the law presumes that the parties intended to supply the vacancy. To take the case out of S. 8 (1) (b) what is required is not the intention of the parties to supply the vacancy but their intention not to supply the vacancy....."

Thus, unless a negative intention is indicated, S. 8 (1) (b) of the Act would be applicable and under the provisions of S. 20 (4) of the Act, which confers power on the court to appoint arbitrator or umpire, jurisdiction would be vested in the court to make the appointment and thus fill up the vacancy.

Appellant's counsel has not been able to show the negative intention of the arbitration clause. Appellant's counsel had contended that in nominating the named arbitrator parties had taken into consideration the fact that the named arbitrator was associated with execution of the work of a complicated type as was the subject-matter of the agreements and that was a feature which could be taken into consideration as implicitly indicating the intention of parties not to fill up the vacancy by replacing him. There is no material to support this submission, nor is there any material to show that the execution of the contract is of such a type that apart from the named arbitrator, no other person could be competent to handle the dispute successfully. In the instant case, therefore the court had jurisdiction to make the appointment under sub-sec. (4) of S. 20 of the Act. The third point must, therefore, also be decided against the appellant.

9. All the contentions advanced on behalf of the appellant have failed and, therefore, both the appeals are dismissed and the orders of the learned Subordinate Judge are affirmed. I would call upon the parties to bear their own costs in this Court.

Appeals dismissed.

AIR 1979 ORISSA 93

N. K. DAS, J.

Dhrubajyoti Chatterjee, Appellant v. Dila Mukherjee, Respondent.

First Appeal No. 115 of 1977, D/- 26-7-1978.*

Special Marriage Act (43 of 1954), Section 27 (1) (b) — Divorce — Desertion — What amounts to — Fact of separation and intention to bring cohabitation permanently to an end both essential — Wife leaving her house for father's place and not returning for more than 2 years — Sudden appearance of wife with her kins in husband's house in his absence — Disappearance before return of husband — No intention to live with husband made out — Husband entitled to divorce. Case law discussed. (Para 8)

Anno: AIR Manual (3rd Edn.), Sp. Marriage Act, S. 27, N. 1.

Cases Referred : Chronological	Paras
AIR 1975 Andh Pra 239	7
AIR 1973 Punj & Har 134	7
AIR 1970 Cal 266	5
AIR 1966 Madh Pra 212	7
AIR 1965 Andh Pra 407	6
AIR 1964 SC 40	5
AIR 1964 Punj 28	5, 7
AIR 1957 SC 176	5
(1930) P 72 : 142 LT 311, G. v. G.	5, 6
(1904) P 382 : 91 LT 360, Kay v. Kay	5

R. C. Patnaik and P. K. Misra, for Appellant.

JUDGMENT:— Appellant is the husband of the respondent. He filed the suit for dissolution of his marriage with the defendant and for custody of the child born out of their wedlock, under S. 27 of the Special Marriage Act.

2. The case of the plaintiff is that his marriage with the respondent took place

*(Against order of J. N. Acharya, Dist. J., Puri, D/- 14-4-1977).

on 21-2-69 according to the prevailing custom in their community. The consummation of marriage took place at Puri where the residence of the appellant is situated. On the 8th day of their marriage, the respondent and the appellant went to Chandannagar (father's place of the respondent) but the respondent did not return with the appellant on the plea that she would continue her studies. She remained there till July, 1969 but did not resume her studies. After a lot of persuasions the respondent returned and stayed with the appellant till 22-5-70 at Bhobaneswar. During her stay at Bhubaneswar the respondent conceived and on the third month of pregnancy she left for Chandannagar where she gave birth to a daughter on 3-12-70. She did not, however, return to the appellant thereafter though the appellant wrote several letters to her. The appellant also went several times to Chandannagar to persuade the respondent to resume normal life, but he was not allowed any interview. After 22-5-70 the parties have never any cohabitation. The appellant suffered from asthma in 1972, but the respondent did not care to come and see him. In 1974, when the father of the appellant was seriously ill and wanted to see his granddaughter, the appellant wrote to the respondent to come with the daughter, but there was no response. In Jan., 1976 the respondent came with some of her friends and relations to Puri and stayed in the house of the appellant without the knowledge of appellant who was then at Bhubaneswar, and on the day the appellant reached Puri, the respondent left that place before his arrival. The daughter is reported to have been suffering from asthma and is not being looked after well. Accordingly, the appellant prays for dissolution of the marriage and to be in custody of the child.

The respondent did not contest the suit and has not appeared in this Court.

3. The appellant has examined himself and has testified the allegations made by him. He has also proved one letter (Ext. 1) sent by the respondent to him. The learned District Judge has held that it is not a case of desertion without any cause and that the appellant has not proved that there was desertion without any cause for a period of at least three years before filing of the suit.

4. From the statements on oath made by the appellant as well as from the letter Ext. 1, it has been clearly established that after May, 1970, the respondent has all along been living at Chandannagar in West Bengal and in spite of several attempts by the appellant, no interview was granted to him, even though he went to Chandannagar several times. From Ext. 1 it also appears that the respondent has been insisting that the appellant should give up his job at Bhubaneswar and take up some job at Calcutta, in which case she may come and join him. The sudden appearance of the respondent at Puri for some days with her friends and relations without the knowledge of the appellant and her going away from Puri before arrival of the appellant there is sufficient indication about the intention of the respondent not to live with the appellant.

5. Section 27 of the Special Marriage Act provides that there can be divorce if the hunband or the wife has deserted the other for a continuous period of not less than two years immediately preceding the presentation of the petition.

The question of desertion came up for consideration in the case of Bipinchandra Jaisinghbai Shah v. Prabhavati, AIR 1957 SC 176. It has been held therein (at p. 183):

"For the offence of desertion, so far as the deserting spouse is concerned, two essential conditions must be there, namely, (1) the factum of separation, and (2) the intention to bring cohabitation permanently to an end (animus deserendi). Similarly two elements are essential so far as the deserted spouse is concerned; (1) the absence of consent, and (2) absence of conduct giving reasonable cause to the spouse leaving the matrimonial home to form the necessary intention aforesaid. Desertion is a matter of inference to be drawn from the facts and circumstances of each case. The inference may be drawn from certain facts which may not in another case be capable of leading to the same inference; that is to say, the facts have to be viewed as to the purpose which is revealed by those acts or by conduct and expression of intention, both anterior and subsequent to the actual acts of separation. If, in fact there has been a separation, the essential question always is whether that act could be attributable to an animus deserendi. The offence of desertion commences when the fact of separation and the animus deserendi co-

exist. But it is not necessary that they should commence at the same time. The de facto separation may have commenced without the necessary animus or it may be that the separation and the animus deserendi coincide in point of time; for example, when the separating spouse abandons the marital home with the intension, express or implied, of bringing cohabitation permanently to a close."
This has also been reiterated in a subsequent decision of the Supreme Court in the case of Lachman Utamchand Kirpalani v. Meena, AIR 1964 SC 40. The Calcutta High Court in the case of Jyotish Chandra Guha v. Smt. Meera Guha, AIR 1970 Cal 266, has also followed the principles laid down by the Supreme Court in AIR 1957 SC 176.

Relying on the decisions reported in Kay v. Kay, (1904) P. 382 and G. v. G. (1930) p. 72, it has been held by a Single Bench in the case of Smt. Tirath Kaur v. Kirpal Singh, AIR 1964 Punj 28, that where the wife refuses to resign her job which compels her to live away from her husband and join him it cannot be said that she has not deserted him or has not withdrawn from his society without a reasonable cause.

6. In G. v. G., (1930) p. 72 (referred to above), it has been held that a husband is not to be taken as having deserted his wife without reasonable cause because his work in life compels him to live away from her. So also, relying on several decisions of the Calcutta High Court and a decision of the Madras High Court, it has been held in the case of Vuyyuru Pothuraju v. Vuyyuru Radha, AIR 1965 Andh Pra 407, that it is the bounden duty of the wife to live with her husband wherever he may choose to reside. Courts cannot deprive him of his right, except under special circumstances which absolve the wife from that duty. If by an agreement entered into between the parties prior to the marriage they have agreed to live separately, that does not affect the right of the husband.

7. A Division Bench of the Madhya Pradesh High Court in the case of Gaya Prasad v. Mst. Bhagwati, AIR 1966 Madh Pra 212, has also relied on the decision reported in AIR 1964 Punj 28 (referred to above). That was a case of wife accepting service without the consent of the husband at a different place from husband's home, the latter calling upon her to leave service and live with him at his place and wife refusing to obey but requesting him to come and stay with her. It was held that the wife had withdrawn without reasonable excuse from husband's society. A Single Bench of the Punjab and Haryana High Court in the case of Smt. Surrinder Kaur v. Gurdeep Singh, AIR 1973 Punj and Har 134, has also relied on the decisions reported in AIR 1964 Punj 28 and AIR 1966 Madh Pra 212. A Division Bench of the Andhra Pradesh High Court in the case of Pillalimarri Vora Prasada Sarma v. Pillamarri Seshalakshmi, AIR 1975 Andh Pra 239, was considering a case where the wife insisted upon her continuing in service at a distant place away from her husband and it was held that the conduct of the wife amounted to withdrawing from the society of the husband without just and sufficient cause.

8. Considering the facts and circumstances of the case and in view of the consistent view of different High Courts as well as the Supreme Court, as discussed above, the conduct of the respondent amounts to withdrawl from the appellant without any reasonable cause and the respondent has not come to join the appellant in spite of several attempts by the latter. Her sudden appearance with friends and relations at Puri during the absence of the appellant and disappearance before arrival of the appellant at Puri cannot be construed to be an intention on her part to join the appellant. The requirements of S. 27 of the Special Marriage Act have been fulfilled and the findings of the learned District Judge are not sustainable. The appellant is entitled to decree for dissolution of marriage.

9. Admittedly, the child was born in 1970. She would be about eight years old by now. According to the provisions of S. 38 of the Special Marriage Act, the Court can make order for custody, maintenance and education of minor children at the time of passing of the decree. I am told by the learned counsel for the appellant that the appellant is now serving in the Utkal University at Vani Vihar and his present emolument amounts to Rs. 850/- and odd. In the circumstances, it is desirable that the appellant should make a regular payment for the maintenance and education of the daughter and the daughter should remain with her mother. Taking all the circumstances into consideration, I am of opinion that a payment of Rs. 100/- per month for the

maintenance and education of the child will be sufficient for the time being. Law provides that subsequently, on application, this can be modified by the Court.

10. In the result, the appeal is allowed. The decision of the learned Court below is set aside. O. S. No. 3 of 1976-I in the file of the District Judge, Puri is decreed. The marriage of the appellant with respondent stands dissolved. The appellant is to pay Rs. 100/- per month for the maintenance and education of the child to the respondent and the child will remain with the respondent. This payment will be subject to modification according to law. As there is no appearance on behalf of the respondent, I make no order as to costs.

Appeal allowed.

AIR 1979 ORISSA 96

N. K. DAS, J.

Rajkishore Prasad and others, Petitioners v. The State of Orissa and others, Opposite Parties.

Civil Revn. No. 531 of 1978, D/- 23-1-1979.*

Civil P. C. (5 of 1908), O. 11, R. 12 — Discovery of documents — Admissibility of documents in evidence not necessary — Documents which can throw some light on the matter in controversy — Petition for discovery allowed.

It is sufficient for discovery, if the document would be relevant for the purpose of throwing light on the matter in controversy. Every document which will throw any light on the case is a document relating to a matter in dispute in the proceedings, though it might not be admissible in evidence. In other words a document might be inadmissible in evidence, yet it may contain information which may either directly or indirectly enable the party seeking discovery either to advance his case or damage the adversary's case or which may lead to a trail of enquiry which may have either of these two consequences. Unless the party seeking discovery knows what are the documents in the possession or custody of the opposite party which would throw light upon the question in controversy, it is not possible for him to ask for discovery of specific documents.

(Para 4)

The plaintiffs' stand from the very start of filing of the plaint is that not only the house of the plaintiffs but also other structures standing on the land were forcibly demolished on one day taking advantage of the declaration of Emergency and documents have been manufactured about proceedings under the Orissa Prevention of Land Encroachment Act and the plaintiffs have been consistently pressing the matter.

(Para 5)

The documents may be admissible or may not be admissible in evidence, but if the documents can throw some light to show that the stand of the plaintiffs from the very beginning that the documents have been made relating to Encroachment cases and the demolition of houses was done on the same day in the locality and the case of the plaintiffs is one of them, undoubtedly the documents will throw some light on the matter in controversy. (Para 6)

Held that the petition for discovery of documents made by the plaintiffs should be allowed. AIR 1972 SC 2379, (1882) 11 QBD 55 and (1882) 20 Ch D 519; Foll. (1972) 1 Cut WR 175 and AIR 1957 Punj 14, Disting. (Para 8)

Anno: AIR Comm. C. P. C. (9th Edition), O. 11, R. 12, N. 1.

Cases Referred : Chronological Paras

AIR 1972 SC 2379 4
(1972) 1 Cut WR 175 7
AIR 1957 Punj 14 7
(1882) 11 QBD 55 : 48 LT 22, Compagnie Financiere Et. Commerciale Dy. Pacifique v. Peruvian Guano Co. 4
(1882) 20 Ch D 519 : 46 LT 180, Att. Gen. v. Gaskill 4

P. C. Misra and S. P. Misra, for Petitioners; D. P. Mohapatra, B. Rath and Addl. Standing Counsel, for Opposite Parties.

ORDER :— Plaintiffs are petitioners against an order rejecting their petition filed under Order 11, Rule 12 of the Civil P. C. Plaintiffs filed a suit for permanent injunction restraining the defendants from interfering with their possession and not to come over their land or change the status quo thereof. The dispute relates to a portion of a plot belonging to the Jagannath Road Fund Trust. It is contended by the plaintiffs in the plaint that their father was a lessee in respect of the property in

*(From order of D. K. Sahu, Munsiff, First Court, Cuttack, D/- 13-9-1978).

question and had erected a house thereon. After expiry of the lease period, at the instance of the Jagannath Road Fund, demand was made for depositing money for renewal of the lease and money was accordingly deposited. Though the formal lease deed has not yet been executed, the plaintiffs have been in possession of the land with the present structures standing thereon. During the period of Emergency, all of a sudden some officers of the State Government and of the Municipality along with a a police force came with heavy machineries on 30-6-1975 and without any prior notice they demolished the permanent construction standing on the land of the plaintiffs in spite of protest and the occupants were threatened to be detained under the Maintenance of Internal Security Act and the Defence of India Rules. It has been averred in para 10 of the plaint that similar other constructions in the locality were also pulled down by bulldozers and other heavy machineries creating a panic in the minds of the public, in particular the inhabitants of the locality, so much so that none ventured to seek redress against such demolition. The demolition work was carried on rapidly and promptly and there was hardly any time for the public to seek redress against demolition. After demolition was complete in the locality, several writ applications were filed in the High Court challenging the action of the authorities. Plaintiff No. 1 also filed O. J. C. No. 1528 of 1975 in the High Court apprehending further demolition and order of injunction was issued by the High Court restraining the authorities from carrying on further demolition or interfering with the peaceful possession of the plaintiffs. In the counter-affidavits to the writ application, a false plea was taken that the demolition was made under the provisions of the Orissa Prevention of Land Encroachment Act, but as a matter of fact no proceeding was started against the plaintiffs and in fact records were manufactured, fabricated and forged to cover-up the high-handed actions. It is alleged that all the manipulations and fabrications of papers were done for such demolition. The plaintiffs are in possession of the property in question and there is further threatening for their dispossession and, as such, the present suit has been filed. A sketch-map has been appended to the plaint to show the residential area of the plaintiffs and the land for which the suit has been filed. In para 14 of the written statement of the State Government, it has been averred that Encroachment case under the Orissa Prevention of Land Encroachment Act was filed against the plaintiffs and personal contact and proclamation through loudspeaker were made before actual eviction. Proceedings were started against the plaintiffs and orders were passed in accordance with law with the knowledge of the plaintiffs. In para 15, it is only stated that the allegations in paras 9, 10 and 11 of the plaint are not admitted and the plaintiffs are put to strict proof of the same.

A petition for ad interim injunction was filed by the plaintiffs and the present matter arises out of that injunction matter which has been registered as Misc. Case No. 28 of 1978.

2. In that proceeding, it appears from Order No. 17 dated 28-4-78 of the court below that the plaintiffs wanted to cross-examine the persons who have sworn affidavits on behalf of opposite parties Nos. 5 and 6. Counsel for opposite party No. 6 agreed to file the documents in his possession on which the affidavits are based. The trial court rejected the petition of the plaintiffs for cross-examination of the deponents, but passed orders that in the interest of justice and for a just decision of the case, the parties should produce all the documents on which they rely. The case was posted to 1-5-78 and the parties were directed to file documents on which they relied for the case. On 1-5-78, a petition was filed by the plaintiffs to the effect that opposite party No. 5 submitted at the time of argument on 28-4-78 that it has no document in its possession. Opposite party No. 6 agreed to file documents. It is further contended by the petitioners that the allegations by the opposite parties that the plaintiffs have been dispossessed and possession has been delivered by the Jagannath Road Fund to the Greater Cuttack Improvement Trust on 14-10-77, are false and if any document of such delivery is there, such document has been manipulated and created. The provisions of the Orissa Prevention of Land Encroachment Act are not applicable to the case and it is necessary that opposite parties 1 to 3 should be directed to produce all the records of the alleged proceeding taken under the Orissa Prevention of

Land Encroachment Act in respect of the disputed land as well as other lands of the Jagannath Road Fund situated in the locality on which structures were demolished on the same day. The prayer in the petition was that the opposite parties be directed to produce all the records of the alleged proceeding taken under the Orissa Prevention of Land Encroachment Act in respect of the disputed land as well as other lands of the Jagannath Road Fund situated in the locality, demolition of structures over which was done on the same day. From order No. 19 dated 3-5-78 of the court below, it appears that the Government Pleader submitted that the documents were filed in High Court in the writ petition and he would file the same on the following day. Accordingly, the case was adjourned to the following day and it was ordered by the court that if the documents would not be filed, then necessary inference would be drawn according to law and the Misc. Case would be disposed of on merits. On 4-5-78, the plaintiffs filed Hazira of witnesses and wanted to examine them, but the court rejected the prayer and ordered that enquiry of this petition being of a summary nature, there was no question of examination of witnesses and parties were directed to file affidavits in support of their case. Affidavits were accordingly filed by the respective parties. On 17-8-78, a petition was filed by the plaintiffs that on 4-5-78 the Government Pleader produced certain documents without indicating as to which of the opposite party was producing the same. It has been urged in the plaint that not only the house of the plaintiffs but also that of twenty-five others were demolished on the same day in that locality and papers have been manufactured for showing Land Encroachment Cases and service of notices on all persons whose houses have been demolished on that very day. The prayer in the petition was to direct the opposite parties to make discovery of particulars, i. e. number of the cases started under the Orissa Prevention of Land Encroachment Act in respect of the Jagannath Road Fund lands situated in mouza Badajobra on which demolition of structures was effected on 20-6-75; records relating to service of notices; dates of hearing and dates of final orders etc. This petition was rejected by the trial court on the ground that the enquiry was of a summary nature as the question for determination was whether the petitioners have got a prima facie case or otherwise and the scope of enquiry being limited, there was no question to see how many cases under the Land Encroachment Act were instituted by Government against the people of the said locality and what orders were passed in those cases and, as such, the discovery sought for was not in conformity with the question for determination in the case. It was further held that discovery of the aforesaid documents was not necessary for a fair disposal of the petition. As against this order, the present revision has been filed.

3. It is contended by the learned counsel for the petitioners that it has been consistently averred by the petitioners that on one day several houses were demolished by heavy machineries, as a result of high-handed action of the authorities, who are opposite parties, and in the writ petition it was contended that Land Encroachment cases have been filed and in pursuance of the orders in those cases, demolitions were made to evict the occupants. In one petition, as has been stated above, the petitioners have asserted that twentyfive other houses were also demolished on that day in the locality, standing on the Jagannath Road Fund lands. It is asserted by the petitioners that if there is any such document of Land Encroachment cases, then the same has been manufactured. The learned counsel for the opposite parties contends that the records of the Land Encroachment cases relating to the petitioners have been produced in Court and the records in respect of other structures are not relevant for the purpose of the suit and, as such, those are not necessary for production.

4. Order 11, Rule 12 of the Civil P.C. provides:

"Any party may, without filing any affidavit, apply to the Court for an order directing any other party to any suit to make discovery on oath of the documents which are or have been in his possession or power, relating to any matter in question therein. On the hearing of such application the Court may either refuse or adjourn the same, if satisfied that such discovery is not necessary, or not necessary at that stage of the suit, or make such order, either generally or limited to certain classes of documents, as may, in its discretion, be

thought fit: Provided that discovery shall not be ordered when and so far as the Court shall be of opinion that it is not necessary either for disposing fairly of the suit or for saving costs."

While interpreting the above provision, in M. L. Sethi v. R. P. Kapur, AIR 1972 SC 2379, it has been held that the provisions of O. 11, R. 12, C. P. C. mean that it is sufficient if the documents would be relevant for the purpose of throwing light on the matter in controversy. Every document which will throw any light on the case is a document relating to a matter in dispute in the proceedings, though it might not be admissible in evidence. In other words, a document might be inadmissible in evidence, yet it may contain information which may either directly or indirectly enable the party seeking discovery either to advance his case or damage the adversary's case or which may lead to a trail of enquiry which may have either of these two consequences. It has also been held that generally speaking, a party is entitled to inspection of all documents which do not themselves constitute exclusively the other party's evidence of his case or title. If a party wants inspection of documents in the possession of the opposite party, he cannot inspect them unless the other party produces them. The party wanting inspection must, therefore, call upon the opposite party to produce the document. And how can a party do this unless he knows what documents are in the possession or power of the opposite party? In other words. unless the party seeking discovery knows what are the documents in the possession or custody of the opposite party which would throw light upon the question in controversy, how is it possible for him to ask for discovery of specific documents? The aforesaid principle has been elaborately discussed in Compagnie Financiere Et Commerciale Du Pacifique v. Peruvian Guano Company, (1882) 11 QBD 55. In that case, it has been observed that "a document relating to any matter in question in action" means that in order to determine whether certain documents are within that description, it is necessary to consider what are the questions in the action. The Court must look not only at the statement of claim of the plaintiff's case, but also at the statement of the defence and the defendant's case.

In Attorney-General v. Gaskill, (1882) 20 Ch D 519, Cotton, L. J. observed :

"The right to discovery remains the same, that is to say, a party has a right to interrogate with a view to obtaining an admission from his opponent of every thing which is material and relevant to the issue raised on the pleadings. It was said in argument that it is not discovery where the plaintiff himself already knows the fact. But that is a mere play on the word 'discovery'. Discovery is not limited to giving the plaintiff a knowledge of that which he does not know, but includes the getting an admission of anything which he is to prove on any issue which is raised between him and the defendant. To show that the pleadings have raised issues and that therefore interrogatories should not be allowed is another fallacy. The object of the pleadings is to ascertain what issues are. The object of the interrogatories is not to learn what the issues are but to see whether the party intelligently can obtain an admission from his opponent which makes the burden of proof easier than it otherwise would have been."

5. It is contended by the counsel for the opposite parties that the Supreme Court case relates to an enquiry as to pauperism and, as such, the documents sought for would throw light on the question of pauperism, and also in the case reported in the Queen's Bench Division, the question of correspondence relating to a contract which was impugned was concerned and so they were relevant to the fact to be considered and, therefore, it is submitted by the learned counsel that those decisions are not applicable to the present case. As I have already stated above, the definite case of the plaintiffs is that several houses standing on the Jagannath Road Fund lands were forcibly demolished on one day by the opposite parties taking advantage of the proclamation of Emergency and the plaintiffs' house was one of those houses. The plea taken by the opposite parties is that the demolition were made according to proceedings under the provisions of the Orissa Prevention of Land Encroachment Act. From the order sheet of the court below, it appears that the Govt. Pleader had undertaken to file the documents relating to the structures standing on the Jagannath Road Fund lands as prayed for by the petitioners. But, in fact, only the records relating to the petitioners' case were filed. From the prayer in the petition dated 1-5-78 and the

order dated 3-5-78, it is clear that the Government Pleader had undertaken to produce all the documents relating to demolition of structures standing on the land. But this was not done. As such, the plaintiffs were compelled to file a petition for discovery of the documents. It is contended by the learned counsel for the opposite parties that how can those documents relating to other structures prove the case of the plaintiffs, or possession of the plaintiffs, and how those are relevant for the case of the plaintiffs? It would be seen that the plaintiffs' stand from the very start of filing of the plaint is that not only the house of the plaintiffs, but also other structures standing on that land were forcibly demolished and documents have been manufactured about proceedings under the Orissa Prevention of Land Encroachment Act and the plaintiffs have been consistently pressing the matter. It is contended by the learned counsel for the plaintiffs that those documents will throw light on the fact that records were manufactured for a bunch of cases, including that of the plaintiffs under the Orissa Prevention of Land Encroachment Act and there was no service of notice in fact and all the service returns have been manufactured. Relevancy is not the question for consideration at this stage. Those documents will throw light on the matter in controversy and in favour of the plaintiffs or may contain information which will directly or indirectly enable the plaintiffs to advance their case or damage the stand of the opposite parties. This will result in avoiding a trail of enquiry in the matter for consideration.

6. According to the dictum of the Supreme Court as stated above, the documents may be admissible or may not be admissible in evidence, but if the documents can throw some light to show that the stand of the plaintiffs from the very beginning that the documents have been created and manufactured and false reports have been made relating to Encroachment cases and the demolition of houses was done on the same day in the locality and the case of the plaintiffs is one of them, undoubtedly the documents will throw some light on the matter in controversy. The State Government in its written statement has only stated that it does not admit the allegations and puts the plaintiffs to strict proof of the same. The plaintiffs in their petition prayed for production of the documents and the Government Pleader had undertaken production of those documents. In view of these circumstances, it would be fair on the part of the opposite parties, who are public authorities, to place all the documents before the court and if the documents would have been placed before the court, there would not have been dragging of the case so long. It is not a case of fishing enquiry by the plaintiffs. The plaintiffs have made definite assertions. The court has not allowed to cross-examine the witnesses and directed to file affidavits. In pursuance of the order of the Court, affidavits have been filed. The plaintiffs only prayed for production of the documents and the Court had allowed it on the undertaking of the Government Pleader. But all the documents were not filed as undertaken. In view of these circumstances, it cannot be said that discovery of the documents asked for will not throw light on the assertion made by the plaintiffs.

7. The opposite parties have relied on the case of Gopinath Das v. Harihar Das (1972) 1 Cut WR 175, which was a case under O. 11, R. 14 of the Civil P. C. In that case, there was already an inventory of the documents and the Court observed that the plaintiffs should on inspection of the inventory be in a position to know what particular items in the inventory are necessary to be brought to Court and to specify those items and if the Court is satisfied that production of the documents is necessary, the Court would naturally after hearing the parties cause production of only those documents which in his opinion would be necessary and relevant for the purpose of the suit. But the plaintiff had not specified those documents and the counsel for the plaintiff undertook to file an application for specifying the documents. In view of the aforesaid facts, I am of opinion that the decision is not applicable to the present case. Reliance has also been placed by the opposite parties on Lajpat Rai v. Tej Bhan, AIR 1957 Punj 14. This case has absolutely no application to the question raised in the instant case. In that case, discovery of documents was asked for which did not have any bearing on the case of the plaintiff. The case had no relationship with partnership of the parties, but the documents sought to be discovered related to the

question of partnership and as such the Court held that the plaintiff wished to inspect the account books with a view to fish out, if possible, some possible entries in those books and as such fishing enquiry should not be allowed. As I have already observed above, in the instant case the application is not for a fishing enquiry, but definite and consistent assertions have been made by the plaintiffs relating to demolition of houses and manufacture of records.

8. On the aforesaid analysis, I hold that the petition for discovery of documents made by the plaintiffs should be allowed and the reasonings given by the court below are not tenable and amount to illegal exercise of jurisdiction.

9. In the result, the civil revision is allowed. The impugned order of the trial court is set aside and the petition of the plaintiffs for discovery of documents is allowed.

In the circumstances of the case, there will be no order as to costs.

Petition allowed.

AIR 1979 ORISSA 101

K. B. PANDA AND

P. K. MOHANTI JJ.

Surajbali Ram and another, Petitioners v. Dhani Ram and others. Opposite Parties.

Original Jur. Case No. 1200 of 1978, D/- 12-1-1979.*

(A) Constitution of India, Art. 226 — Grounds of certiorari — Error apparent on face of record — Error not self-evident — High Court does not normally re-assess evidence unless perverse — Cannot be cured by writ of certiorari.

In a writ of certiorari the scope of interference is meagre. Such writ can only be issued to judicial or quasi-judicial bodies on any of the grounds viz., want or excess of jurisdiction; failure to exercise jurisdiction; violation of procedure; disregard of principles of natural justice; and error of law or fact apparent on the face of the record.

(Para 12)

No error which is not self-evident and has to be established by a long drawn process or reasoning on points where there may conceivably be two opinions cannot be said to be an error apparent on the face of the record.

(Para 12)

The High Court, in exercise of its extraordinary jurisdiction, normally does not re-assess the evidence, unless it is perverse or based on errors of record. Where the findings of the appellate Court do not suffer from any of these infirmities, interference is not justified.

(Para 14)

Anno: AIR Comm. Const. of India (2nd Edn.). Art. 226, N. 166, 171.

(B) Orissa House Rent Control Act (4 of 1968), Ss. 2 (4), 7, 12 — Eviction proceedings — Scope of enquiry — Summary in nature — Rent Controller has jurisdiction to decide question of title of landlord in a summary manner.

If the question of title to the disputed immovable property arises incidentally, the authorities under the Act are to decide it in a summary manner. They are not expected nor required that they are to decide complicated questions of title and arrogate to themselves the powers of a Civil Court. The provisions of S. 12, that the enquiry should be summary in nature and should be disposed of as far as possible within a period of six months from the date of institution are clear indications of the fact that the authorities under the Act should not go into subtle questions of title. (Para 14)

Where the finding of fact recorded by the appellate forum is that the tenants were paying rent payable for the whole house, to the landlord alone, that would give him the right to ask for eviction without joining any other person who may be a co-owner of the building. (Para 20)

If, however, a tenant raises the contention that there is no relationship of landlord and tenant between the parties, the authorities constituted by the Act would necessarily be called upon to record a finding on the jurisdictional issue and the Controller would certainly have jurisdiction to decide as to who is the landlord of the premises, within the meaning of S. 2 (4). In the instant proceeding, the appellate authority had examined the question from that point of view and the finding of the appel-

*(Against order of S. K. Behera Chief Judl. Magistrate, Cuttack, D/- 4-8-1978.)

late authority could not be questioned as being contrary to law. (Para 21)

(C) Evidence Act (1 of 1872), S. 116 — Estoppel of tenant — Possession of tenant consequence of tenancy created by landlord — Barred from questioning the title of landlord.

Estoppel under S. 116 of the Evidence Act applies in cases under house rent control cases also. Where the tenants were in possession in consequence of the tenancy created by the opposite party, he should not be allowed to question the title of the opposite party as long as they are in enjoyment of the tenancy. In other words, let the tenants vacate the premises and then question the title of the landlord and not when continuing in possession of the tenanted house. This is based on the salutary principle of prohibiting the beneficiary while enjoying the benefit, to challenge the competence of the benefactor to confer on him that benefit. First Appeal No. 334 of 1977, D/- 7-4-1978 (Orissa), Rel. on; AIR 1952 Orissa 95, Disting. (Para 14)

Anno: AIR Manual (3rd Edn.) Evi-Act, S. 116, N. 4.

Cases Referred: Chronological Paras

AIR 1978 Orissa 233: 45 Cut LJ 387 14
(1978) First Appeal No. 334 of 1977, D/- 7-4-1978 (Orissa), Balaram Panda v. Dhani Ram 14
AIR 1952 Orissa 95 14

Somanath Chatterjee, N. Mukherjee, Debananda Misra, B. K. Misra, P. K. Ray, Deepak Misra and B. S. Mohapatra. for Petitioners; S. S. Mohanty Addl. Standing Counsel, P. K. Dhal, S. C. Sahu, M. K. C. Rao, A. K. Rao, A. Pasayat, H. K. Jena and Miss G. Lakshma, for Opposite Parties.

PANDA, J.:— The two petitioners, who are brothers and tenants under opposite party No. 1, in this application seek annulment of the eviction order passed against them under the Orissa House Rent Control Act, 1967 by the appellate authority on 4-8-1978 (Annexure 8).

2. This is a typical case exemplifying the desperate efforts made by the tenants to perpetuate their possession by all conceivable methods — doubtful and dubious.

3. Facts necessary for the disposal of this writ petition may be stated as follows:—

Dhani Ram, opposite party No. 1, is alleged to be the owner of a pucca house appertaining to Holding No. 38 in Ward No. 24 of Cuttack Municipality. The ground floor of that building has got two units. A pucca wall separates these two units and divides the well lying at the centre into two halves. These halves, therefore, can conveniently be described as 'eastern part' and 'western part'. The western part is cross marked in red ink and that is the property from which eviction was sought for by Dhani Ram (opp. party No. 1) of the two tenant-petitioners. The case was numbered as House Rent Control Case No. 37 of 1976. Admittedly, the petitioners had been inducted by Dhani Ram as tenants as early as in 1958. Dhani Ram (opposite party No. 1) sought eviction mainly on the ground that the house he was staying in and carrying on business had become insufficient for the accommodation of his increased family of four married sons and fourteen grandchildren. Besides, his sons who have now become adults, were in bona fide need of this tenanted house for having independent business of their own. It is conceded that the two tenant-petitioners were running a sweetmeat stall all through in the disputed house.

4. The case of the petitioners in essence was that the house in question did not belong to Dhani Ram but to his brother Ram Chandra Ram. Dhani Ram, therefore, was not entitled to initiate the eviction proceeding for his personal use. They admitted to be paying rent to Dhani Ram, but added that it was under a "mistaken impression about his title." According to them, in a partition deed between Dhani Ram and his brothers effected on 4-11-1953, the tenanted house standing on C. S. Plot No. 1367/1566 and 1367/1567 had fallen to the share of Ram Chandra Ram. After mutation of his name in the Tahsil Office, Ramchandra Ram instituted House Rent Control Case No. 58 of 1975 against them for eviction. In that case, Ram Chandra Ram succeeded and evicted the present two petitioners through Civil Court and took delivery of possession on 31-10-1975. After such eviction, Ram Chandra Ram entered into a fresh contract with the petitioners for lease and allowed them to continue their business on sweetmeats on the

front portion while he remained in occupation of the back portion. The case of Dhani Ram that he needed the house for his personal use i. e. to provide business for his sons was generally denied.

5. A large number of documents were exhibited. Out of them the partition deed dated 4-11-1953 is Ext. 1 (Annexure 3) and the municipal rent receipts (Exts. 7 to 79) are important. More important are Exts. 2 to 2/2, the counterfoils of the three rent receipts granted to the tenants by Dhani Ram for the months of January, February and March, 1976. Their significance lies in the fact that according to the tenant-petitioners they had been evicted by the real owner Ram Chandra Ram in pursuance of the decree passed in H. R. C. Case No. 58 of 1975 on 31-10-1975. If this H. R. C. Case, consequent eviction and creation of a new tenancy by Ram Chandra Ram with the tenant-petitioners, whereby he (Ram Chandra Ram) occupied the back portion if true and genuine, there was no conceivable reason why the tenants of Dhani Ram would continue paying the usual rent to him till March end, 1976. i. e. for five months even after their eviction by the so-called real owner and a fresh tenancy replacing the old one. Certainly the petitioner-tenants who are seasoned businessmen, cannot be so silly or charitable as to make double payment of rent, once to Ram Chandra Ram. the real owner according to them as per the new tenancy; and Dhani Ram (opposite party No. 1) the "benami owner" for Ram Chandra Ram according to them as per the old tenancy.

6. Dhani Ram as petitioner in H. R. C. case examined 5 witnesses. P. W. 1 is Dhani Ram himself. P. W. 3 is one of his four sons who is desirous of opening a shop on the disputed building. P. W. 2 is one of the "family friends" of both Ram Chandra Ram and Dhani Ram. He is named in the partition deed (Annexure 3) to have effected the partition and as such a very material witness. He spoke about the ownership of Dhani Ram over the tenanted suit house. P. Ws. 4 and 5 are two municipal tax collectors who were examined to prove that they were collecting municipal tax all through for the suit holding from Dhani Ram and not from Ram Chandra Ram.

7. From the side of the tenants (here petitioners) four witnesses were examined. Out of them O. P. W. No. 1 is a survey-knowing Advocate privately taken by Ram Chandra Ram in Dec. 1975 who stated that after survey he found the house in question to be standing on C. S. plot Nos. 1367/1566 and 1367/1567 within the area allotted to Ram Chandra Ram under the partition deed. Opposite party No. 2 (aged 28 years) is the son of Ram Chandra Ram and he was examined to prove his father's title and possession over the disputed house O. P. W. No. 3 is one of the employees of the opposite parties (petitioners herein) who stated about the possession of Ram Crandra Ram over a portion of the house in question. O. P. W. No. 4 is the process-server who stated to have delivered possession of the house in question to Ram Chandra Ram on 31-10-1975 in furtherance of the earlier order of eviction passed in H. R. C. Case No. 58 of 1975 referred to above, brought by Ram Chandra Ram against the tenant-petitioners behind the back of Dhani Ram (opposite party No. 1). Subsequently, two witnesses were examined on behalf of the opposite parties (here petitioners) as O. P. W. Nos. 5 and 6 to prove how the tenant-petitioners have purchased the house in question on 26-9-1977 under Ext. K (Annexure 9) from Ram Chandra Ram in Calcutta. This is obviously during the pendency of this H. R. C. proceeding i. e. H. R. C. Case No. 37 of 1976 initiated on 12-4-1976.

8. The learned House Rent Controller held that :—

(1) Ram Chandra Ram is the owner of the disputed house;

(2) Dhani Ram was realising rent from the petitioners as benamidar of Ram Chandra Ram;

(3) Dhani Ram had failed to prove that he required the house in good faith for his own use though he might have a wish or desire like that;

(4) The earlier tenancy having come to an end by eviction in consequence of the legal proceeding instituted by Ram Chandra Ram, there was no further scope for Dhani Ram to profess himself as the landlord.

However, he rejected the plea of the tenants that a single case against both is not maintainable under O. 7, R. 3. Civil P. C. as also the plea that the suit

properties have not been properly described and so suffer from indistinctness.

9. Dhani Ram (opposite party No. 1) came up in appeal (Appeal No. 18/77) and the appellate Court set aside the order of the House Rent Controller holding that—

(1) The House Rent Controller is not competent to decide the question of title as expected of a Civil Court but had it disposed it of in a summary manner;

(2) Examination of evidence on record does not prove the case of the tenants that Ram Chandra Ram had acquired property in a partition and ever since was exercising the right of ownership thereon;

(3) The benami story set up by the tenants should not have been relied upon by the learned House Rent Controller;

(4) During the continuance of tenancy, the tenants cannot question the title of the landlord Dhani Ram as defective and bank upon the same to defeat his case before restoring possession to him by surrender;

(5) The need of the landlord Dhani Ram was bona fide and he had been able to prove it justifying eviction.

The learned appellate Court like the House Rent Controller rejected the objections of the petitioners under O. 7, R. 3, C. P. C. that the suit house has not been distinctly described.

10. It is in this background that the tenant-petitioners have filed this writ application on 4-9-1978 for quashing the order of eviction passed against them by the appellate Court.

11. In the itinerary of this lis the following undisputed points have emerged:—

(i) Dhani Ram (opposite party No. 1) had inducted the two petitioners as tenants into the suit house sometime in 1958.

(ii) The tenant-petitioners were paying rent to Dhani Ram regularly, ever since 1958 and at varying enhanced rates also, as settled between them from time to time without demur till the end of March, 1976.

(iii) Dhani Ram has been all along and all alone paying the municipal tax in respect of the holding No. 38 that includes the suit building.

(iv) The two tenant-petitioners had all along acknowledged Dhani Ram as their landlord paying rent to him till the end of March, 1976. It is for the first time that they disputed his ownership and title to the building when they stated in their written statement dated 25-8-1976 in this proceeding under S. 7 of the Orissa House Rent Control Act that—

"8. That the payment of rent has been made for the mistaken impression that the applicant has title but it is now found out that the petitioner has no title."

(That has been reproduced in para 13 of this writ petition.)

(v) Ram Chandra Ram, as a fact, had previously filed H. R. C. Case No. 58 of 1975 in respect of this identical building against the petitioners. It was not contested and Ram Chandra Ram got an ex parte decree for eviction. He levied execution and got the petitioners evicted on 31-10-1975. Neither to this House Rent Control case nor to the execution proceeding, Dhani Ram was a party and they were finalised keeping Dhani Ram all the while in the lurch.

(vi) That on 13-9-1976 Ram Chandra Ram filed Title Suit No. 134/76 (Ext. 3) against Dhani Ram and the present two petitioners. The suit was valued at Rs. 200/- and the prayer portion is intriguing and interesting (Annexure Q). On the plaintiff's petition under O. 39 Rr. 1 and 2, C. P. C. Misc. Case No. 256/76 arose out of that suit. The Munsif, First Court, Cuttack held that Ram Chandra Ram was not entitled to an order of injunction as he had not been able to make out a prima facie case in respect of the proprety (Annexure R).

(vii) While the suit (T. S. No. 134/76) was pending, Dhani Ram filed an ad interim injunction petition which was numbered as Misc. Case No. 148 of 1976. The Court allowed the petition, restrained the present petitioners not to purchase the properties from Ram Chandra Ram and "restrained Ram Chandra Ram from transferring or dealing in any way with the suit properties till the disposal of the suit" (Annexure S).

(viii) Ram Chandra Ram then filed a petition under O. 23, R. 1 C. P. C. to withdraw the suit which was allowed

on 24-9-1977 — vide Ext. 81 wherein the Court ordered that the suit is withdrawn as abandoned by the plaintiff with a cost of Rs. 30/- to the defendant. A copy of that order is Annexure-T.

(ix) On 2-6-1977 the petitioners entered into an agreement with Ram Chandra Ram to purchase the property.

(x) Thereafter Ram Chandra Ram and the petitioners entered into a registered agreement for sale on 4-7-1977 at Cuttack (Deed No. 3880 dt. 4-7-77) wherein the petitioners are said to have advanced Rs. 20,000/- to Ram Chandra Ram.

(xi) On 26-9-1977 Ram Chandra Ram as vendor sold the suit building to the petitioners as vendees on receipt of balance consideration of Rs. 20,000/-. Thus according to the petitioners from 26-9-1977 they are the owners having full title over the suit building.

12. This being a writ of certiorari the scope of interference is meagre indeed. Such a writ can only be issued to judicial or quasi-judicial bodies on any of the grounds viz., want of or excess of jurisdiction; failure to exercise jurisdiction; violation of procedure; disregard of principles of natural justice; and error of law or fact apparent on the face of the record. Strenuous endeavour was made to bring the case under "error apparent on the face of the record." No error which has to be established by a long drawn process or reasoning on points where there may conceivably be two opinions can hardly be said to be an error apparent on the face of the record. Where an alleged error is not self-evident, but has to be established by lengthy and complicated arguments, such an error cannot be cured by a writ of certiorari.

S. 12 of the Orissa House Rent Control Act, 1967 lays down that an enquiry under the Act "shall be of a summary nature" and shall as far as possible "be disposed of within a period of six months from the date of the Institution." So the petitioners to succeed must establish that the learned appellate Court has committed an error either of fact or of law and that is so manifest that it requires no ingenuity or endeavour to detect the same.

13. Judged from the above standard, and after giving a patient hearing to the counsel for the petitioners, I was not satisfied that any substantial point had been raised to merit consideration. So, willy-nilly, I asked the learned counsel for the petitioners to formulate his points of attack and that has been quoted verbatim as hereunder:—

"(a) That the petitioner-landlord wanted to eject the opposite party tenant from holding No. 38 and says that it is same as holding No. 12 which under Ext. 1 was given to him by his uncle Sitaram and the other brother Ram Chandra Ram and Bharat Ram have no interest therein. But from the documents and from the admission it is apparent that holding No. 38 is not the same holding No. 12.

(b) It is found on admission in the memo of appeal in the lower appellate Court (para 6 (6)) that the building in question not only stands on a portion of plot Nos. 1367/1566 and 1367/1567, but also on a portion of plot No. 1367.

(c) The learned lower Court in para 15 of his judgment has said that it is not a forum to decide the question of title and it is sufficient to decide the matter in a summary way.

(d) The estoppel under S. 116 of the Evidence Act has no place in cases under House Rent Control Act. The tenant is not estopped from denying the landlord's title to it prior to and subsequent to his induction.

(e) In this particular case when it is found that these 3 plots belonged to the joint family of Dhani Ram, Bharat Ram and Ram Chandra Ram and the suit house stands on a portion allotted to Ram Chandra Ram, the Court has to go into title to find out whether Dhani Ram let it out and if so, whether on his own behalf or on behalf of Ram Chandra Ram. This assumes great importance when the question of requirement will be considered because if it is the property of Ram Chandra Ram and Dhani Ram as the elder brother was leasing it out, it will be presumed that he had done so on behalf of Ram Chandra Ram and, therefore, a tenant cannot be ejected for the requirement of Dhani Ram's son for business. It is only for the requirements of Ram Chandra Ram that the tenant can be ejected and the lower appellate Court's finding is wrong."

14. The tenability of the above points raised on behalf of the petitioners may now be examined.

(i) Point Nos. (a), (b) & (c):— The first two points are disputed questions of fact to be determined on assessment of evidence. This Court, in exercise of its extraordinary jurisdiction, normally does not re-assess the evidence, unless it is perverse or based on errors of record. The findings of the learned appellate Court, as I find, do not suffer from any of these infirmities to justify interference.

The simple points in the proceeding for determination were (a) was there existing a relationship of landlord and tenant between the parties as contemplated under the Orissa House Rent Control Act in respect of the building in question? and (b) if so, did the landlord succeed in bringing his case under any of the grounds that entitles him for eviction of the tenants?

If the question of title to the disputed immoveable property arises incidentally, the authorities under the Orissa House Rent Control Act (hereinafter referred to as the Act) are to decide it in a summary manner. They are not expected nor the Act requires that they are to decide complicated questions of title and arrogate to themselves the powers of a Civil Court. The provisions of S. 12 of the Act that the enquiry should be summary in nature and should be disposed of as far as possible within a period of six months from the date of institution are clear indications of the fact that the authorities under the Act should not go into subtle questions of title. There is, therefore, nothing to quarrel over the observations of the learned appellate Court that this is not the forum to decide the question of title and it is sufficient to decide the matter in a summary way. This view of the appellate Court is very correct.

Over the question whether present holding No. 38 corresponds to holding No. 12 of the year 1953 when the partition took place under Annexure 3 between the three brothers, the landlord has pledged his own oath. Besides, he has adduced documentary evidence Exts. 7 to 79 (rent receipts) and examined the Tax Collector (P. W. 5-Trilochan Patra). As against this, the evidence on the side of the tenants (petitioners) is nil. They only rely on Ext. 1 (Annexure-3) which on scrutiny has been found to be incorrect at least on two very material points, that is, regarding the description of the land in question and secondly regarding the area of the building in question. The learned appellate Court has very convincingly dealt with this aspect of the question in para. 11 of his judgment. As is clear therefrom A. 0.017 decimals of vacant land had been divided between opposite party No. 1 and Ram Chandra Ram. It is hinted that the western half of this belongs to Ram Chandra and on that half the disputed building stands. Since the eastern portion is already in possession of Dhani Ram (opposite party No. 1) who has got it by evicting the tenant Balaram referred to above, by necessary implication this western half of the building belongs to Ram Chandra Ram. Suffice it to say, the question has not to be decided on surmises or conjectures but on evidence. A.0.017 decimals as has been very rightly held by the learned appellate Court cannot accommodate all the rooms rented out to the tenants. The learned appellate Court has given the dimension of the rooms and has observed thus:—

"As per his version A.0.017 decimals is equal to 220 square feet, and at the face of this evidence conclusion can never be to the effect that the rented house in question has been put to partition under that deed Ext. 1 and allotted to the share of Ramchandra Ram, since even half of that house cannot get adjusted within those 17 decimals of Ramchandra Ram.

12. In that document, Ext. 1, the brothers had admitted the title of the petitioner in respect of a house which he had got from his paternal uncle Sitaram.

xx xx xx

It was for the O. Ps. to prove the title of Ramchandra Ram over the house in question and that they having failed to do, they cannot now come forward and ask the petitioner to place proof with regard to his title in view of the provision of S. 116 of the Evidence Act.

13. In that suit T. S. 134 of 1976, as evident from Ext. 3, Ramachandra Ram had indicated that his claim from out of Survey Plot No. 1367/1566, 1367/1567 which had a total area of A. 0.297 acre was just 0.017 acre, but still, under Exts. G and K, he had convey-

ed title to the O. P. No. 1 over 0.17 acre. The O. P. No. 1, who had taken O. P. W. 1 to measure the lands on 24-12-75, would not have purchased 0.17 acre from Ramchandra Ram, when he had only 0.017 acre in those plots, without demur, had he not been cherishing the idea of playing tricks with the petitioner to deprive him of the house in question. The learned controller, as is apparent failing to mark the difference between 0.17 and 0.017 has fallen into an error in holding that the house was of Ramchandra Ram's share."

Regarding the alleged admission in para 6 (c) of the appeal memo, I may say that it is not proper to read a sentence divorced from the context. The spirit of the entire paragraph in which it occurs has to be taken into consideration and that belies the argument advanced on behalf of the petitioners. What is stated there is that "the building stands on a portion of the lands appertaining to plot Nos. 1367/1566 and 1367/1567 but not on that portion of the plots which was allotted to Ram Chandra Ram in the partition deed, but on a portion of the main plot No. 1367 which measures A. 0.953 decimals." Thus, this becomes a disputed fact and this Court cannot and should not attempt to resolve it in its writ jurisdiction with inadequate date before it.

From the above quotation from the judgment of the appellate Court it would be clear that it has approached the topic in its proper perspective and has given due weight to the oral, documentary and the circumstantial evidence. As such, there is no scope for interference and the points are decided against the petitioners.

(ii) Point No. (d):— The first part of the proposition that estoppel under S. 116 of the Evidence Act has no place in cases under the Act smacks of as a nobel proposition of law. No authority has been cited in support of the same. On the other hand, a Bench of this Court in a house rent control case between this opposite party No. 1 and a tenant (Balaram Panda) in respect of the eastern portion of the disputed holding No. 38 in First Appeal No. 334 of 1977 (Balaram Panda v. Dhani Ram) (disposed of on 7-4-1978) (Ori) has held—

"11. On a review of the oral and documentary evidence, we come to the unhesitating conclusion that the defendant was never a tenant under the plaintiff in respect of holding No. 41 and that the counterfoils Exts. 1 series and 25 series relate to the rent receipts obtained by the defendant on payment of rent for occupation of the suit premises appertaining to holding No. 38. Once the relationship of landlord and tenant is established between the parties, the tenant would be stopped from disputing the landlord's title. The suit is based upon tenancy and not upon title. So the question of title cannot be gone into. The estoppel under S. 116, Evidence Act prevents the tenant from pleading absence of title in the landlord as a ground for refusing to pay rent."

S. 116 of the Evidence Act provides—

"No tenant of immovable property, or person claiming through such tenant, shall, during the continuance of the tenancy, be permitted to deny that the landlord of such tenant had, at the beginning of the tenancy, a title to such immovable property; and no person who came upon any immovable property by the licence of the person in possession thereof, shall be permitted to deny that such person had a title to such possession at the time when such licence was given."

Great reliance was placed on a Division Bench decision of this Court in the case of Udaypratap Singh Deo v. Krushna Padhano (AIR 1952 Orissa 95). Emphasis was laid on a sentence which runs thus*:—

"The questioning of the landlord's title with reference to the time prior to the commencement of the tenancy and subsequent thereto is not covered by the well-known principle of estoppel as between the landlord and the tenant."

Relying on this it was very strenuously argued that as the tenants here were questioning the title of the landlord at the time of partition in 1953, i. e. five years prior to the creation of the tenancy in 1958, the bar of estoppel under S. 116 of the Evidence Act is not attracted. This argument ingeneous though cuts no ice. The sentence when read with reference to the context means something different. In the

*See AIR Head Note — Ed.

words of their Lordships it is as follows*:—

"A tenant who had been let into possession cannot deny his landlord's title, however defective it may be, so long as he has not openly restored possession by surrender to his landlord. The real significance of the term "during the continuance" means so long as the tenant is continuing in enjoyment of the benefits of the tenancy, he shall not be allowed to deny or challenge the author of the said tenancy."

Obviously this is based on the salutary principle of prohibiting the beneficiary while enjoying the benefit to challenge the competence of the benefactor to confer on him that benefit. In this case, the tenants being in possession in consequence of the tenancy created by opposite party No. 1 should not be allowed to question the title of the landlord opposite party No. 1 as long as they are in enjoyment of the tenancy. In other words, let them vacate the premises and the building and then question the title of the landlord and not when continuing in the house. This citation, therefore, does not come to the help of the petitioner at all. This is therefore decided against the petitioners.

(iii) Point No. (e):— This point does not require much scrutiny. The landlord has never stated anywhere that he had acted either as a benamdar or as an agent or as a manager or as a trustee for anybody else, much less for Ram Chandra Ram — his brother, whom the tenants try to set up as the true owner. The landlord sought eviction of the tenants on his own behalf as the landlord. It is only the tenants who alleged that he is a benamdar for Rama Chandra Ram. There is no evidence either oral, documentary or circumstantial to lend the slenderest support to any such purposeful and pregnant suggestion. Law is clear that one who alleges that the state of things is not the real state of things, it is for him to establish it and in that the tenants have signally failed.

It was finally argued that Dhani Ram as the eldest member of the family was acting on behalf of Ram Chandra Ram and inducting tenants. Accordingly he was a benamdar for Ram Chandra. If so, the onus lay squarely on Ram Chandra Ram to lead evidence in support of that stand. But instead of doing it Ram Chandra Ram has not come to the dock. Evidence is that ever since partition he has shifted to Ajamgarh in Uttar Pradesh. The municipal taxes are being all along paid in respect of holding No. 38 by opposite party No. 1. There is no streak of evidence anywhere nor is there any allegation that the money Dhani Ram was realising from the tenants was being sent to the real owner Ram Chandra Ram at any stage during these 18 years. Nor there is any correspondence between Ram Chandra Ram and Dhani Ram to lend support to any such laboured inference. Again, it is ununderstandable how after the partition in 1953, Dhani Ram continued to be the manager when the joint family had already disrupted by metes and bounds partition in the year 1953 under Ext. 1 (Annexure 3). This is, therefore, merely a desperate stand barren of any substance.

Incidentally I may refer to the last argument advanced for the petitioners that at least the opposite party No. 1 was a trustee for Ram Chandra Ram. In this context the case law reported in 45 Cut LT 387: (AIR 1978 Orissa 233) (K. Chitti Babu v. K. Anjaneyelu) was recited in extenso. It is unnecessary to refer to it for in that case the admitted position was that the trustee for the deity wanted ejectment of the tenants for his personal benefit, namely, to start a shop of hardware for his benefit and not for the benefit of the deity for whom he was the trustee. Here such is not the case and so it is utterly otiose.

15. Thus, all the points having been decided against the petitioner, the petition is bound to fail and the order of eviction must stand.

16. Before closing this judgment, I am constrained to observe how the tenant-petitioners made frantic efforts to flout the legitimate claim of the landlord-opposite party No. 1. They have taken recourse to various subterfuges to retain possession of the building in question by hook or crook. Having come over to the building through opposite party No. 1 and having remained there for nearly two decades,

*See AIR Head Note—Ed.

they colluded with Ram Chandra Ram who brought a fake eviction proceeding and obtained a fake delivery of possession also on 31-10-1975. Then they entered into an agreement as if they remained in the front portion of the building and Ram Chandra Ram remained in the back portion. All these are make-belief affairs calculated to defraud the landlord. Since this did not serve their purpose, Ram Chandra Ram brought Title Suit No. 135 of 1976. Dhani Ram contested it and the attempts of Ram Chandra Ram to obtain injunction against Dhani Ram proved futile. Naturally Dhani Ram became suspicious and on his petition Ram Chandra Ram was injuncted not to sell the house to the tenants and the tenants were injuncted not to purchase the house during the pendency of the suit. This evidently created difficulty and so the suit was withdrawn without permission to bring any fresh suit. Thereafter Ram Chandra Ram and the tenants entered into a registered agreement for sale of the suit building on 4-7-1977 at Cuttack and then on 26-9-1977 the registered deed was executed for Rs. 40,000/- at Calcutta. Thus by now the petitioners have become the owners of the house according to them. Behind this tell-tale background, assertion that Dhani Ram was a benamdar for Ram Chandra Ram appears fantastic. If the tenants have a better title now by virtue of the sale deed, it is for them to give up possession first to opposite party No. 1 and then sue him for title and possession on the basis of their alleged paramount title, if they are so advised. But they cannot be allowed to do so while lingering possession and remaining in the house, merely alleging that opposite party No. 1 is just a "statutory landlord" as finally contended.

17. Since in exercise of extraordinary jurisdiction of the High Court disputed questions of fact and complicated questions of title are not to be decided any observations made by me while disposing of this petition should not be utilised to the prejudice of any party in any subsequent suit if filed. But all the same, each party will be entitled to the benefit of law that flows from admitted facts such as res judicata or estoppel or limitation as the case may be.

18. The petition is not only absolutely devoid of merit but exhibits an attempt at overreaching the law and the law Court to which the House Rent Controller fell a victim. The petition stands rejected with costs. Stay of Execution Case No. 351/78 pending in the Court of the Munsif, First Court, Cuttack stands vacated. Hearing fee rupees 250/- (Rupees two hundred and fifty only).

The petitioners to deliver possession of the tenanted building to opposite party No. 1 by 31st January, 1979, without fail.

P. K. MOHANTI, J.:— 19. I agree to the order proposed by my brother, but in view of what was argued at the hearing, I propose to add a few paragraphs of my own.

20. It was argued on behalf of the petitioners that as a portion of the house in question stands on a plot of land which has been allotted to Ramchandra Ram in the family partition, the petition for eviction could not have been filed by the opposite party No. 1 all by himself. This contention has no force in view of the fact that in order to be entitled to ask for eviction under S. 7 of the Act what all is required is that the applicant should be receiving or be entitled to receive rent of the house on his own account or on behalf of another or on behalf of himself and others. This finding of fact recorded by the appellate forum is that the petitioners were paying rent payable for the whole house to the opposite party No. 1 alone and he was receiving the same on his account. The opposite party No. 1 would, therefore, be a landlord within the definition of the term occurring in S. 2 (4) of the Act and that would give him the right to ask for eviction without joining any other person who may be a co-owner of the building.

21. It had next been contended on behalf of the petitioners that the enquiry under the Act being of a summary nature and the authorities constituted under the Act having limited jurisdiction, it was beyond the competence of the appellate authority to hold that the previous proceeding under S. 7 of the Act at the instance of Ramchandra Ram for the premises in question against the petitioners was a collusive

and fraudulent one. There appears to be some force in the argument that when it is contended that an earlier decision of a tribunal was vitiated by fraud, the question should ordinarily be left to be decided in a regular suit and the tribunals constituted with limited jurisdiction should not be allowed to investigate such questions and finally hold that the previous proceeding was vitiated on account of fraud. Where, however, a tenant raises the contention that there is no relationship of landlord and tenant between the parties, the authorities constituted by the Act would necessarily be called upon to record a finding on the jurisdictional issue and the Controller would certainly have jurisdiction to decide as to who the landlord of the premises is. In the present proceeding the appellate authority has examined the question from that point of view and I am inclined to hold that the action to the appellate authority cannot be questioned as being contrary to law.

22. S. 116 of the Evidence Act postulates that a tenant who has been admitted into possession would not be entitled to deny the landlord's title, however defective it may have been, so long as he has not surrendered possession of the premises to the landlord. In the facts of the case and particularly when even after the eviction order was passed against the tenant in the previous proceeding, he continued to pay rent to the opposite party No. 1 as per Ext. 2 series, it would not be open to the tenants to contend that the opposite party No. 1 was not their landlord.

Petition dismissed.

AIR 1979 ORISSA 110

R. N. MISRA AND

P. K. MOHANTI, JJ.

Artabandhu Mohapatra and others, Appellants v. Bisweswar Bhutia and others, Respondents.

Second Appeal No. 5 of 1975, D/- 12-1-1979.*

*(Against decision of N. P. Mohapatra Addl. Dist. J. Dhenkanal, D/- 27-11-1974.)

CW/CW/B142/79/GSN/VBB

Limitation Act (36 of 1963), Article 65 — Adverse possession, break in — Suit for recovery of possession — Running of adverse possession suspended — Same position continues until the decree for recovery continues to be executable. AIR 1969 Orissa 54, Overruled.

On institution of a suit for recovery of possession, running of adverse possession is arrested and the same position continues until the decree for recovery continues to be executable. (Para 10)

Where the defendant had obtained a decree for possession and had levied execution of that decree, plaintiff was not entitled to acquire any prescriptive title by tacking the period of possession prior to the suit and subsequent to it. The running of adverse possession got suspended with the institution of the suit in 1954 and as long as the decree remained executable, plaintiff was not entitled to maintain that his possession being for more than twelve years continuously could fructify into prescriptive title. AIR 1969 Orissa 54, Overruled; AIR 1923 PC 175, AIR 1948 Bom 149, AIR 1959 Andh Pra 146, AIR 1967 SC 978 and AIR 1971 Him Pra 5, Disting.; AIR 1958 Cal 437 and AIR 1973 Madh Pra 72, Rel. on. (Para 11)

Anno: AIR Comm. Lim. Act (5th Edn.) Art. 65 N. 63, 64 and 92.

Cases Referred: Chronological	Paras
AIR 1976 Mad 283	9
AIR 1973 Madh Pra 72	9, 10
AIR 1971 Him Pra 5	3, 8
1969 All LJ 975	9
AIR 1969 Orissa 54	2, 3, 8, 10
AIR 1967 SC 978	3, 7
AIR 1959 Andh Pra 146	3, 6
AIR 1958 Cal 437	9, 10
AIR 1948 Bom 149	3, 5
AIR 1944 All 17: 1943 All LJ 485	9
AIR 1944 Pat 77	10
AIR 1943 Mad 425	9
AIR 1930 Lah 472	8
AIR 1923 PC 175: 21 All LJ 730	3, 4

B. H. Mohanty, for Appellants; P. K. Misra, for Respondents.

R. N. MISRA, J.:— Legal representatives of the plaintiff are in appeal against the affirming judgment and decree of the learned Additional District Judge of Dhenkanal in a suit for title, confirmation of possession and permanent injunction.

2. O. S. No. 40 of 1954 had been filed on 11-3-1954 for recovery of possession from the plaintiff on the allegation that the defendant had been forcibly dispossessed on 16-12-1953 and the suit was decreed for recovery of possession on 7-7-1955. Execution of the decree had been levied and the last execution case being No. 12 of 1966 for recovery of possession was pending when on 19-12-1966, the plaintiff filed the present action being Title Suit No. 75 of 1966 alleging in para 12 of the plaint:—

"That as the defendants are not to dispossess the plaintiff from the suit land by levying execution of the decree in O. S. No. 40 of 1954, vide Execution Case No. 12 of 1966, pending in the court of the Munsif, Dhenkanal, and since in the Settlement of 1965 the disputed land has been wrongly recorded in the names of the defendants, the plaintiff institutes the suit for declaration of his title, confirmation of his possession and a permanent injunction against the defendants restraining them not to interfere with the plaintiff's possession of the suit land at any time in future."

On behalf of the plaintiff, it was contended that a mere decree did not arrest the running of adverse possession and as plaintiff has remained in possession from 16-12-1953 before Execution Case No. 12 of 1966 was instituted on 15-4-1966, he had already remained for more than twelve years by way of adverse possession and had acquired title to the property. In support of this contention reliance was placed in a single Judge decision in the case of Damodar Jew Thakur v. Hema Narayan Misra, AIR 1969 Orissa, 54. When both the courts below negatived that plea, in Second Appeal the same contention has been reiterated. When the Second Appeal was placed for hearing, our learned brother Das, J. directed it to be placed before a Division Bench in consideration of the fact that the legal position was somewhat conflicting and that is how the appeal has now been placed before us.

3. Mr. Mohanty for the appellants seeks support from the following observations of the learned single Judge in Damodar Jew Thakur's case (AIR 1969 Orissa 54 at p. 55):—

"The real difficulty arises with regard to 22 acres which is the subject-matter of alienation by permanent Pattas in favour of defendants 21 to 49. These Pattas were granted in April, 1944. The concurrent findings of the courts below are that these transferees are in possession over since then till the date of the suit which was instituted on 21-12-1956. On this finding the plaintiff's suit is prima facie barred by adverse possession as the transferees are in possession for more than 12 years in their own right, title and interest openly."

After extracting a paragraph from Lord Buckmaster's judgment in the case of Subbaiya Pandaram v. Md. Mustafa, AIR 1923 PC 175, the learned Judge continued to say:—

"There is clear indication in the aforesaid passage that after a declaratory decree is obtained unless appropriate steps are taken for recovery of possession, the declaratory decree by itself would not prevent the running of time and the adverse possession prior to the suit can be tacked to the adverse possession continuing thereafter.

There is conflict of thought as to whether the aforesaid principle would apply to a decree for declaration of title and recovery of possession not followed by delivery of possession either symbolical or actual. Most of the authoritative pronouncements are in favour of the view that a mere decree for declaration of title and recovery of possession would not interrupt the running of time. It stands on the same footing as a mere declaratory decree. If, however, the decree for recovery of possession is followed by actual seizure of the property either in execution or by amicable arrangement or compromise, then a break in the running of time comes into operation from the date of the seizure ....."

Mr. Mohanty also relies upon the ratio in the cases of Dagadabai v. Sakharam, AIR 1948 Bom 149; Maidi Bhikashmiah v. Venugopalrao, AIR 1959 Andh Pra 146; Soni Lalji Jetha (deceased) through his L. Rs. v. Soni Kalidas Devchand, AIR 1967 SC 978 and Moti v. Roshan AIR 1971 Him Pra 5. We may now proceed to examine the correctness of the submission of Mr. Mohanty with reference to the ratio indicated in the aforesaid cases.

4. It is appropriate that we proceed chronologically and first deal with the decision of the Privy Council (AIR 1923 PC 175). The facts of the case in nutshell are the following. Certain properties were dedicated to charitable purposes in terms of two deeds dated 21st Feb. 1890 and 13th Dec. 1894. The settler died in 1895 leaving behind his widow and a son by name Arunachellam. Arunachellam became involved in debt and one of his creditors sued him, obtained a decree in execution of which the endowments of the charity were attached. Thereupon the grandson of the settler represented by the settler's widow raised an objection to the attachment, but the same was dismissed on the ground that during the lifetime of Arunachellam he had no locus standi. In the same year, a suit was instituted by the minor acting through the grandmother seeking to establish the validity of both the deeds and while that suit was pending, the property was brought to sale under the decree against Arunachellam. The sale was confirmed on 11th Aug. 1898 and delivery of possession was made to the purchaser who remained in uninterrupted possession thereof. On 31st of Dec. 1900, the second suit was decreed giving a declaration that the properties formed part of the trust estate. On 9th Nov. 1911, Arunachellam's son on attaining majority applied to the District Court for leave to remove Arunachellam from the office of trustee and on obtaining his removal instituted a suit on 23rd July, 1913 for recovery of the property. The claim in the suit was defended on the ground of bar of limitation. The question for consideration was posted in the following terms:—

"There is no doubt that whatever period of limitation be assigned, the full period had run before these proceedings were instituted, unless it could be alleged that by virtue of the proceedings to which reference has been made, there was some interruption in the period.

Now the real argument in favour of the appellant was that in the presence of the purchaser it was declared that the trust had been validly created and that the property was, in fact, trust property, and it is suggested that this effects res judicata as against the respondent and prevents them from now asserting that the property is their own."

The aforesaid contention was met by their Lordships by observing:—

"Their Lordships do not think that the decree had that effect. At the moment when it was passed, the possession of the purchaser was adverse, and the declaration that the property had been properly made subject to a trust disposition, and therefore ought not to have been seized, did not disturb or affect the quality of his possession; it merely emphasised the fact that it was adverse. No further step was taken in consequence of that declaration until the present proceedings were instituted, when it was too late."

It is clear that the decree of 31st December, 1900, was a merely declaratory one and the Judicial Committee, therefore, rightly indicated that such a declaration did not disturb or affect the quality of possession and the opponents' possession continued to be adverse. The facts of the present case are very different. There was a decree for recovery of possession and it has been put to execution. Defendant-decree-holder has claimed for recovery of possession. There is nothing in the Privy Council decision which would support the plaintiff's contention of acquisition of title here by adverse possession.

5. The next case upon which reliance has been placed is from the Bombay High Court (AIR 1948 Bom 149). Plaintiff had mortgaged the land and the mortgagee had brought a suit in 1923 against the plaintiff as also defendants 2 and 3 who were in possession of the property. He obtained a decree on his mortgage and it had been provided in the decree that he should have possession for two years and that possession thereafter should go to the plaintiff. He attempted to execute the decree but failed to obtain possession. It was contended before the court that adverse possession set up by the defendants was interrupted by the decree of 1931. The Court observed:—

"...It may be that cases involving symbolical possession are on a somewhat different footing from cases where no possession at all is given, but whether a decree for possession does or does not interrupt adverse possession

must surely be a pure question of fact. If the decree does not in fact result in the defendant giving up possession of the property or having possession of the property taken from him, we do not see how it can be said that it has interrupted possession; nor can it in law affect the nature of the possession, so far as we can see, unless it does so in fact; and whether it does so in fact would probably depend upon the attitude with which it was received by the defendant. ....."

In the Bombay case, therefore, though there was a decree for possession, possession had not been obtained and adverse possession for the statutory period brought about loss of title of the true owner.

6. The same question came up for consideration before a Division Bench of the Andhra Pradesh High Court in the case of Maldi Bhikashmiah v. Venugopalrao AIR 1959 Andh Pra 146. The Court observed (at p. 148):—

"The counsel of the appellants has thereafter argued that because of the Tahsildar's and the Subedar's judgments the appellants' right to recover possession of the properties was in suspended animation and that when counting 12 years the periods during which these orders were operative, should be deducted under S. 14 of the Limitation Act. There are authorities binding on me that mere decree of possession by civil courts do not interrupt running of adverse possession...

In other words, if passing a declaratory decree does not constitute a change of animus of the person in possession giving a decree for possession should not be interpreted otherwise....."

7. Reliance was next placed on a decision of the Supreme Court reported in AIR 1967 SC 978. The Court was called upon to decide whether a decree for specific performance of contract affected the adverse nature of possession of the defendants. The question that arose before the Supreme Court was very different. Reliance, however, was placed on the decision for the purpose of saying that the ratio in the Privy Council decision as also in the Bombay decision, referred to already, had been quoted with approval. Beyond that aspect, nothing has been said by the Supreme Court which would support the proposition canvassed before us by Mr. Mohanty.

8. The next case on which reliance has been placed is of the Himachal Pradesh High Court in the case of Moti v. Roshan, AIR 1971 Him Pra 5. Beg, C. J., as the learned Judge then was, referred to some decisions of the Bombay High Court and quoted with approval the observations of Addison, J, in the case of Jaimni Das v. Phulla Khan, AIR 1930 Lah, 472, where it was said (at p. 9 of AIR Him Pra):—

"A decree not accompanied by actual effective assertion of rights and taking possession of these rights does not help to stop adverse possession running."

It is clear from the facts of the Orissa case (AIR 1969 Orissa 54) that though a decree for recovery of possession had been obtained, it was not followed up by execution of the same.

9. There are series of authorities supporting the view that once a suit is filed, running of adverse possession is arrested. A Bench of the Madras High Court in the case of Fatima Bibi v. A. Hajee Muhammad Usman Sahib, AIR 1943 Mad 425, dealt with the effect of the institution of a suit on adverse possession. Leach C. J., spoke for the Court thus :—

"It would be a negation of the right given by O. 21, R. 63 to hold that when the suit has been filed in time, the person wrongly in possession of the property can get a title by adverse possession after the institution of the suit. In our opinion, the institution of the suit arrests the running of time in favour of defendant-1. ....."

A Division Bench of the Allahabad High Court in the case of Nand Lal v. Sunder Lal AIR 1944 All 17. while dealing with the effect of institution of a suit on adverse possession observed :—

".....It would therefore appear that if the judgment-debtor never had anything more than an immature title which was assailed and therefore, as it were, came under suspension before it ever did mature, then auction purchaser can be in no better position than his judgment-debtor was at the date of the decree or the date of the actual dispossession. The effect of the institution of a suit within limitation is to destroy previously existing adverse possession with effect from the date of institution

or at any rate to suspend it from that date until the suit is finally decided one way or the other. ....."

A Division Bench of the Calcutta High Court in the case of Achhiman Bibi v. Abdur Rahim Naskar, AIR 1958 Cal 437, examined the same question and pointed out (at p. 440):—

"We hold that there is considerable difference between a suit for mere declaration and a suit for declaration coupled with a prayer for possession. It is true that by a decree for declaration without more the position of person in wrongful occupation will not be disturbed, even if the decree be passed in his presence. If such person continues in possession even after the declaratory decree, he may, nevertheless, acquire prescriptive title. The consequences are different if the suit for declaration is coupled with a claim for possession, as was done in the present case, and such suit is decreed."

A Bench of the Madhya Pradesh High Court in the case of Mst. Sultan Jehan Begum v. Gul Mohd. AIR 1973 Madh Pra 72, went into the question at length and in our opinion summarized the legal position very aptly by saying (at p. 74):—

"In our view the law is clearly this:—

(1) When a person entitled to possession does not bring a suit against the person in adverse possession within the time prescribed by law his right to possession is extinguished. From this it only follows that if the former brings a suit against the latter within the prescribed period of limitation his right will not be extinguished.

(2) If a decree for possession is passed in that suit in his favour he will be entitled to possession irrespective of the time spent in the suit and the execution and other proceedings.

(3) The very institution of the suit arrests the period of adverse possession of the defendant and when a decree for possession is passed against the defendant the plaintiff's right to be put in possession relates back to the date of the suit.

(4) S. 28 of the Limitation Act (now S. 27) merely declares when the right of the person out of possession is extinguished. It is not correct to say that the section confers title on the person who has been in adverse possession for a certain period. There is no law which provides for 'conferral of title', as such on a person who has been in adverse possession for whatever length of time.

(5) When it is said that the person in adverse possession 'has perfected his title,' it only means this. Since the person who had the right of possession but allowed his right to be extinguished by his inaction, he cannot obtain the possession from the person in adverse possession, and, as its necessary corollary the person who is in adverse possession will be entitled to hold his possession against the other not in possession, on the well settled rule of law that possession of one person cannot be disturbed by any person except one who has a better title."

A learned single Judge of the Madras High Court in the case of N. E. Vedammal v. S. R. Krishnamoorthy Iyer, AIR 1976 Mad 283 dealt with the same question and quoted with approval the principle indicated by a Division Bench of the Allahabad High Court in the case of Ragho Prasad v. Pratap Narain Agarwal, 1969 All LJ 975, where it was stated (at p. 285 of AIR):—

"The suit in the instant case was not a suit for declaration, it was a suit for partition and possession. In a suit such as this, it is not possible to hold that if the defendant has been in adverse possession before the institution of the suit such adverse possession continues to run even after the institution of the suit so as to prescribe a good title in favour of the defendant. Were that so it could result in the frustration of the suit because while it was pending and before it terminated in a decree the defendant could have acquired title by adverse possession. Such a result is wholly unwarranted in law."

Ismail, J. in the Madras decision further stated (at pp. 285, 286 of AIR):—

"Let us test the proposition of the learned counsel for the appellant from a practical point of view. Suppose a person is in wrongful possession of the property and after he has been in such wrongful possession for three years, the real owner files a suit for declaration of title and recovery of possession. Assume that for some reason or other the suit was pending for nearly 9 years before the Court and after 12 years from the commencement of the posses-

sion of the defendant (person in wrongful possession) the suit was decreed. Can it be held that since the decree itself was passed 12 years after the adverse possession commenced the defendant had perfected title to the suit property by adverse possession and therefore acquired a good title and the decree-holder cannot thereafter execute the decree and recover possession of the property? That merely emphasises the fact that when a suit for declaration of title and recovery of possession is instituted before the adverse possession has culminated in the acquisition of prescriptive title the time during which the suit is pending cannot be taken advantage of by the person in wrongful possession and tacked on to the period during which he was in possession before the institution of the suit for the purpose of claiming prescriptive title."

10. In view of what has been stated in these decisions, it must follow that on institution of the suit for recovery of possession, running of adverse possession is arrested and the same position continues until the decree for recovery continues to be executable. From the facts of the Orissa decision (AIR 1969 Orissa 54) it appears that the decree for possession had not been put to execution. The distinction was lost sight of and reliance had been placed on a Bench decision of the Patna High Court in the case of Krishna Prasad Singh v. Adyanath Ghatak, AIR 1944 Pat 77, where the decree had not been executed. We are inclined to hold that the legal position as indicated by the Bench decision of the Calcutta High Court in AIR 1958 Cal 437 is correct and the learned single Judge in Damodar Jew Thakur's case (AIR 1969 Ori 54) went wrong in dissenting from it. The Orissa decision, therefore, does not correctly state the law. On the other hand, we are inclined to agree with the conclusions indicated in the Division Bench decision of the Madhya Pradesh High Court in Sultan Jehan Begum's case (AIR 1973 Madh Pra 72).

11. The net result, therefore, is that in the instant case where the defendant had obtained a decree for possession and had levied execution of that decree, plaintiff was not entitled to acquire any prescriptive title by tacking the period of possession prior to the suit and subsequent to it. The running of adverse possession got suspended with the institution of the suit in 1954 and as long as the decree remained executable, plaintiff was not entitled to maintain that his possession being for more than twelve years continuously could fructify into prescriptive title.

12. Plaintiff's suit had, therefore, been rightly dismissed by the courts below and such dismissal must be affirmed. Defendants shall be entitled to costs throughout.

P. K. MOHANTI, J.:— I agree.

Petition dismissed.

AIR 1979 ORISSA 115

S. K. RAY, C. J. AND J. K. MOHANTY, J.

Raghubar Ramanuja Das, Petitioner v. Commissioner of Endowments and others, Opposite Parties.

Original Jur. Case No. 111 of 1978, D/- 23-10-1978.

Orissa Hindu Religious Endowments Act (2 of 1952), Ss. 7, 35, 28, 42 — Suo motu proceeding initiated by Commissioner under S. 35 — Power to pass interim order under S. 7 — Scope.

The Commissioner of Endowments can pass interim orders for ensuring proper administration of the math in question and for proper application of the income of the properties of the math for the purposes for which it has been founded or exists, during the pendency of the proceeding under S. 35 specially when there is nothing in that Section or any other Section of the Act vesting any power in any authority constituted under the Act to pass a judicial order with regard to the very matters in respect of which the Commissioner has passed his impugned order appointing the Inspector of Endowments as an interim turstee of the religious institution in question and its properties until further orders. Such an order cannot be impeached as invalid or having been passed without jurisdiction. (Case law discussed). (Paras 7, 8)

What S. 7 provides is that the Commissioner can do all things which are reasonable and necessary to ensure proper administration of religious institutions and endowments and for proper

application of their income for the purposes for which they are founded or exist, unless that power is restricted by some other provisions of the Act which provide for doing of such things for such purposes as aforesaid. It would not be correct to infer from express provisions of the Act, other than S. 7, whereunder power has been conferred either on the Commissioner or on other authorities under the Act to do certain acts for temporary protection of the religious institutions and endowments and their income in certain eventualities, that such powers cannot be exercised at all under S. 7 in situations to meet which there is no specific provision in the Act. To give such a restricted interpretation to S. 7 will amount to doing violence to the clear, unambiguous and grammatical meaning of the language used in various sub-sections of S. 7 and making it nugatory. The limitations on the general power of the Commissioner under S. 7 have to be found from other express provisions of the Act. Those restrictions in those provisions would be confined to the situations envisaged in them, and not otherwise. (Para 4)

In the instant case, the pending proceeding is one under S. 35. That Section contains nothing like sub-sec. (3) of S. 28 or sub-sec. (5) of S. 42 conferring power on the Commissioner to pass the impugned order. The power and jurisdiction of the Commissioner under S. 7 in the instant case are not limited by or subjected to anything contained in S. 35. Sub-sec. (5) of S. 35 confers power on the Commissioner to appoint one or more persons to discharge the functions of the trustee of the institution, only after but not before he has declared the trustee as disqualified either temporarily or for the lifetime in an enquiry held under sub-sec. (2) of that Section. That stage not having been reached, sub-sec. (5), containing an express provision regarding appointment of another person to discharge the functions of the trustee and thereby limiting the general power of superintendence of the Commissioner under S. 7 does not operate. Thus, until the trustee is declared disqualified, the Commissioner's power under sub-sec. (2) of S. 7 remains in tact and his interim order cannot be held to be invalid for want of power and jurisdiction (Para 5)

Cases referred : Chronological Paras

AIR 1976 SC 1059	6
AIR 1972 Orissa 188	6
(1955) 21 Cut LT 93	6
AIR 1954 SC 400	6

R. Ch. Mohanty and J. P. Das, for Petitioner; S. Mohanty, A. S. Naidu, R. Mohanty, B. K. Jena, K. Patnaik and A. C. Mohanty, for Opposite Parties.

S. K. RAY, C. J.:— The petitioner is the Mahant and hereditary trustee of Biranchi Narayan Math alias Buguda Math at Buguda, District Ganjam. Opposite party No. 1 who is the Commissioner of Endowments initiated a suo motu proceeding under S. 35 of the Orissa Hindu Religious Endowments Act, 1951 (hereinafter called the Act) as per Annexure-1 dated 4-10-1977. This proceeding was occasioned in consequence of allegations made by members of general public against the petitioner. By Annexure-1 the Commissioner of Endowments framed three charges and called upon the petitioner to show cause as to why he shall not be disqualified and shall not cease to hold office.

2. During the pendency of this proceeding under S. 35 of the Act the opposite party No. 1 issued the impugned Annexure-2 in purported exercise of his powers under S. 7 of the Act, whereunder the Inspector of Endowments was appointed as an interim trustee of the religious institution in question and its properties until further orders. Opposite party No. 1 in his counter has stated that the expression 'interim trustee' in Annexure-2 has been inappropriately used and what was intended by Annexure-2 was to appoint the Inspector of Endowments as a fit person to look after the management of the institution pending finalisation of the proceeding under S. 35 of the Act. In view of this counter, the expression 'a fit person' has to be read in place of 'interim trustee' in Annexure-2 while considering the challenge made to its legality and propriety. The religious functions of the institution, however, have been allowed to be retained by the petitioner. This annexure has further directed the Inspector of Endowments to take

charge of the institution and its properties from the petitioner and to manage the institution subject to the duties and functions of the petitioner which have been expressly left with him. Consequent to Annexure-2 the Divisional Inspector of Endowments, Berhampur who is the opposite party No. 2 issued Annexure-3 dated 25-12-1977 which is a general notice to the public purporting to be issued under S. 42 (5) of the Act for the purpose of appointing a fit person to discharge any of the functions of the trustee of the institution in question.

3. The petitioner has sought for quashing Annexure-2 and for staying further proceedings thereunder as well as under Annexure-3. As appears from para 8 of the counter of opposite party No. 1, Annexure-3 has been conceded to be invalid and that it should be ignored. The only question which, therefore, remains for consideration is whether Annexure-2 is to be quashed. The sole contention of the petitioner is that S. 7 of the Act does not empower the Commissioner of Endowments to issue the interim order as contained in Annexure-2 in view of other express provisions of the Act specifically empowering the Commissioner to appoint an interim trustee or a fit person, as the case may be to manage the institution.

4. It is, therefore, necessary to analyse the ambit and scope of S. 7 of the Act.

S. 7 reads as follows:—

"7. Powers and duties of Commissioner:— (1) Subject to the provisions of this Act, the general superintendence of all religious institutions and endowments shall vest in the Commissioner.

(2) The Commissioner may do all things which are reasonable and necessary to ensure that the religious institutions and endowments are properly administered and that their income is duly appropriated for the purposes for which they were founded or exist.

Explanation — The Commissioner shall have power to pass such interim order as he deems necessary for the proper maintenance of a religious institution or the proper administration of a religious endowment including the power to pass such orders if and when necessary for the proper management of any institution when a dispute concerning the same is pending in a Court."

Sub-sec (1) vests power of general superintendence of all religious institutions and endowments which is subject to the provisions of the Act. Religious institutions and endowments referred to here include math and all properties belonging to or given or endowed for the support of math or for the performance of any service or charity connected with the math. This will be clear on reading the definition of "religious endowment" in S. 3 (xii) of the Act. Sub-section (2) is couched in general terms and authorises the Commissioner to do all things for the proper administration of the religious institutions and endowments (which include a math) and for ensuring that their income is duly appropriated for the purposes for which they were founded or exist. The language has not imposed any limitation on this power of the Commissioner, except that he must consider it necessary and reasonable before exercising any such power. The Explanation to this sub-section also confers power on the Commissioner to pass such interim orders as he deems it necessary for the proper maintenance of a religious institution or for proper administration of a religious endowment, including power to pass such orders, if and when necessary, for the proper management of any institution when a dispute concerning the same is pending in a Court. The powers of the Commissioner under this Section are very wide. The only limitations on such powers are indicated in the opening words "Subject to the provisions of this Act" in sub-sec. (1) thereof. On a plain reading of this Section it appears to me that the Commissioner is vested with powers to pass orders for the purposes specified in the Section, namely, in effectuating his power of general superintendence of all religious institutions and endowments and in doing all things which, in his opinion, are reasonable and necessary for ensuring proper administration of the religious institutions and endowments and for proper application of the income of such institutions for the purposes for which they have been founded or exist. This power, though wide, is supervisory and

regulatory in character and can be unrestrictively exercised in proper situations, in the absence of any specific provisions of the Act designed to meet such situations. Where there are specific provisions, the Commissioner is to act according to them and cannot fall back upon his general power under S. 7. In cases where a dispute concerning any religious institution or religious endowment is pending in any proceeding in a Court of law, as is permissible under S. 73 of the Act or is pending under S. 78 of the Act, or before any authority under the Act acting judicially, the Commissioner shall have power to pass such interim orders as he deems necessary for the proper management of such religious institutions or for proper administration of such religious endowments which are the subject-matter of that proceeding in the Court. In other words, where a particular field or situation is covered by other provisions of the Act providing for passing of protective orders, the Commissioner cannot invoke his powers under S. 7 in that field or to meet those situations. This is clear from the opening expression of sub-sec. (1) of S. 7, namely, "Subject to the provisions of this Act." For instance, S. 28 of the Act deals with the proceeding for suspension, removal or dismissal of trustees. During pendency of such a proceeding the Commissioner is empowered under sub-sec. (3) thereof to appoint a fit person to discharge the functions of the trustee in certain circumstances. This is an express provision empowering the Commissioner to appoint a fit person in a situation envisaged in that Section during the pendency of a proceeding thereunder. Thus, where a proceeding under S. 28 is pending, the Commissioner in order to appoint a fit person must draw his power from sub-sec. (3) of S. 28 and cannot invoke his general power under S. 7, which is subject to this specific power. Similarly, where a proceeding for framing of a scheme under S. 42 is pending, the power to appoint a fit person by way of making an interim arrangement to discharge all or any of the functions of the trustee of an institution is conferred on the Commissioner under sub-sec. (5) of that Section. This section, therefore, limits the general power of the Commissioner under S. 7 in the matter of appointment of a fit person during the pendency of the proceeding under Section 42 of the Act. Having regard to the scheme of the Act and reading the various other provisions, I have no doubt in my mind that what S. 7 provides is that the Commissioner can do all things which are reasonable and necessary to ensure proper administration of religious institutions and endowments and for proper application of their income for the purposes for which they are founded or exist, unless that power is restricted by some other provisions of the Act which provide for doing of such things for such purposes as aforesaid. It would not be correct to infer from express provisions of the Act, other than S. 7, whereunder power has been conferred either on the Commissioner or on other Authorities under the Act to do certain acts for temporary protection of the religious institutions and endowments and their income in certain eventualities, that such powers cannot be exercised at all under S. 7 of the Act in situations to meet which there is no specific provisions in the Act. To give such a restricted interpretation to S. 7 will amount to doing violence to the clear, unambiguous and grammatical meaning of the language used in various sub-sections of S. 7 of the Act and making it nugatory. The limitations on the general power of the Commissioner under S. 7 have to be found from other express provisions of the Act. Those restrictions in those provisions would be confined to the situations envisaged in them, and not otherwise.

5. In the instant case, the pending proceeding is one under S. 35 of the Act. That Section contains nothing like sub-sec. (3) of S. 28 or sub-sec. (5) of S. 42 conferring power on the Commissioner to pass an order of the nature of Annexure-2. The power and jurisdiction of the Commissioner under S. 7 of the Act, in the instant case, are not limited by or subjected to anything contained in S. 35 of the Act. Sub-sec. (5) of S. 35 confers power on the Commissioner to appoint one or more persons to discharge the functions of the trustee of the institution, only after but not before he has declared the trustee as disqualified either temporarily or for the lifetime in an enquiry held under sub-sec. (2) of that Section. That stage

not having been reached, sub-sec. (5), containing an express provision regarding appointment of another person to discharge the functions of the trustee and thereby limiting the general power of superintendence of the Commissioner under S. 7 does not operate. Thus, until the trustee, here the petitioner, is declared disqualified, the Commissioner's power under sub-sec. (2) of S. 7 of the Act remains intact and his interim order as per Annexure-2 cannot be held to be invalid for want of power and jurisdiction.

6. S. 7 of the Act is almost a verbatim reproduction of S. 11 of the Orissa Hindu Religious Endowments Act IV of 1939 (hereinafter called the old Act). On a comparative reading of these two sections it will be seen that the powers of the Commissioner under S. 11 of the old Act have been considerably enlarged. S. 11 of the old Act was considered by the Supreme Court in the case of Sri Jagannath Ramanuj Das v. State of Orissa, AIR 1954 SC 400. This Section was held to be intra vires and it was further held that the powers under S. 11, though seemingly wide, can be exercised only to ensure that maths and temples are properly maintained and the endowments are properly administered The Explanation attached to the Section only makes it clear that the general power conferred upon the Commissioner extends to passing of interim orders as the Commissioner might think fit.

Section 11 of the old Act also came in for consideration by a Division Bench of this Court in the case of Sarat Kumar Mohanty v. Gourhari Samantaray and Gour Chandra Das, (1955) 21 Cut LT 93. Opening words of S. 11 "Subject to the provisions of this Act" were construed and it was held that "S. 11 in unambiguous language lays down that the power vested by it should be read subject to the other provisions of the Act and of any scheme settled or deemed to be a scheme settled under it." Their Lordships did not disapprove the view that an interim order involving suspension of rights of the hereditary trustee may be passed by the Commissioner during pendency of an enquiry directed at disqualifying, removing or dismissing the hereditary trustee.

The ambit and scope of power conferred under S. 7 of the Act was directly considered in the case of Nabaghan Naik v. Sadananda Das, AIR 1972 Orissa 188. It was held that the power which the Commissioner may exercise and the duties which he may perform must be in regard to matters not otherwise provided for in the Act and in areas not otherwise covered. Their Lordships also further clarified that where under any Section of the Act the jurisdiction and power is conferred on the Endowment Commissioner for doing a thing embracing a power to making interim orders, in exercise of which he manifestly acts judicially, no such interim order can be passed by the Endowment Commissioner under S. 7, because the area in which either the judicial order or administrative order under S. 7 is to operate is the same, and thereby has been expressly excluded from the ambit of S. 7.

Section 7 of the Act was again noticed by the Supreme Court in the case of Hindu Religious Endowments v. B. Samitra, AIR 1976 SC 1059. In that case the question mooted was whether the Assistant Commissioner of Endowments had jurisdiction to appoint a non-hereditary trustee of a religious institution under S. 27 of the Act without prior determination of the question that the institution is a public one and has no hereditary trustee, under S. 41 of the Act. Their Lordships answered the question in the negative after repelling the Endowment Commissioner's contention which was based on the ground that otherwise it would become difficult to exercise effective control on public and religious institutions as proceedings under S. 41 take a long time. In giving attention to this difficulty in exercising effective control, their Lordships noticed S. 7 of the Act. They said (at pp. 1065, 1066):—

"..... The argument cannot also be countenanced as it overlooks the explanation appended to S. 7 whereunder the Commissioner has been given power to pass such interim orders as he may deem necessary for the proper maintenance, administration and management of religious institutions and endowments when a dispute concerning the same is pending."

Their Lordships did not give pointed attention to the expression "pending in a Court" in the Explanation to sub-sec. (2) of S. 7 of the Act and the general way in which they have interpreted this Explanation would indicate that

even though the dispute is pending before any of the specified authorities under the Act, the power to pass interim orders can be exercised by Commissioner and that it is not necessary that the dispute should be pending in a Court of law, that is to say, a civil Court. This opinion was expressed on the hypothesis that the various authorities under the Act exercising judicial functions constitute and function as Courts.

7. In view of the aforesaid decisions, and the interpretation of S. 7, by applying normal rules of construction, the inevitable conclusion is that the Commissioner of Endowments can pass interim orders for ensuring proper administration of the math in question and for proper application of the income of the properties of the math for the purposes for which it has been founded or exists, during the pendency of the proceeding under S. 35 of the Act, specially when there is nothing in that Section or any other Section of the Act vesting any power in any authority constituted under the Act to pass a judicial order with regard to the very matters in respect of which the Commissioner has passed his impugned order (Annexure-2) under S. 7. Annexure-2, therefore, cannot be impeached as invalid or having been passed without jurisdiction.

8. In result, for the aforesaid reasons, Annexure-2 cannot be quashed as it seems to have been passed validly by the Commissioner of Endowments in exercise of his powers under S. 7 of the Act. The writ application, therefore, fails and is dismissed with costs assessed at Rs. 100/- (rupees one hundred).

Writ application is dismissed with costs.

J. K. MOHANTY, J.:— I agree.

Petition dismissed.

AIR 1979 ORISSA 120

R. N. MISRA AND P. K. MOHANTI JJ.

K. C. Rout, Petitioner v. State of Orissa and another, Opposite Parties.

O. J. C. No. 959 of 1977, D/- 24-1-1979.

(A) Constitution of India, Art. 226 — Mandamus — Issue of — Valid lease — Lessee seeking to enforce his statutory right to possession by filing writ petition — Maintainable. (T. P. Act (4 of 1882), S. 108 (b)).

Under the provisions of Sec. 108 of the T. P. Act, the lessee has a statutory right to force the lessor to put him in possession of the leasehold property. In fact, Section 108, cl. (b) of the Act, casts that obligation on the lessor. When there is a valid and duly registered lease in favour of a lessee, right to property is created in his favour and he is entitled to have possession and enjoy the leasehold in accordance with law. If the lessor omits to perform its part of the obligation of putting the lessee in possession, the lessee of the property has a statutory right to enforce performance of the obligation. The lessee is entitled to invoke the extraordinary writ jurisdiction for enforcement of his statutory right. AIR 1976 Delhi 154 and AIR 1977 SC 1496 and AIR 1977 SC 2149, Disting. (Paras 6, 7)

Anno: AIR Comm. Constn. of India (2nd Edn.), Art. 226 N. 17 (E) and (G); T. P. Act (4th Edn.), S. 108 (b), N. 1 and 3.

(B) Evidence Act (1 of 1872), Section 115 — Promissory estoppel — Estoppel against Government — Lessee surrendering his first plot on offer by Government to provide alternate site — Lessee entitled to its possession.

Where on the basis of the representation made by the State Government that the lessee will be provided with alternate site and will enjoy the property for 90 years, the lessee surrendered the legal right created in his favour under the first lease deed and a valid lease-deed in respect of the alternate site was also executed and registered in his favour and thus the lessee changed his position to his prejudice relying on representation, the lessee is entitled on the basis of promissory estoppel to claim possession of the alternate site from the State Government. AIR 1968 SC 718 Rel. on. (Para 7)

The Government is bound to act in a manner which would hold out ideal conduct for citizens to imbibe and it cannot undertake performance of its functions in a manner which would lead to litigations and drive law-abid-

ing citizens to raise dispute for enforcing their admitted rights. By its conduct and performance, the State must create a sense of security in the minds of the citizens and citizens while dealing with the State must be in a position to rely upon the representations made by it. A special sanctity attaches to its acts; a presumption of correctness is available in respect of them and a sense of security is assumed in relation thereto. (Para 7)

Anno: AIR Manual (3rd Edn.) Evidence Act, S. 115, N. 83 (A)

Cases Referred : Chronological	Paras
AIR 1977 SC 1496	4
AIR 1977 SC 2149	4, 5
AIR 1976 Delhi 154	4
AIR 1968 SC 718	7
AIR 1964 SC 685	4

G. Rath, for Petitioner; Government Advocate, for Opposite Parties.

R. N. MISRA, J.:— This is an application under Art. 226 of the Constitution for a direction to the opposite parties to put the petitioner in possession of the land leased out to him under a registered deed of lease dated 14-1-1976.

2. Petitioner alleges that the State of Orissa opposite party No. 1 leases out homestead plots within the New Capital area of Bhubaneswar for residential purpose in terms of the guidelines laid down under executive instructions. On the basis of an application of the petitioner the State Government in the Political and Services Department allotted plot No. 313-A measuring 87' x 75' in Kharabela Nagar, Unit No. III, and a regular deed of lease was executed in his favour by the Governor of Orissa and was got duly registered on 30-12-1970. When the petitioner asked for possession thereof, there was dispute over the occupation of the land and the Labour Department of the State Government did not permit the petitioner to take possession on the ground that in an earlier plan, the area had been reserved for the construction of a multipurpose labour welfare centre. After five years of correspondence and negotiation, the State Government agreed to provide an alternate site in Saheednagar to the petitioner by carying out two plots bearing Nos. B-61/A and B/61/B each measuring 40' x 80'. On 19th Dec. 1975, the Director of Estates-opposite party No. 2 informed the petitioner to the following effect:—

"Government have been pleased to allot the plot Nos. B-61/A and B-61/B in S. C. R. site measuring 40' x 60' each in the District Centre, Sahidnagar as per drawing No. 462 in your favour in exchange of plot No. 313-A measuring 87' x 75' in Unit No. 3 Kharbelanagar." Petitioner was directed to execute a deed of surrender in respect of the earlier plot and to clear up the ground rent of the said plot and produce up-to-date rent receipt. He was also informed that the amount of Rs. 1472/- towards the premium of the new plots had been adjusted out of the sum of Rs. 1500.75 deposited by the petitioner in respect of the earlier plot. In pursuance of the aforesaid direction, a fresh lease deed was duly registered on 14-1-1976, in the name of the Governor of Orissa in favour of the petitioner and the rights and obligations were indicated in the terms appended thereto. One of the relevant terms therein was to the following effect:—

"the lessor demise to the lessee for the purpose of construction of buildings and structures thereupon according to the plan and type approved by the lessor for the purpose of using the same only for commercial establishment with necessary living accommodation, to HOLD the said premises from the 29th day of Dec. 1975 for the term for 90 years paying therefor during the said term Rs. 22.04 paise as initial rent per annum, ..."

In terms of the requirement, petitioner submitted a registered surrender deed in respect of the earlier plot on 9-2-1976, and furnished a duplicate copy of the lease deed dated 14-1-1976, with a view to enabling the Department to prepare the lay-out plan and deliver formal possession. Rent was realised in respect of the new leasehold from the petitioner. As no action was taken for delivering the same to the petitioner, he demanded the same by writing a letter dated 11-8-1977. Notwithstanding the demand, possession was not delivered. Petitioner, therefore, filed the writ application on 22-11-1977, for a direction to the opposite parties to put him in possession of the leasehold. He alleges that his right to hold property and enjoy the same guaranteed under Art. 19 of the Constitution is being in-

fringed by the action of the State.

3. The Director of Estates-opposite party No. 2 made a return to the rule nisi issued by the Court on behalf of both the two opposite parties, and admitted all the facts alleged by the petitioner. In para 7 of the counter affidavit it has been pleaded inter alia:—

"..... Side by side, the petitioner was also intimated to take delivery of possession of the plots. The Director, Town Planning, Orissa did not extend his consent to the carving out of the two above plots allotted to the petitioner on the ground that the aforesaid open space reserved in the front of the District Shopping Centre abutting Janapath will be affected and sizeable buildings and the proposed auditorium will be tracted behind. Carving out of two new plots will completely obstruct the proposed auditorium. In these circumstances, possession of the plots could not be delivered to the petitioner. Since the possession of the lands has not been delivered to the petitioner, it cannot be said that the petitioner has acquired valid and complete title over the lease-hold property."

It has been further pleaded in para 8 of the counter affidavit:—

"....., assuming though not admitting that title passed to the petitioner on execution of the lease deed before delivery of possession, it is submitted that according to sub-cl. XI of cl. 2 of the lease deed, if the lessor at any time, before expiry of the lease, desired for any public purpose to resume the holding or any part thereof, the lessee shall vacate it or the part required, within 3 months of notice given by the lessor. In that event lessee will be entitled to reasonable compensation. It is not possible now to deliver possession of the plots to the petitioner as Government intends to resume the land for the public purpose, i. e. for the proposed auditorium etc. in that area, under sub-cl. XI of cl. 2."

Petitioner filed a rejoinder reiterating his stand in the writ application.

4. At the hearing of the application, learned Government Advocate on behalf of opposite parties while conceding that there was no dispute over the facts in the matter has contended that the extraordinary jurisdiction of this court should not be permitted to be invoked in the instant case as, at the most, petitioner has alleged breach of contract and he should be asked to seek his relief by a regular suit. In support of this contention of his, reliance has been placed on a decision of the Delhi High Court in the case of N. L. Dalmia v. Union of India, AIR 1976 Delhi 154, and two recent decisions of the Supreme Court in the cases of Radhakrishna Agarwal v. State of Bihar, AIR 1977 SC 1496, and Bihar E. G. F. Co-op. Socy. v. Sipahi Singh, AIR 1977 SC 2149.

The facts of the Delhi case are the following:—

Petitioner entered into an engagement for supply of ten thousand tents of a particular make for a price of Rs. 4,30,000/- by a stipulated date. The period of delivery was extended by the Union of India on certain conditions, but on August 18, 1969, the contract was cancelled on the allegation that the petitioner had failed to deliver the goods before Nov. 30, 1968, or the extended dates being Feb. 15, 1969, and May 31, 1969. The petitioner was told that the extra expenditure incurred in the risk purchase necessitated by the petitioner's failure to perform the contract would be intimated to him without prejudice to the rights of the Union of India as per the terms and conditions of the contract and in April, 1975, the Union of India informed the petitioner that they were entitled to recover a sum of Rs. 32,250/- by way of general damages. Upon petitioner's failure to pay the same, he was threatened with action as stipulated under the contract. Thereupon petitioner filed a writ application before the Delhi High Court that the demand of April 18, 1975, be quashed and the Government be directed to refund the money of the petitioner. The High Court ultimately concluded by saying (at pp. 161,162):—

"There is clear distinction between a statutory obligation and a contractual obligation of the Government to pay money to a petitioner. Statute imposes a public duty while the duty imposed by a contract is owed by the Government not to the public but to the petitioner individually. A contravention of statute makes the action of a Government illegal. The breach of contract is not illegal in the same sense. Direct contravention of a statute is illegal but

the breach of a contract may be wrongful. It is not contravention of any statute directly. A duty imposed by statute is different from a duty imposed by contract. Therefore, the breach of the first duty amounts to illegality while the breach of the second type of duty amounts to only a breach of contract.

We conclude, therefore as follows:

(1) The respondent are not under any public duty to pay to the petitioner the price of the goods purchased by them from the petitioner.

(2) The price of the goods is payable by the Government to the petitioner only under a contract.

(3) The non-payment of the price or withholding the payment thereof only amounts to a breach of contract.

(4) A writ petition would not be entertained to enforce the payment of money due from the Government to the petitioner because the non-payment of the money amounts at the most to a breach of contract.

(5) Absolutely no reason is given by the petitioner why the ordinary remedy of an arbitration or a civil suit should not be resorted to by him in recovering money due to him from the Government."

The facts indicated in the judgment clearly show that petitioner was trying to enforce the contract and the Court was of the view that since the claim was on the basis of a contract and at the most what was alleged amounted to a breach of contract, a writ of mandamus should not be issued.

In Radhakrishna Agarwal's case (AIR 1977 SC 1496) (supra), the facts are the following: Petitioners were lessees from the State of Bihar and one of the terms of the lease stipulated was that the rate of royalty could be revised every three years in consultation with the lessees and the decision of the State Government was to be binding on the lessees. Purporting to exercise the power of revision of the royalty, Government enhanced the same and when the lessees refused to accept the liability. Government directed cancellation of the lease. Thereupon the Patna High Court was moved for vacating the enhancement of the royalty and the consequent cancellation of the lease. Before the Supreme Court reliance was placed on Art. 14 of the Constitution. Repelling the contention, Learned Chief Justice spoke for the Court thus (at p. 1500):—

"In the cases before us the contracts do not contain any statutory terms or obligations and no statutory power or obligation which could attract the application of Art. 14 of the Constitution is involved here. Even in cases where the question is of choice or considration of competing claims before an entry into the field of contract facts have to be investigated and found before the question of a violation of Art. 14 could arise. If those facts are disputed and require assessment of evidence the correctness of which can only be tested satisfactorily by taking detailed evidence, involving examination and cross-examination of witnesses, the case could not be conveniently or satisfactorily decided in proceedings under Art. 226 of the Constitution. Such proceedings are summary proceedings reserved for extraordinary cases where the exceptional and what are described as, perhaps not quite accurately 'prerogative' powers of the Court are invoked. We are certain that the cases before us are not such in which powers under Article 226 of the Constitution could be invoked."

The Co-operative Society's case (AIR 1977 SC 2149) (supra) also came from the Patna High Court in appeal. The facts of the case appear from para 2 of the judgment are these: The Co-operative Society took settlement of certain fishery in 1950. The particular fishery was settled with it for the year 1974-75 beginning from 1-7-1974 on a premium of Rs. 1,50,000/-. At the end of the year it was discovered that the Society had defaulted in paying to the tune of Rs. 66,869/-. Thereupon the fishery was settled for one year with effect from July 1, 1975, with the respondent by way of public auction by the Revenue Department for the highest bid of Rs. 1,65,000/-. In Feb. 1976, the auction purchaser made a representation to the Revenue Department for remission of Rs. 75,000/- on the ground that he had suffered a heavy loss as a result of unlawful activities of the members of the Society. In the alternative, he prayed that the lease may continue with him for three years at the same amount so that he could recoup his losses and pay the legitimate dues

of the State. Government directed that for two subsequent years on the same annual consideration as in the first year the respondent may continue to enjoy the fishery but called upon the respondent to deposit the amount of rupees 1,65,000/- as a condition precedent. The respondent deposited the amount on May 3, 1976, and asked for issue of the patta of settlement. In the meantime, the State Government had changed its mind on the representation of the Co-operative Society and by order dated 29-6-1976, Government decision was communicated to the effect that the fishery should be settled with the Society on condition that the Society should make good the deficiency of the earlier year and undertake to pay the sum of Rs. 1,65,000/- which was the highest bid amount. When the respondent wanted to be put in possession, he was appraised of the subsequent Government decision. Thereupon he moved the High Court at Patna under Art. 226 of the Constitution for cancellation of the Government decision and for being put in possession of the fishery for exploitation. The High Court held that there was no binding or enforceable contract between the State Government and the respondent. Yet, relying on the principle of promissory estoppel, it allowed the application. Before the Supreme Court, three contentions were advanced, namely, (i) that since there was no completed, binding and enforceable contract between the State of Bihar and respondent No. 1 as contemplated by Art. 299 of the Constitution the writ petition filed by respondent No. 1 was not maintainable (ii) that to a case like the present one, the doctrine of promissory estoppel had no application and (iii) that in any case, since there was no breach of any statutory duty a writ of mandamus could not have been issued. The decision on the third contention is relevant for the present case. The learned Judges in dealing with that contention observed (at p. 2154):—

"..... There is abundant authority in favour of the proposition that a writ of mandamus can be granted only in a case where there is a statutory duty imposed upon the officer concerned and there is a failure on the part of that officer to discharge the statutory obligation. The chief function of a writ is to compel performance of public duties prescribed by statute and to keep subordinate tribunals and officers exercing public functions within the limit of their jurisdiction. It follows, therefore, that in order that mandamus may issue to compel the authorities to do something, it must be shown that there is a statute which imposes legal duty and the aggrieved party has a legal right under the statute to enforce its performance. .....

In the instant case, it has not been shown by respondent No. 1 that there is any statute or rule having the force of law which casts a duty on respondents 2 to 4 which they failed to perform. All that is sought to be enforced is an obligation flowing from a contract which, as alredy indicated, is also not binding and enforceable. Accordingly, we are clearly of the opinion that respondent No. 1 was not entitled to apply for grant of writ of mandamus under Art. 226 of the Constitution and the High Court was not competent to issue the same."

In Radhakrishna Agarwal's case (supra) the title of the petitioner to the leasehold was in dispute, inasmuch as the lease had already been cancelled and the case before the Court was one where question of pure alleged breaches of contract were involved. The Constitution Bench in the case of State of Orissa v. Ram Chandra Dev, AIR 1964 SC 685, pointed out in para 8 of the judgment:—

"..... Under Art. 226 of the Constitution, the jurisdiction of the High Court is undoubtedly very wide. Appropriate writs can be issued by the High Court under the said article even for purposes other than the enforcement of the fundamental rights and in that sense, a party who invokes the special jurisdiction of the High Court under Art. 226 is not confined to cases of illegal invasion of his fundamental rights alone. But though the jurisdiction of the High Court under Art. 226 is wide in that sense, the concluding words of the article clearly indicate that before a writ or an appropriate order can be issued in favour of a party, it must be established that the party has a right and the said right is illegally invaded or threatened. The exis-

tence of a right is thus the foundation of a petition under Art. 226....."

In Radhakrishna Agarwal's case (supra) his right to the property under the lease was under challenge and the entire claim was found to be confined to the contract which had been rescinded. In that background, the Court dealt with the matter.

5. In the Co-operative Society's case (supra) the right was also under challenge and there was thus no property with conceded title in favour of respondent No. 1 to be protected. From para 4 of the judgment it is clear that the High Court had found and the Supreme Court in appeal did not disturb the finding that there was no binding and enforceable contract between the parties. The Court came to hold that the doctrine of promissory estoppel was not applicable. The Court further found that the respondent No. 1 was not pressing for enforcement of any statutory duty or legal obligation.

6. The facts of the present case are, however, very different. The fact that there is a valid lease deed in favour of the petitioner has not been questioned. Though it has been contended in the counter affidavit that since possession has not been delivered, title does not accrue, it is not necessary to cite authorities for the proposition that upon registration of the lease deed title to the leasehold vests in the lessee. Under the provisions of S. 108 of the T. P. Act, the lessee has a statutory right to force the lessor to put him in possession of the leasehold property. In fact S. 108, cl. (b) of the Act, casts that obligation on the lessor. Petitioner has claimed for enforcement of that statutory obligation.

7. Admittedly when there is a valid lease in favour of the petitioner, right to property has been created in his favour and he is entitled to have possession and enjoy the leasehold in accordance with law. Since the lessor has omitted to perform its part of the obligation, petitioner as the lessee of the property has a statutory right to enforce performance of the obligation.

Even while keeping the provisions of the Transfer of Property Act in view, at one stage we were inclined to accept the objection advanced by the State Government, inasmuch as the obligation stipulated therein was within reference to a lessor and not the State as such; but the facts have a tell-tale aspect. Petitioner in his anxiety to obtain lease of some lands within the New Capital approached the State Government as early as 1970 and obtained a valid lease in his favour by payment of the consideration money. Possession of the property was not granted to him on account of an objection raised by another Department of the State Government. Though possession was not made over to the petitioner, he was made to pay the rent for the property up to surrendering the same in 1976. Ungrudgingly petitioner bore the burden as he was anxious for an alternate site by way of lease. For good consideration, an alternate site was offered and petitioner performed his part of obligation and on the representation of the State that he was going to enjoy the property for 90 years petitioner surrendered his right under the earlier lease, specific performance of which he could have asked for. Government had not been able to perform its obligation under the first lease on account of objection by another Department of its own. When an alternate site was offered, it is assumed that appropriate enquiry was made and Government was satisfied that the same difficulty which had been experienced earlier was not going to be again experienced in regard to the new site. It must be assumed that appropriate satisfaction had been reached before the fresh offer was made and ultimately the offer, when accepted by the petitioner led to a formal lease deed. Government must be aware of its obligation under law and when it makes representation to a citizen and enters into obligation in the shape of a formal contract, Government must be aware of the position that its act creates rights in favour of the citizen and the said citizen is entitled to work out his rights. It was only on the basis of the representation of the State Government that the petitioner surrendered the legal right created in his favour under the first lease deed and thus changed his position to his prejudice relying on the representation. In the facts and circumstances appearing in the case, the principles indicated in the case of Union of India v. Anglo Afgan Agencies, AIR 1968 SC 718, are fully attrac-

ted and petitioner is entitled to succeed on the basis of promissory estoppel.

We cannot but point out that the State Government is bound to act in a manner which would hold out ideal conduct for citizens to imbibe and it cannot undertake performance of its functions in a manner which would lead to litigations and drive law-abiding citizens to raise disputes for enforcing their admitted rights. By its conduct and performance, the State must create a sense of security in the minds of the citizens and citizens while dealing with the State must be in a position to rely upon the representations made by it. Government is an indispensable institution for every civilised Society. On account of the fact that Government is the repository of the mighty powers of the State and notwithstanding the change that the democratic set up brings about in the manning thereof, there is continuity of administration; there is a declared policy and impersonal approach to matters, over the ages and throughout the world, Governmental dealings have been treated as a class by themselves. A special sanctity attaches to its acts; a presumption of correctness is available in respect of them and a sense of security is assumed in relation thereto. No group of men in charge of the administration at a given time is entitled to affect its credibility or tarnish its image. In the long run, Society is bound to reap the evil consequences of the fallen path. These are the special circumstances which lead us to hold that petitioner has all the equities in his favour.

8. In the counter affidavit it has been pointed out that if the property is given to the petitioner and he is allowed to raise construction the proposed auditorium would be adversely affected. It has simultaneously been pointed out that under the contract it is open to State to resume the property on payment of compensation. It is unfortunate that such a stand has been taken without disclosing any further material to support the genuineness of the plea. It is also not known as to when the site for the auditorium was determined. Since title has already vested in the petitioner in respect of the two plots offered by way of the alternative, petitioner must be given possession of the property and thereafter it is open to the State in accordance with law and contract to resume the same. No notice of resumption has been given nor has compensation been offered. In the circumstances, the plea raised in paragraph 8 of the counter affidavit seems to be only a defence for the purpose of litigation without any genuine basis for it, Government in the Political and Services Department while dealing with the question of leasing out public property to individual citizens must behave with greater care and attention so that the image of the State may not be tarnished and its transactions may not end up in litigations. Credibility of the State is of paramount consideration and no citizen should be given occasion to develop feeling of antagonism against the State.

9. Having heard learned counsel for both sides and for the reasons indicated above, we are inclined to hold that the objection raised on behalf of the State is not tenable on the facts of the case and the writ application has to be allowed. We accordingly direct that a writ of mandamus shall issue to the two opposite parties to put the petitioner in possession of the leasehold within one month from the date of service of the writ. Petitioner shall have his cost of the application. Hearing fee is assessed at Rs. 200/- (two hundred).

P. K. MOHANTI, J. I agree.

Petition allowed.

AIR 1979 ORISSA 126

S. ACHARYA J.

M/s. Surajmall Shiwbhagawan, Petitioner v. M/s. Kalinga Iron Works, Opposite party.

Civil Revn. No. 158 of 1978, D/- 9-3-1979.*

(A) Civil P. C. (5 of 1908), S. 20 — Concurrent jurisdiction to two or more Courts — Agreement between parties that dispute between them shall be tried by one of such Courts is not contrary to public policy — (Contract Act (9 of 1872) S. 28). AIR 1971 SC 740; AIR 1978 Orissa 167; AIR 1979 Mad 16 and AIR 1979 Mad 21 Rel. on. (Para 5)

*(From order passed by S. K. Misra Sub. J. Keonjhar, D/- 21-1-1978.)

DW/EW/C145/79/BBB/VBB

Anno: AIR Manual (3rd Edn.) Contract Act. S. 28. N. 2. AIR Comm. C. P. C. (9th Edn.) S. 20, N. 16-A.

(B) Civil P. C. (5 of 1908), S. 20 — Choice of forum by agreement — Ouster of jurisdiction of particular Court — Words "All subject to Calcutta jurisdiction" printed on purchase order — Ouster of jurisdiction of other Court cannot be implied merely from these words — (Contract Act (9 of 1872), Section 28).

A purchase order was sent by the defendant to the plaintiff, by which the defendant placed orders with the plaintiff for supplying certain varieties of pig iron from its concern at Barbil in the Keonjhar district to the defendant in Calcutta. At the top of the purchase order it was printed. "All subject to Calcutta jurisdiction." The purchase order was typed in the defendants' letter-head and issued by the defendant and it had not been signed by the plaintiff.

Held that by mere recital of the said words at the top of the purchase order, and sending the same to the plaintiff. it could not be said that the plaintiff agreed to confine settlement and adjudication of all disputes between the parties relating to the contract only at one place, i. e. in the courts at Calcutta and nowhere else. Ouster of Court's jurisdiction should not be easily construed and could not be assumed or presumed very easily. Ouster of jurisdiction must be proved by express words or by necessary or inevitable implications. AIR 1959 Mad 227, Rel. on; AIR 1963 Guj 148, Distinguished. (Para 6)

Anno: AIR Manual (3rd Edn.) Contract Act S. 28 N. 2 AIR Comm. C. P. C. (9th Edn.) S. 20, N. 16-A.

(C) Evidence Act (1 of 1872), S. 114 Illus. (f) — Postal business — Certificate of posting — Presumption — Absence of positive proof of the fact that original of the letter was actually posted in an envelope and that envelope was actually posted in a post office — No presumption that letter was posted and received can be drawn.

Where certificate of posting did not indicate whether the letter posted was an envelope, in-land letter or post card and there was no direct evidence on record that the original letter was actually put in an envelope and that particular envelope was posted under certificate of posting, the Court cannot draw presumption under S. 114 that the letter was posted and received. AIR 1978 Cal 123 and AIR 1971 Ker 231 Rel. on. (Para 8)

Anno: AIR Manual (3rd Edn.) Evi. Act. S. 114, N. 43.

Cases Referred:	Chronological Paras
AIR 1979 Mad 16	5
AIR 1979 Mad 21	5
AIR 1978 Cal 123	8
AIR 1978 Orissa 167: 46 Cut LT 89	5
AIR 1971 SC 740	5
AIR 1971 Ker 231	8
AIR 1963 Guj 148	6
AIR 1959 Mad 227	6

P. Roy and M. Sinha, for Petitioner; S. Mohanti and P. Mohanti, for Opposite Party.

ORDER:— The defendant has preferred this revision against the order passed by the Subordinate Judge, Keonjhar on 21-1-78 in Money Suit No. 1 of 1975.

2. The plaintiff is a unit of the Industrial Development Corporation of Orissa, Ltd. The defendant-firm carries on business in Calcutta. The plaintiff's suit, in short, is for realisation of certain amount of money claimed on the basis of the balance dues on the defendant on account of supply of goods by the plaintiff to the defendant and on account of loss sustained by the plaintiff due to payment of demurrage and other amounts due to the default of the defendants as specified in the plaint. The defendant while denying the plaintiff's claim has alleged that the court at Keonjhar has no territorial jurisdiction to try this suit as no part of the cause of action arose within the jurisdiction of this Court and the plaintiff had entered into an agreement with the defendant to the effect that all disputes between the parties arising out of the said contract would be settled in Calcutta or by the courts in Calcutta.

3. After the filing of the written statement and framing of the issues in the suit, on the petition of the defendant, the court below took up for decision the issue No. 2 namely: "Has this Court jurisdiction to try the suit?", and by the impugned order it has arrived at the finding that the court at Keonjhar has jurisdiction to entertain and try this suit. The defendant has

preferred this Civil Revision against the said order.

4. Ext. C dated 1-11-71 is the purchase order sent by the defendant to the plaintiff by which the defendant placed orders with the plaintiff for supplying certain varieties of pig iron from its concern at Barbil in the Keonjhar District to the defendant in Calcutta. The plaintiff on receipt of Ext. C sent its work order Ext. A dated 2-11-71 to the defendant. The supply of pig iron by the plaintiff from Barbil to the defendant in Calcutta started from 13-11-71. The above facts and the finding of the court below that the cause of action for the suit arose at Barbil within the jurisdiction of the Keonjhar Civil Court are not challenged in this revision.

5. In view of the admitted fact that the defendant resides and carries on business in Calcutta and the unchallenged finding that the cause of action for the suit arose in Barbil within the jurisdiction of the Keonjhar Civil Court, the courts in Calcutta as well as those in Keonjhar have jurisdiction to try the suit. It is well settled that where two courts or more have jurisdiction under the Code of Civil Procedure to try a suit or proceeding an agreement between the parties that the dispute between them shall be tried in one of such courts is not contrary to public policy (AIR 1971 SC 740); (1978) 46 Cut LT 89 : (AIR 1978 Orissa 167); and AIR 1979 Mad 16 and 21). According to the defendant, petitioner herein, both the parties had agreed that the jurisdiction for determination of any dispute arising out of the contract between the parties would be only in Calcutta whereas the plaintiff contends that there was no such contract of agreement between them.

6. The defendant in support of his assertion to the above effect depends only on Exts. C and B. At the top of Ext. C, the purchase order dated 1-11-71, it is printed "All subject to Calcutta jurisdiction." The purchase order is typed in defendant's own letterhead and issued by the defendant, and it has not been signed by the plaintiff. By the mere recital of the said words at the top of Ext. C and by sending the same to the plaintiff it cannot be said that the plaintiff agreed to confine settlement and adjudication of all disputes between the parties relating to the contract only at one place i. e. in Calcutta or only in the Courts at Calcutta and nowhere else. Ouster of court's jurisdiction should not be easily construed and cannot be assumed or presumed very easily. Ouster of jurisdiction must be proved by express words or by necessary or inevitable implications. Merely by mentioning, "All subject to Calcutta jurisdiction" by one of the parties at the top of his purchase order, it cannot be said that the jurisdiction of other courts, which can be legally approached by the other parties under the Civil Procedure Code or under any other law, is ousted by the said words. My above view gets support from the decision reported in AIR 1959 Mad 227 Patel Bros. v. Vadilal Kashidas Ltd, wherein it has been held (at p. 228):

"Ex. P 1 says that the transaction is "subject to Bombay jurisdiction." But it does not exclude the jurisdiction of any other court. In my opinion ouster of jurisdiction of a court to which a person is entitled to resort to under the Civil Procedure Code or any other statute cannot be a matter of assumption or presumption but one to be proved by express words contained in the contract or at least by necessary or inevitable implication."

Mr. Roy, the learned counsel for the petitioner, submits that the above view has not been accepted in the decision reported in AIR 1963 Guj 148. That decision was given entirely on different context and facts, which is evident from what is stated and held in the following passage extracted from that judgment (at p. 149):—

"(3) When one of the parties to a contract signs a printed form printed by the other party containing the words "subject to the jurisdiction of a place Q" and sends the order form to the other party it must be assumed that the party agreed that Q is the place for the settlement of disputes. It is not open to a person who signs an order form of the opposite party containing the printed words to say that the printed words are not part of the contract. To take the view taken by the learned Judge of the Madras High Court would be to upset the commercial practice of India,

and unless such a position is necessary in view of the wording of any particular section, I am not prepared to take that view. I am not prepared to upset the commercial practice of India unless the law requires me to do so. There is nothing in the law to hold that the expression "subject to jurisdiction of Q" printed at the top of a form may not bind M who signed the order form."

Towards the end of para 4 of that judgment it is said (at p. 150):

"xx xx This is not a case of a ticket or a receipt taken by the plaintiffs but this is a case of an order placed by the plaintiffs themselves on a form signed by them and whatever is contained in the form would be binding on them in view of the signature on the form xx xx xx xx"

In the Gujarat case one of the parties to the contract signed a printed form printed by the other party containing the words in bold type "subject to Madras Jurisdiction" and sent that order form to the other party. On those facts one can say that the party who signed such a printed form consciously agreed that the place of settlement or adjudication of disputes would be Madras and not at any other place. So all that has been stated in para 5 of that decision apply only to cases of that nature. There is nothing in that decision to run contrary to the above view taken by me on the facts of this case. The Madras decision on the point was rendered on facts similar to the facts in the present case.

7. In the present case before me the letterhead on which the purchase order Ext. C was typed had been printed by the defendant and he only signed and sent the same to the plaintiff for supply of certain materials. So all the contents in Ext. C emanated from the defendant and the plaintiff had not in any manner appended its approval or assent to any part of it. Rather very soon after the latter received Ext. C, on 2-11-71 it sent its own terms of business as contained in Ext. A to the defendant, which indicates that the defendant's order was accepted or intended to be accepted only on the terms and conditions stated in Ext. A. Clause 22 of Ext. A is as follows:—

"Clause 22 — All contracts to which the corporation's Terms of Business and Genral understandings relate, shall be deemed to have been entered into at Barbil in the district of Keonjhar, Orissa, for the purpose of jurisdiction and in the event of any dispute, arising out of any such contract. neither party to any such contract shall be competent to bring a suit in regard to any matter, by any such contract at any place outside the local limits of that jurisdiction of the Courts in the district of Keonjhar, Orissa."

Therefore, even if it is said that the recital "All subject to Calcutta jurisdiction" printed on Ext. C was a condition for acceptance of the purchase order, from the above facts it is evident that that condition was not accepted by the other party to the contract i.e. the plaintiff, and so it has had no binding effect on the plaintiff.

8. It is next contended by Mr. Roy, the learned counsel for the petitioner, that apart from the above recital on the top of Ext. C, the defendant by his letter to the plaintiff dated 8-11-71, copy of which is said to be Ext. B, expressly intimated to the latter that in view of the above statement in the purchase order (Ext. C), the jurisdiction for adjudication or settlement of all disputes and controversies relating to and arising from the said purchase order, would be Calcutta and not Keonjhar. The plaintiff has expressly denied receipt of any such letter. According to the defendant that letter was sent under certificate of posting, Ext. B/1. No doubt, under the said certificate of posting one letter addressed in the name of the plaintiff was posted in the Calcutta R. M. S. Post Office on 8-11-71. Merely on the proof of the said certificate of posting, it is extremely difficult to hold that the original of the letter Ext. B was actually sent to the plaintiff on that date. No doubt, the court u/s. 114 of the Evidence Act may presume that the common course of business has been followed in particular cases and so if it is proved that a particular letter was posted on the address of a particular person it may be presumed that the letter was received at the other end. In this case Ext. B/1 does not indicate whether the letter posted to the plaintiff under that certificate of

posting was an envelope, inland letter or a postcard. Ext. B is on the letter-head of the defendant. There is no direct, clear-cut, and convincing evidence on record that the original of Ext. B was actually put in an envelope and that particular envelope was posted under Ext. B/1. So long that fact is not established, it would not be possible for the court to draw the presumption that the copy of the letter Ext. B was posted and received by the plaintiff. D. W. 2, is the only witness who has deposed about the posting of the letter under Ext. B/1. He has not stated that the original of the letter Ext. B/1 was actually enclosed by him or by somebody in his presence in an envelope, and that envelope was posted under the certificate of posting. At one stage in his cross-examination, he stated that he did not remember if he sent any letter relating to this case. He has further admitted that all important letters of the defendant's firm which were intended to definitely reach the other party were posted by registered post. If that was so, it is not understood why the said letter containing such an important term of the contract. was not sent by registered post. Moreover, this witness could not say if he had sent any other letter to any body relating to this contract. Because of his halting and vacillating statements in this respect his deposition does not inspire confidence. In the absence of positive proof of the fact that the original of the letter Ext. B was actually enclosed in an envelope and that envelope was actually posted in post office, even the rebuttable presumption u/s. 114 of the Evidence Act cannot be drawn. In this connection, the decisions reported in AIR 1978 Cal 123 and AIR 1971 Ker 231 should be seen.

Moreover it is seen that there is absolutely no mention about the said alleged letter or at least the effect thereof in the written statement. As the defendant takes his stand on the question of jurisdiction of the court on the posting of the original of Ext. B he should have, as provided u/o 6 R. 9 C. P. C. mentioned about that letter or at least referred briefly to the effect thereof in his written statement, as the contents of the alleged letter were material and the said material facts were capable of being evidenced by a document as alleged by the defendant. Total silence about the alleged document or the effect thereof in the written statement creates suspicion about the defendant's plea on this aspect, more so when this is considered in the context and background of other facts discussed above.

On the above considerations and discussions, it is extremely difficult to hold that the original of the letter Ext. B was posted by the defendant or received by the plaintiff. As that fact is not established, the recital in Ext. B that "If we do not hear anything from you contrary to what we stated, we take it that you have accepted our condition of jurisdiction" is of no avail or effect.

9. On the above considerations I agree with the finding of the court below that there was no contract between the parties ousting the jurisdiction of the civil court at Keonjhar for the institution of the suit in question. As the petitioner now does not challenge the finding of the court below that the cause of action for the suit arose in Barbil within the jurisdiction of Keonjhar civil court, the court below has jurisdiction to try the suit. So this civil revision, challenging the jurisdiction of the court below to try the suit in question, has no merit and it is accordingly dismissed with costs. Hearing fee Rs. 100/-.

Revision allowed.

AIR 1979 ORISSA 130

R. N. MISRA, J.

Sudhamani Dei, Petitioner v. Sadananda Mohanty and another, Opposite Parties.

Civil Revn. No. 277 of 1978, D/- 14-2-1979.*

Civil P. C. (5 of 1908), S. 53 — 'Other descendant' — Expression does not include widow — Decree against deceased husband — Execution — Share received by widow is immune.

Widow's share in the husband's property received by her under the provi-

*(Against order of P. S. Panda, Munsiff, Kendrapara, D/- 5-4-1978.)

sions of the Hindu Succession Act would not be available for execution of the decree against the deceased husband and her share therefore is immune. (Para 3)

S. 53 expressly confines the liability to the property in the hands of a son or other descendant. The widow is not a descendant and she gets her right in the husband's property as a statutory heir. AIR 1952 SC 170; AIR 1966 Bom. 169; AIR 1977 Pat 185 Foll. (Para 3)

Anno: AIR Comm. Civil P. C. (9th Edn.) S. 53 N. 2.

Cases Referred: Chronological	Paras
AIR 1977 Pat 185	3
AIR 1966 Bom 169	3
AIR 1952 SC 170	3

S. S. Das, for Petitioner; S. Kr. Mohanty, for Opposite Parties.

ORDER:— This is an application by the widow of one of the judgment-debtors whose objection under S. 47 of the Code of Civil Procedure (hereinafter referred to as the 'Code') to the execution of the decree has been rejected. She has claimed that the property in her hands was not liable for execution and, therefore, should be exempted.

2. Opposite party No. 1 obtained a decree in Money Suit No. 4 of 1967 on 23-12-1968, against one Narayan Mohanty and his son Chandrakanta. The decree was put into execution in Execution Case No. 43 of 1975. In view of the death of Narayan his widow and daughter were brought on the record as legal representatives. An objection was filed in the executing court by the widow and her daughter contending that they were not liable for the decretal dues and as such should be expunged from the execution case. The executing court rejected the objection. The widow has carried this revision challenging the order of rejection of her objection. So far as the daughter is concerned, the order has become final against her in the absence of any challenge.

3. There is no dispute that the widow and the daughter are sought to be proceeded against on the ground that they have obtained a share of the property of the original judgment-debtor and it is conceded from the side of the decree-holder that their liability is limited to the extent of the inheritance. Mr. Das for the petitioner places reliance on the provision of S. 53 of the Code which provides:—

"For the purposes of Section 50 and S. 51, property in the hands of a son or other descendant which is liable under Hindu Law for the payment of the debt of a deceased ancestor, in respect of which a decree has been passed, shall be deemed to be property of the deceased which has come to the hands of the son or other descendant as his legal representative."

According to the objector, she not being 'a son or other descendant' and she having succeeded to a portion of the property in her own right under the Hindu Succession Act of 1956, cannot be made liable for satisfaction of the decree in view of S. 53 of the Code. S. 50 of the Code on which Mr. Mohanty for the decree-holder relies provides:—

"(1) Where a judgment-debtor dies before the decree has been fully satisfied, the holder of the decree may apply to the Court which passed it to execute the same against the legal representative of the deceased.

(2) Where the decree is executed against such legal representative, he shall be liable only to the extent of the property of the deceased which has come to his hands and has not been duly disposed of; and, for the purpose of ascertaining such liability, the Court executing the decree may, of its own motion or on the application of the decree-holder, compel such legal representative to produce such accounts as it thinks fit."

It is maintained by Mr. Mohanty that the widow is a legal representative of her husband and in view of clear provision in sub-sec. (1) of S. 50 of the Code, the court is entitled to execute the decree against the legal representatives. It is fairly settled that S. 53 is an explanation to Ss. 50 and 52 of the Code. While Ss. 50 and 52 provide for remedies of a creditor against the properties of his deceased debtor in the hands of his legal representative, S. 53 explains the meaning of the term 'property of the deceased.' Section 2 (11) of the Code defines the term 'legal representative.' Section 53 indicates a modified position, namely in case of a Hindu, the property of the judgment-debtor in the hands of a son or other descendant only would be liable as legal

representative. In the case of Pannalal v. Mt. Narain, AIR 1952 SC 170, it has been indicated (at p. 174):—

"It is now settled by judicial decisions that there is no difference as between son, grandson and great grandson so far as the obligation to pay the debts of the ancestor is concerned; but none of them has any personal liability in the matter irrespective of receiving any assets, ... The position, therefore, is that the son is not personally liable for the debt of his father even if the debt was not incurred for an immoral purpose and the obligation is limited to the assets received by him in his share of the joint family property or to his interest in such property and it does not attach to his self-acquisitions ....."

Even if the widow be a legal representatative, in terms of the definition under S. 2 (11) of the Code and under S. 50, she could be substituted in place of the deceased husband as a legal representative, in view of the special provision in Section 53 of the Code she would not be liable. This section expressly confines the liability to the property in the hands of a son or other descendant. Where joint family property passes by survivorship from one member of a joint family to another, the property is that of the latter, but the section regards it as the property of the deceased in the circumstances mentioned therein and confines the liability in the hands of the son or other descendant. The legal position seems to be uniform that the widow is not a descendant and she gets her right in the husband's property as a statutory heir. (AIR 1966 Bom 169: Rangubai v. Laxman Lalji Patil, and AIR 1977 Pat 185: Keshav Nandan Sahay v. The Bank of Behar). If the widow would not come within the ambit of the phrase 'other descendant,' she would not have liability under S. 53 of the Code. It is unnecessary to refer to many authorities cited at the Bar as most of them have no direct bearing on the point. On the analysis presented above, it should be held that the widow's share in the husband's property received by her under the provision of the Hindu Succession Act would not be available for execution of the decree against the deceased husband and her share, therefore, is immune.

4. The revision application must accordingly succeed. The objection filed by the judgment-debtor-petitioner asking for exemption of her property from execution must be accepted. I would accordingly allow the civil revision, vacate the order of the executing court and direct that the objection raised by the widow be allowed. There would be no order for costs.

Revision allowed.

AIR 1979 ORISSA 132

S. ACHARYA, J.

Paramananda Fateshingh and others, Petitioners v. Labanya Bewa and others, Opposite Parties.

Civil Revn. No. 113 of 1978, D/- 12-1-1979.*

Civil P. C. (5 of 1908), O. 18 R. 3-A — Order for examining witnesses — Party may be examined even after examination of other witnesses in the interests of justice and for a just decision. AIR 1978 Ori 228 Followed.

(Para 4)

Anno: AIR Comm. Civil P. C. (9th Edn.) O. 18 R. 3A N. 1.

Cases Referred: Chronological Paras

AIR 1978 Orissa 228: 45 Cut LT 356 3

R. C. Patnaik and P. K. Misra, for Petitioners; Devananda Misra and Deepak Misra, for Opposite Parties.

ORDER:— Defendants 1 and 2 in O. S. No. 159/72 in the court of the Munsif, Khurda, have preferred this revision against the order of the trial court rejecting their prayer to examine defendant No. 2 on 27-2-1978 as a witness in the suit.

2. The hearing of the suit started on 20-2-1978. For the first time the witness for the defendants were examined on 23-2-1978. On that date defendant No. 2 was not present and so he could not be examined as a witness. Of course no petition to enable this defendant to be examined on a subsequent date was filed. On the next day, i. e. on 24-2-78, when 3 other witnesses on behalf of the defendants were to be examined and

*(From order of P. N. Patnaik, Munsiff, Khurda, D/- 24-2-1978.)

were actually examined, a petition on behalf of the defendants was filed to enable defendant No. 2 to be examined as a witness in this case on a later date, as he, due to unavoidable reasons could not come to the court on that date. The court below dismissed the said petition on taking a very strict and conservative view of R. 3-A of O. 18, C. P. C. Hence this revision.

3. In Maguni Del's case (1978-45 Cut LT 356) : (AIR 1978 Orissa 228 April part) a Division Bench of this Court has held that the court can examine a party at a later stage if it considers the evidence essential despite some negligence on the part of a party. The observations made in that decision and the law laid down therein with regard to this rule should be perused by the courts in disposing of matters of this nature.

4. The hearing of the case started only on 20-2-1978 and the witnesses for the defendants were examined for the first time on 23-2-78. On the next date, i. e. on 24-2-78, a petition to enable defendant No. 2 to be examined as a witness in the suit was filed. In that petition it was stated that defendant No. 2 could not be examined on the due date as on 23-2-78 he had gone to Nayagarh for filling up his application forms to appear at the B. A. examination. Averments to that effect and to the effect that he actually submitted that application in the Nayagarh College on 23-2-78, on affidavit, have been made in this revision petition. Defendant No. 2 claims to be the adopted son of plaintiff No. 1, which averment is contested by the plaintiffs. Issue No. 3 is—"Whether the defendant No. 2 is the adopted son of the husband of plaintiff No. 1?". In the petition for allowing defendant No. 2 to be examined as a witness in this case it is stated that defendant No. 2 is mainly contesting this suit and it is essentially necessary to examine him in this case. On hearing the counsel appearing for both the parties and in view of the pleadings in this suit I am of the view that in the interest of justice and for a just decision of this case an opportunity to examine defendant No. 2 as a witness in the case should be given to the defendants.

5. On considering all the above facts and in view of all that has been stated by the Division Bench of this Court in the above-mentioned decision with regard to the provisions of R. 3-A of O. 18, C. P. C., I am of the view that the court should have allowed an opportunity to the defendants to examine defendant No. 2 as a witness in this case on granting proper compensatory costs in favour of the plaintiffs. In that view of the matter, the impugned order is set aside on condition that the petitioners deposit Rs. 50/- as costs in that court or pay the said amount to the counsel for the plaintiffs in that court within a week from the date of the intimation of the receipt of the lower court records from this Court, failing which the impugned order shall take effect. If the said amount is paid in time, the trial court shall fix a date for examination of defendant No. 2 as a witness for the defendants and shall proceed to dispose of the suit in accordance with law. The fact of the receipt of the lower court records by the court below be intimated to the counsel for the defendants 1 and 2 to enable them to deposit or make payment of the costs as ordered above.

6. The revision is allowed on the aforesaid terms. No costs.

7. The L. C. R. be sent back immediately.

Revision allowed.

AIR 1979 ORISSA 133

S. K. RAY, C. J. AND
J. K. MOHANTY, J.

Rabindra Nath Mohanty and others, Petitioners v. State Transport Appellate Tribunal, Orissa and others, Opposite Parties.

Original Jur. Cases Nos. 381, 382 and 881 of 1976, D/- 15-11-1978.

(A) Motor Vehicles Act (4 of 1939), S. 63 (7) — Orissa Tourist Vehicles Rules (1967), R. 3 (1) — Endorsement on permit by S. T. A. that vehicle is a tourist vehicle — Applicant must be a holder of permit — Such endorsement cannot be made in anticipation.

It is clear from the provisions of the Rules and Sch. I that a holder of a permit issued in the State in relation to a motor cab or an omnibus is only competent to apply to the State Trans-

port Authority for endorsement on that permit to the effect that the vehicle to which the permit relates is a tourist vehicle. The application must be in the form set out in Sch. I which means that the applicant must disclose on the application the description of his permit, the number and date of issue of such permit and other particulars which leave no doubt in mind that he must hold a permit on the date of making an application, otherwise the application will be invalid and not entertainable at all. (Para 6)

In the instant case, applications, though in forms as prescribed in Sch. I, were incomplete because many of their columns were left blank. Thus, no proper applications were received by the S. T. A. on or before the fixed date. Further the applications were not notified and processed in accordance with the requirements of sub-rules (2), (3) and (4) of R. 3 of the Rules. Thus, the S. T. A. acted wholly without jurisdiction in entertaining incomplete applications from persons who did not hold any permit and proceeding to grant anticipatory endorsements on permits yet to come into existence and that again without complying with the mandatory requirements of R. 3 (2), (3) and (4) of the Rules. (Para 6)

Anno: AIR Comm. M. V. Act (1st Edn.), Section 63 N. 1.

(B) Motor Vehicles Act (4 of 1939), Section 64 (1) (a) and (1) (i) — Orissa Tourist Vehicles Rules 1940, Rr. 78, 78A and 79 — Orissa Tourist Vehicles Rules (1967), R. 3 (8) — Order of STA — Appeal — Forum.

The order of S. T. A. comes under the purview of either S. 64 (1) (a) or 64 (1) (i) of the Act. Therefore, appeal from such an order lay to the State Transport Appellate Tribunal constituted under sub-section (2) of that section. Rule 3 (8) of the 1967 Rules, however, provides for an appeal to the appellate authority to be specified by the State Government, within 14 days of receiving the order of S. T. A. By amendment of Section 64 in 1969, sub-section (2) was incorporated. This amended provision laid down that "the State Government shall constitute for the State a State Transport Appellate Tribunal which shall consist of a whole time judicial officer not below the rank of a District Judge." In accordance with this amended provision, State Transport Appellate Tribunal was constituted for the State of Orissa. It is clear, therefore, that according to the amended provision all appeals from the orders of the S. T. A. coming within the purview of cl. (a) or (i) of sub-sec. (1) of S. 64 of the Act lay to the State Transport Appellate Tribunal, expect appeals which were pending at the commencement of such amendment. While the statute was amended, the Rules did not undergo corresponding amendment to bring it in accord with the statute. There has, therefore, arisen a repugnancy between the statutory provision and the rules, namely, Rr. 78, 78A and 79 of the Orissa Motor Vehicles Rules, 1940 and R. 3 (8) of the 1967 Rules. In face of this repugnancy, according to well established principle, the statutory provision must prevail. Therefore,, appeals were properly preferred before the State Transport Appellate Tribunal. (Para 7)

Looking from another angle, sub-rule (8) of R. 3 of the Rules does not designate the appellate authority, but provides that the State Government is to specify the appellate authority which may vary from occasion to occasion and from cases to cases as the State Government may deem fit. Since the State Government had not specified in the instant case the appellate authority within 14 days of receipt of the order of the S. T. A.. and since power to specify has apparently been taken away by the amendment of Section 64 (2) of the Act, there was neither any appellate forum in existence nor any possibility of any such forum coming into existence under the aforesaid sub-rule before which appeal could have been preferred. (Para 7)

Anno: AIR Comm. M. V. Act, (1st Edn.), S. 64 N. 1.

(C) Motor Vehicles Act (4 of 1939), S. 134 (2) — Order of S. T. A. which lacks initial jurisdiction is not saved under this section.

In the instant cases, the S. T. A. acted wholly without jurisdiction in the matter of granting All India Tourist permit by entertaining incomplete applications not in accordance with Sch. I, which were invalid documents.

and without processing the same in accordance with the mandatory provisions of sub-rule (4) of R. 3 of the Rules, which resulted also in infringement of rights of third parties conferred under that sub-rule. In view of these aspects, Section 134 (2) of the Act has no application at all and the impugned order of the S. T. A. cannot be saved pursuant to it. (Para 8)

Anno: AIR Comm. M. V. Act, (1st Edn.), S. 134, N. 2

R. C. Patnaik (in O. J. C Nos. 381 and 382 of 1976 and P. K. Mohanty (in O. J. C. No. 881 of (1976), for Petitioners; S. C. Ray, G. P. Mohanty, M. M. Sahu and H. B. Swain, Standing Counsel (Transport), for Opposite Parties.

S. K. RAY, C. J.:— All these three applications have been heard analogously as they involve identical questions of law. Opposite parties 1 and 2 in each of these writ applications are respectively State Transport Appellate Tribunal, Orissa, and State Transport Authority. The petitioners have prayed for issuance of a writ of certiorari to quash Annexure-2, which is the impugned proceeding of opposite party No. 2 dated 22-2-1975 by which their applications for grant of endorsement under R. 3 (1) of the Orissa Tourist Vehicles Rules, 1967 (hereinafter called the 'Rules') have been rejected. The consequential intimation of this order of rejection to the petitioners which is Annexure-3, and the judgment and order of opposite party No. 1 dated 15-4-76 by which M. V. Appeal No. 15 of 1975 preferred by the petitioner in O. J. C. No. 381 of 1976, M. V. Appeal No. 16 of 1975 preferred by the petitioner in O. J. C. No. 382 of 1976 and M. V. Appeal No. 17 of 1975 preferred by the petitioner in O. J. C. No. 881 of 1976, which were analogously heard, have been dismissed. This order of opposite party No. 1 is Annexure-4 in O. J. C. Nos. 381 and 382 of 1976 and is Annexure-6 in O. J C. No. 881 of 1976.

2. By Annexure 1 dated 24-6-1974 opposite party No. 2 invited applications for endorsement on permit of motor cab or omnibus authorising it to ply as an All-India Tourist vehicle. This notice set out different numbers of vacancies available to be filled up in respect of three classes of vehicles. There were 91 vacancies in respect of tourist motor cab, 11 vacancies in respect of tourist omnibus with passenger capacity not exceeding 29 and 2 vacancies in respect of tourist omnibus with passenger capacity exceeding 29. Such applications were to be dealt with in accordance with the provisions of the Rules framed by the State Government in exercise of the powers conferred by S. 68 of the Motor Vehicles Act IV of 1939 (hereinafter called the 'Act'). The Rules provided that the State Transport Authority (opposite party No. 2) could grant an endorsement on the contract carriage permits granted under S. 51 of the Act in the State in relation to any motor cab or omnibus to the effect that such vehicles to which the permits relate are 'All India Tourist Vehicles.'

3. In response to Annexure-1, the petitioners along with 57 other persons filed two sets of applications each, one set was for grant of contract carriage permit in the State of Orissa and another set of applications for endorsement on such permits envisaged under rule 3 (1) of the Rules. All these applications were processed under S. 50 of the Act in course of which three representations were received. The S. T. A. in its 105th meeting dated 22-2-1975. decided to grant permits for all India Tourist Omnibus with passenger capacity not exceeding 29 to eleven applicants, one from each of the district of Balasore, Bolangir, Dhenkanal, Ganjam, Kalahandi and Puri, three from the district of Cuttack and two from the district of Mayurbhanj, and rejected the applications of the petitioners in O. J. C. Nos. 382 and 881 of 1976. Those grantees (except one Pradip Kumar Nath whose name was expunged from records of the appeals before the Tribunal) have been impleaded as opposite parties 3 to 12 in O. J. C. Nos. 382 and 881 of 1976. The S. T. A. in that very meeting also decided to grant permits for All India Tourist Omnibus with seating capacity more than 29 in favour of two persons by rejecting the claim of the petitioner in O. J. C. No. 381 of 1976. These grantees have been impleaded as opposite parties 3 and 4 in O. J. C. No. 381 of 1976.

4. Being aggrieved by the aforesaid decision of the S. T. A. the petitioners preferred three motor vehicle appeals to the State Transport Appellate Tri-

bunal, namely, M. V. Appeals Nos. 15, 16 and 17 of 1975. All these three appeals were heard analogously and the Tribunal held by his common judgment that the S. T. A. acted with jurisdiction in entertaining the applications for grant of endorsement under rule 3 of the Rules and to deal with them compositely with applications for All Orissa Contract Carriage permit. He also held that appeal to the State Government lay and not to him as provided in R. 3. sub-rule (8) of the Rules and that since rule 3 of the Rules authorised the S. T. A. to endorse a permit, there was no inherent lack of jurisdiction in rendering a decision to grant endorsement in anticipation of grant of stage carriage permits to such applications. On both grounds the opposite party No. 1 dismissed the appeals.

5. Two main questions have been canvassed here. The first is that only a holder of any permit granted in the State can apply for grant of endorsement thereon that the vehicle to which the permit relates is an All India Tourist Vehicle and, as such, it was beyond the jurisdiction of the S. T. A. to entertain applications made in response to Annexure-1 when none of the applicants was a holder of a permit as indicated above. Unless the procedure and the conditions envisaged in r. 3 of the Rules are complied with, it would be beyond the power and jurisdiction of the S. T. A. to make any order granting endorsement or granting All India Tourist permit as per Annexure-2. The second is, as alleged by the counsel for the opposite parties, that no appeal having been preferred to the appellate authority specified by the State Government as required under Rule 3 sub-rule (8) of the Rules, the writ applications are not maintainable as the alternative remedy has not been availed of. This necessarily involves the question whether appeal to the Trbunal was maintainable.

6. We will now take up the first question mooted. Under S. 63 (7) of the Act any State Transport Authority is authorised to grant in respect of tourist vehicles such number of permits valid for the whole or any part of India as the Central Government may, in respect of that State, specify in this behalf and the provisions of Ss. 49, 50, 51, 57. 58, 59, 59-A, 60, 61 and 64 shall apply as far as may be, in relation to such permits. This power is subject to the rules made under the Act. There is no controversy in this case that the Central Government has specified the number of permits which the State Transport Authority of Orissa State could grant. By Annexure-1 opposite party No. 2 invited applications 'for endorsement in the permit of motor cabs or omnibus authorising it to ply as an All India Tourist Vehicles.' It also specified certain conditions which the applicant must fulfil in respect of the vehicle in respect of which All India Tourist permit is applied for. On receipt of applications for grant of permits in respect of tourist vehicles, the S. T. A. was bound to follow the procedure laid down in R. 3 of the Rules, the relevant portions whereof are extracted hereinbelow :—

"Endorsement on permits of vehicles,

3. (1) The State Transport Authority may, in accordance with the provisions of this rule, make an endorsement on any permit granted in the State in relation to any motor cab or omnibus to the effect that the vehicle to which the permit relates is an All-India Tourist Vehicle :

Provided that at no time shall the total number of—

(i) Motor cabs in respect of which such endorsements are in force shall exceed fifty; and

(ii) Omnibuses in respect of which such endorsements are in force shall exceed ten.

(2) Any person who holds a permit issued in the State in relation to a motor cab or an omnibus may apply in the forms specified in Sch. I, to the State Transport Authority for an endorsement on the permit to the effect that the vehicle to which the permit relates is a tourist vehicle.

(3) Any application under sub-rule (2) shall be accompanied by a fee of Re. 1 in shape of special adhesive stamp and shall be made not less than six weeks before the date on which it is desired that the endorsement shall take effect or, if the State Transport Authority appoints a date for the receipt of such applications, on such date.

(4) On receipt of an application under sub-rule (2) the State Transport Authority shall make the application

available for inspection at the office of the Authority and shall publish the application or the substance thereof in the official Gazette, officce notice board as well as in the notice board of Regional Transport Authority together with a notice of the date which will be not less than 15 days before which representations in connection therewith may be submitted by—

(i) any person who holds a permit on which an endorsement has been made under this rule;

(ii) any local or police authority in the State, and the date, not being less than thirty days from such publication on or after which the application and any representation received will be considered:

Provided that if the making of any endorsement in accordance with the application would have the effect of increasing the number of vehicles bearing such endorsements beyond the limits fixed in that behalf under the proviso to sub-rule (1) or if the vehicle in respect of which the application is made is registered more than one year before the date of the application or at the time of renewal of endorsement of the vehicle is 5 years old or has done 150,000 miles the State Transport Authority may summarily reject the application without following the procedure laid down in this rule.

xx xx xx xx
xx xx xx xx"

Rule 2 (a) defines "permit" as a permit issued under S. 51 of the Act and R. 2 (b) defines "Schedule" as the schedule annexed to the Rules. Schedule I runs as follows:—

"Application for the grant of endorsement on the permit of a motor cab/ omnibus for country wide operating under the Orissa Tourist Vehicles Rules, 1967. I/We the undersigned apply for endorsement on the following permit for a country wide operation:—

1. Description of the permit
2. (i) Number of permit and the date of issue.
(ii) Date of expiry
(iii) Particulars of vehicle(s)
1. Make of the vehicle
2. Year of manufacture
3. (a) Year of the registration
(b) Registration No.
xx xx xx xx
13. Date of grant of permit
14. Date of the grant of endorsement
15. Date on which the permit or the endorsement will expire.
3. xx xx xx xx
4. xx xx xx xx

To be filled in the office of the Transport Authority

1. Date of receipt
2. Date of publication
3. Date or dates of hearing of objections
4. Granted subject to the ..... Tourist Vehicles Rules, 1967.

xx xx xx xx
xx xx xx xx"

It is clear from the aforesaid provisions of the Rules and Schedule-I that a holder of a permit issued in the State in relation to a motor cab or an omnibus is only competent to apply to the State Transport Authority for endorsement on that permit to the effect that the vehicle to which the permit relates is a tourist vehicle. The application must be in the form set out in Sch. I which means that the applicant must disclose on the application the description of his permit, the number and date of issue of such permit and other particulars which leave no doubt in mind that he must hold a permit on the date of making an application, otherwise the application will be invalid and not entertainable at all. It is further clear that application validly made in the form prescribed in Sch. I shall be made not less than six weeks before the date on which it is desired that the endorsement shall take effect, or if the State Transport Authority appoints a date for the receipt of such application on such date. The date of receipt appointed by the S. T. A. in Annexure-1 being 30-7-1974, all applications must be made at the latest on such date. After receiving the applications, the S. T. A. shall make them available for inspection at its office and shall publish these applications or the substances thereof in the official Gazette, office notice board as well as in the notice board of Regional Transport Authority together with a notice of the date which will be not less than 15 days before which representations in connection therewith may be submitted. In the instant case, applications, though in form as prescribed in Sch. I, were incomplete because many of their columns were left blank,

obviously because none of the applicants held any permit granted under S. 51 of the Act on which endorsements as envisaged in R. 3(1) of the Rules were sought for. thus, as no proper applications in form of Schedule I were received by the S. T. A. on or before 30-7-1974, it could not act on the same. Further, it is not in controversy that the applications were not notified and processed in accordance with the requirements of sub-rules (2), (3) and (4) of R. 3 of the Rules. Thus. the S. T. A. acted wholly without jurisdiction in entertaining incomplete applications from persons who did not hold any permit and proceeding to grant anticipatory endorsements on permits yet to come into existence. and that again without complying with the mandatory requirements of R. 3 (2), (3) and (4) of the Rules. This contention of the petitioners, to our mind, is well founded and Annexure-2 is liable, on this ground alone, to be quashed.

7. The second question is whether appeal from the decision of the S. T. A. lay to the State Transport Appellate Tribunal or to the State Government as provided for in rule 3 (8) of the Rules. The impugned order of the S. T. A. comes under the purview of either Section 64 (1) (a) or 64 (1) (i) of the Act. Therefore, appeal from such an order lay to the State Transport Appellate Tribunal constituted under sub-sec. (2) of that section. Rule 3 (8) of the Rules, however, provides for an appeal to the appellate authority to be specified by the State Government, within 14 days of receiving the order of S. T. A. There is, therefore, apparent contradiction between the statutory provision contained in S. 64 of the Act and the provisions of the Rules in the matter of the appellate forum. Section 64 of the Act, before its amendment by Central Act 56 of 1968, provided that any person aggrieved may appeal to the prescribed authority. The prescribed appellate authority was the Minister in charge of Transport Department of the State Government as indicated in Rules 78, 78-A and 79 of the Orissa Motor Vehicles Rules, 1940. Rule 3 (8) of the Rules which was framed in the year 1967 was in consonance with S. 64 (1) of the Act as it stood then, which provided that the appellate forum shall be as specified by the State Government. By amendment of S. 64 in 1969, sub-sec. (2) was incorporated. This amended provision laid down that "the State Government shall constitute for the State a State Transport Appellate Tribunal which shall consist of a whole-time judicial officer not below the rank of a District Judge." In accordance with this amended provision, State Transport Appellate Tribunal was constituted for the State of Orissa. It is clear, therefore, that according to the amended provision all appeals from the orders of the S. T. A. coming within the purview of cl. (a) or (i) of sub-sec. (1) of S. 64 of the Act lay to the State Transport Appellate Tribunal, except appeals which were pending at the commencement of such amendment. While the statute was amended, the Rules did not undergo corresponding amendment to bring it in accord with the statute There has. therefore, arisen a repugnancy between the statutory provision and the rules, namely, Rr. 78, 78-A and 79 of the Orissa Motor Vehicles Rules, 1940 and R. 3 (8) of the Rules. In face of this repugnancy, according to well established principle, the statutory provision must prevail. Therefore, appeals were properly preferred before the State Transport Appellate Tribunal. It was wrong for the Tribunal to hold that appeals to him were incompetent.

Looking from another angle, sub-rule (8) of R. 3 of the Rules does not designate the appellate authority, but provides that the State Government is to specify the appellate authority which may vary from occasion to occasion and from cases to cases as the State Government may deem fit. Since the State Government had not specified in the instant case the appellate authority within 14 days of receipt of the order of the S. T. A., and since the power to specify has apparently been taken away by the amendment of S. 64 (2) of the Act, there was neither any appellate forum in existence nor any possibility of any such forum coming into existence under the aforesaid sub-rule before which appeal could have been preferred. In the circumstances to avoid repugnancy, the State Transport Appellate Tribunal constituted under S. 64 (2) of the Act shall be read in place of the expression 'appellate authority to be specified by the State Government' in sub-rule (8) of R. 3 of the Rules.

8. Counsel for opposite parties and the Standing Counsel (Transport) argued that the S. T. A. has suo motu jurisdiction to deal with applications for all Orissa Contract Carriage permits and grant such permits, even without applications being called therefor. The S. T. A. only called for applications as envisaged under the Rules as per Annexure-1. But since both types of applications, one for contract carriage permits and the other for All India Tourist permits, have procedures laid down in respect of them which are separate and independent, the S. T. A. could deal with both types of applications by taking two independent steps, one under the Act and the other under the Rules. The S. T. A. instead of adopting independent proceedings and passing independent orders has passed a composite order in the interest of public which is of paramount importance. Annexure-2 cannot, therefore, be entirely quashed. Secondly, it is contended, basing on S. 134 (2) of the Act that the order of the S. T. A. shall not be reversed or altered on account of any error, omission or irregularity in the proceedings unless such error, omission or irregularity has, in fact, occasioned a failure of justice.

The order of the S. T. A. Annexure-2, is not a composite order. It expressly and specifically deals with the matter as if the applications were mde under the Rules for grant of an endorsement on the permit of a motor vehicle to the effect that the vehicle is an All India Tourist Vehicle. It does not deal with applications for State Contract Carriage permits at all. The subject-matter of that order is indicated in the following words:—

".....selection of operators for All-India Tourist Vehicles."

After considering the cases of individual applicants, the S.T.A. observed:—

"The S. T. A. considered that for promotion of tourism all over the State preference should be given to the districts which have not been allotted any All India Tourist Omnibus with seating capacity of more than 29 or so."

Then it is observed:—

"The S. T. A. therefore decided to grant permits for All India Tourist Omnibus with seating capacity more than 29" in favour of particular applicants. Then in the penultimate paragraph of the order it proceeds to say that such grant of permits is subject to the vehicles being produced later on according to plan and specification approved by the Chairman. The contention that the impugned order of the S. T. A. is a composite order cannot be countenanced.

It is true that S. 134 (2) of the Act provides that no order made by the competent authority under the Act shall be reversed or altered on account of any error, omission or irregularity in the proceedings, unless such irregularity, error or omission has occasioned a failure of justice. This provision does not purport to save orders passed by authorities which lack initial jurisdiction. In the present cases, as already pointed out, the S. T. A. acted wholly without jurisdiction in the matter of granting All India Tourist permit by entertaining incomplete applications not in accordance with Schedule I, which were invalid documents, and without processing the same in accordance with the mandatory provisions of sub-rule (4) of R. 3 of the Rules, which resulted also in infringement to rights of third parties conferred under that sub-rule. In view of these aspects, S. 134 (2) of the Act has no application at all and the impugned order of the S. T. A. cannot be saved pursuant to it.

9. A point was taken that these writ applications shall not be entertained in view of Art. 226 (3) of the Constitution of India. This provision lays down that no petition for the redress of any injury referred to in sub-cl. (b) or (c) of cl. (1) shall be entertained if any other remedy for such redress is provided for by or under any other law for the time being in force. This point was urged on the hypothesis that appeal lay to the State Government from the order of the S. T. A. and such forum of appeal not having been availed of, the writ applications must be held to be non-entertainable in view of the constitutional provision referred to above. As held earlier, the appeal lay to the State Transport Appellate Tribunal and that forum of appeal has been exhausted. The bar envisaged under Art. 226 (3), in these circumstances, cannot be invoked. This contention is, therefore, not well founded.

10. In result, these writ applications are allowed. Annexure-2 and the order of the State Transport Appellate Tribunal in Annexure-4 in O. J. C. Nos. 381 and 382 of 1976 and Annexure-6 in O. J. C. No. 881 of 1976 are quashed and, consequentially, Annexure-3 is also quashed. The petitioners are entitled to costs assessed at Rs. 200/- (Rupees two hundred) in each writ application.

Writ petitions are allowed with costs.

J. K. MOHANTY, J. :— I agree.

Petitions allowed.

AIR 1979 ORISSA 140

P. K. MOHANTI, J.

Sabitri Debi and another, Petitioners v. Baikuntha Das and another, Opposite Parties.

Civil Revn. No. 523 of 1978. D/- 11-1-1979.*

Civil P. C. (5 of 1908), Ss. 105 (1), 115 — 'Case decided' — Order refusing to send document to handwriting expert — No revision lies.

By an order refusing to send a document for Expert's examination, no right or obligation of the parties in controversy is adjudicated upon by the Court. It is a matter relating to procedure. Since no right or obligation of any of the parties is determined by the impugned order, it would not come within the ambit of the expression "case which has been decided". (Para 7)

Section 105 (1) clearly indicates that an erroneous interlocutory order which affects the decision of the case may be attacked in an appeal from the ultimate order or decree passed in the suit. The revisional powers should not be exercised unless it is found that the party approaching the High Court under Section 115 has no other remedy open to him for redressal of his grievance. (Para 9)

Anno : AIR Comm. Civil P. C. (9th Edn.), S. 115, N. 4 and S. 105, N. 12.

Cases Referred : Chronological	Paras
AIR 1978 SC 47 : 1978 Cri LJ 165	5
AIR 1970 SC 406	5

S. K. Dey and Y. Mohanty, for Petitioners: R. N. Sinha, for Opposite Parties.

ORDER :— This civil revision is directed against an order refusing to send a disputed document to the Handwriting Expert for examination.

2. One Gadadhar Das died leaving behind him a daughter named Agani. Petitioner No. 2 is the husband's brother of Agani. Petitioner No. 1 is the wife of petitioner No. 2. Opposite Party No. 1 Baikunthanath Das claims to be the adpoted son of Gadadhar. He filed Title Suit No. 99 of 1975 for eviction of the petitioners Nos. 1 and 2 from the suit land alleging that they were mere licensees in respect of the same.

The suit was resisted by the petitioners on the ground that the land in suit had been orally gifted to them by late Gadadhar Das in the year 1949 and they have acquired title to the same by adverse possession. They claimed to have constructed a house on the suit land after it was orally gifted to them.

3. In course of trial, the petitioners relied upon a post card letter dated 30-12-1953 alleged to have been written by late Gadadhar to the Baidyanath Misra admitting therein that he had orally gifted the land to the petitioners. The letter was marked as Ext. R. Opposite party No. 1 having disputed the genuineness of the signature of Gadadhar Das appearing on Ext. R, the petitioners applied for sending the document to an Expert for examination of the disputed signature and comparison of the same with the admitted signatures. The learned Subordinate Judge by his order dated 15-11-1978 rejected the prayer on the ground that the opinion of an Expert is not conclusive evidence and that the Court is competent to compare the disputed signature with the admitted signatures.

Aggrieved by this order, the petitioners have come up in revision.

4. Mr. Sinha, the learned counsel appearing for the opposite parties raised a preliminary objection to the effect that by the impugned order no case has been decided within the meaning of Section 115, C. P. C and as such the civil revision is not maintainable in law.

5. The question as to what is "a case decided came up for consideration before the Supreme Court in the case of Baladevdas v. Filmistan Distributors (India) Pvt. Ltd. AIR 1970 SC 406 wherein it was laid down as follows (at p. 410):

"A case may be said to be decided, if the Court adjudicates for the purposes of the suit some right or obligation of the parties in controversy."

This view was reiterated in a recent decision reported in AIR 1978 SC 47 : Madhu Limaye v. State of Maharashtra.

6. No doubt, under the Explanation to the amended Section 115 C. P. C., the expression

*(From order of D. Kar, Sub. J. Puri, D/- 15-11-1978.)

"any case which has been decided" includes any order made, or any order deciding an issue in the course of the suit or other proceeding. That does not mean that every interlocutory order passed during the progress of the suit is to be regarded as a case decided within the meaning of Section 115 C. P. C. An interlocutory order can be said to be a case decided if it determines some right or obligation of the parties for the purpose of the suit. In case every interlocutory order is held to be revisable by the High Court the very purpose of enacting the provisions of Section 115 C. P. C. will be frustrated.

7. By an order refusing to send a document for Expert's examination no right or obligation of the parties in controversy is adjudicated upon by the Court. It is a matter relating to procedure. Since no right or obligation of any of the parties is determined by the impugned order, it would not, in my opinion, come within the ambit of the expression "case which has been decided."

8. It is next contended by Mr. Sinha that even assuming that by the impugned order a case may be said to be decided, yet it would not be revisable in view of the proviso to Section 115 C. P. C. The proviso runs as follows:

"Provided that the High Court shall not, under this section vary or reverse any order made, or any order deciding an issue, in the course of a suit or other proceeding, except where—

(a) the order, if it had been made in favour of the party applying for revision, would have finally disposed of the suit or other proceeding, or

(b) the order, if allowed to stand, would occasion a failure of justice or cause irreparable injury to the party against whom it was made."

9. If the impugned order had been made in favour of the petitioners, that would not have finally disposed of the suit. Similarly the order, if allowed to stand, would not occasion a failure of justice or cause irreparable injury to the petitioners, because if the decision of the suit on merits goes against them, it would be open to them to canvass before the appellate court in an appeal from the decree in the suit that the prayer for sending the document to the Expert was wrongly rejected. I would refer in this connection to S. 105 C. P. C. which provides that when a decree is appealed from, any error, defect or irregularity in any order affecting the decision of the case may be set forth as a ground of objection in the memorandum of appeal. This clearly indicates that an erroneous interlocutory order which affects the decision of the case may be attacked in an appeal from the ultimate order or decree passed in the suit. The revisional powers should not be exercised unless it is found that the party approaching the Court under S. 115, C. P. C. has no other remedy open to him for redressal of his grievance.

10. In view of the foregoing discussions, the revisional application is not maintainable. It is accordingly dismissed. There will be no order as to costs.

Revision dismissed.

AIR 1979 ORISSA 141

R. N. MISRA AND P. K. MOHANTI, JJ.

Ramachandra Misra and another, Petitioners v. Addl. Director of Public Instruction (Schools) and another, Opposite Parties.

Original Jur. Case No. 1055 of 1978, D/-10-1-1979.

Orissa Education Act (15 of 1969), Section 11 (1) Explanation 2 (before amendment of 1978) — Aided educational institution — Managing Committee — Supersession of — Jurisdiction — Post of Director of Public Instruction kept in abeyance — Additional Director of Public Instruction held, has no jurisdiction.

Supersession of Managing Committee of an aided High School by the Additional Director in exercise of conferment of power of Director when the post of Director was kept in abeyance, was without jurisdiction. (1960) 2 Mad LJ 75, Relied on. (Para 6)

There is a clear distinction between the post being kept in abeyance and the post being kept vacant. The Explanation (2) under Section 11 refers to a situation when there is a live post going unmanned thus giving rise to a vacancy, whereas the situation in hand is a case where the post is not live on account of the Government decision to keep it in abeyance. Such a situation would not come within the ambit of the Explanation. (Para 5)

Cases Referred: Chronological Paras

(1960) 2 Mad LJ 75 5

G. Rath, for Petitioners; Govt. Advocate, for Opposite Parties.

R. N. MISRA, J.:— Petitioners are members of the Managing Committee of the Rajanagar High School which is an aided educational institution. By notice dated 16-11-77 (Annexure-1), the Additional Director of Public Instruction (Schools) called upon the mem-

bers of the Managing Committee to show cause as to why the said Committee may not be superseded and reconstituted as provided under Section 11 (1) of the Orissa Education Act, 1969 (hereinafter referred to as the 'Act'). After cause was shown, on 25-7-1978, the Additional Director superseded the Managing Committee and put the Inspector of Schools, Cuttack-III Circle as Special Officer to exercise the powers and functions of the Committee in respect of the School till reconstitution of the Managing Committee. The initiation of the proceeding and the order of supersession are assailed in this proceeding on the ground that the Additional Director of Public Instruction has no jurisdiction under the Act to initiate the same or make the impugned order.

2. In a common counter affidavit, the opposite parties have supported the order.

3. As far as relevant, S. 11 of the Act provides :—

"(1) Without prejudice to the provisions contained in any other law for the time being in force, whenever it appears to the Director of Public Instruction that the managing committee of any educational institution has neglected or failed to perform any of the duties imposed by or under this Act or the rules made thereunder he may after giving the managing committee..... a reasonable opportunity for showing cause against the proposed action and after considering the cause, if any, shown, supersede the managing committee.....

(2) Upon supersession of the managing committee....., the Director of Public Instruction shall, as soon as possible thereafter, reconstitute the managing committee..

(3) .....

(4) During the period intervening the supersession and reconstitution of the managing committee....., the powers and functions of the managing committee ..... shall be exercised by such person or persons as the Director of Public Instruction may appoint in that behalf.

(5) The managing committee ..... may, if it is aggrieved by the order of supersession made under this section, prefer an appeal to the State Government within thirty days from the date of the order.

Explanation — (1) The expression 'Director of Public Instruction' shall mean the Director of Public Instruction (Higher Education) in the case of colleges and the Director of Public Instruction (Schools) in the case of schools.

(2) In the event of vacancy in any of the offices specified in Cl. (1), the powers and functions of the Director of Public Instruction shall be exercised and performed by such other officer of the Directorate of Public Instruction not below the rank of a Joint Director as the State Government may by notification, specify in this behalf."

Petitioners allege, relying upon the order of the State Government dated 21-11-1974 that the post of Director of Public Instruction (Schools) has been kept in abeyance for the time being and the post of a Joint Director of Public Instruction was created. Government made a notification on 7th of June, 1977, vide Annexure-5 to the following effect:—

"In exercise of the powers conferred by Cl. (2) of the Explanation to S. 11 of the Orissa Education Act, 1969 (Orissa Act 15 of 1969) and in supersession of Government Notification No. 3034 EYS dated the 20th Jan. 1976, the State Government do hereby direct that in the event of a vacancy in the office of the Director of Public Instruction, the Additional Director of Public Instruction shall exercise the powers and functions of the said Director under the said section of the said Act."

On 28th of March, 1978, Government made another notification running to the following effect:—

"In exercise of the powers conferred by Cl. (2) of the Explanation to S. 11 of the Orissa Education Act, 1969 (Orissa Act 15 of 1969) and in supersession of the Government notification of the Government of Orissa in the Education and Youth Services Department No. 21396 dated 7th June, 1977, the State Government do hereby direct that in the event of a vacancy in the office of the Director of Public Instruction (S) the Director of Public Instruction (Higher Education) shall exercise and perform the powers and functions of the said Director under Sec. 11 of the said Act."

The opposite parties have relied upon these notifications in support of their plea that the impugned supersession was an act within the jurisdiction of the Additional Director. Petitioners on the other hand have contended that when the post of the Director of Public Instruction (Schools) was kept in abeyance, it was not a case of a vacancy but it was a case where the filling up the post had been deferred and no person was entitled to be posted as such until there was a revocation of the Government decision of keeping the post in abeyance. Thus, the situation arising out of the post being kept in abeyance was not covered by the second Explanation to Section 11 and it was not open to the State Government to make the notification under Annexure-5 to confer jurisdiction on the Addi-

tional Director of Public Instruction to exercise the powers conferred under S. 11 of the Act.

4. A Bench of this Court has already held that the Joint Director of Public Instruction (Schools) in whose favour power had been conferred by notification in terms of the second Explanation to Section 11 was not competent to exercise the powers of the Director.

5. The term 'vacancy' has not been defined by statute and must accordingly be given the common parlance meaning. According to the Shorter Oxford English Dictionary the following would be the meaning of the term:—

The state or condition of being unoccupied; absence of occupation; an occupied period or interval; the fact or condition of an office or post being, becoming or falling vacant; a vacant or unoccupied office, post or dignity. A Bench of the Madras High Court in the case of Additional District Panchayat Officer, Tirunelveli v. S. Venkatarama Iyer (1960) 2 Mad LJ 75, was called upon to deal with the meaning of the word 'vacancy' occurring in Section 25 (4) of the Madras Village Panchayats Act, 1950 which provides :—

"Any vacancy in the office of President shall be reported to the election authority, by such person and within such time as may be prescribed, and the election authority shall arrange for the election of the President."

Rajamannar, C. J. spoke for the Court thus:—

"'Vacant' means inter alia not filled or occupied, devoid of an occupant'. In Anderson's Dictionary of Law we find the following instructive information:

'Vacancy is the state of being empty or unfilled ..... An old office is vacated by death, resignation or removal. An Office newly created is ipso facto vacant at creation.'"

"Abeyance" on the other hand according to the Oxford English Dictionary means "a state of suspension, dormant condition, a position of being without an owner". When Government have taken the decision of keeping the post in abeyance, there is no intention in praesenti of filling up the vacancy. There is certainly a difference between a vacancy simpliciter and the post being kept in abeyance. In the case of a vacancy it is available to be filled up at any time in the case of a post kept in abeyance, the post has to be brought into life from the stage of dormancy and then a vacancy created to be filled up. Otherwise put, when the post is kept in abeyance, there is no vacancy because there is no post to be filled up. The creation of the post on permanent basis may not have been recalled, but on account of the direction that the post shall be kept in abeyance, there would not be a live vacancy for being manned. Thus, there is a clear distinction between the post being kept in abeyance and the post being kept vacant. The Explanation (2) under Section 11 of the Act refers to a situation when there is a live post going unmanned thus giving rise to a vacancy, whereas the situation in hand is a case where the post is not live on account of the Government decision to keep it in abeyance. Such a situation would not come within the ambit of the Explanation. Learned Government Advocate does not dispute the position that the post had been directed to be kept in abeyance. On this conceded position, we are inclined to agree with counsel for the petitioners that the Explanation (2) to Section 11 and the Government notification cannot be called in aid to support the present action of the Additional Director of Public Instruction (Schools). We may note that by Orissa Act 31 of 1978 operative with effect from Oct. 1978, an amendment to Section 11 has been brought in, but in view of the conceded position at the Bar that the provisions of the amending Act are prospective, no support can be derived from the amendment by the opposite parties.

6. The net result, therefore, is that the Additional Director of Public Instruction (Schools) had no jurisdiction to initiate the proceeding for supersession nor to pass the order of supersession of the Managing Committee. Since there was no jurisdiction in the public officer, the impugned order must be held to be an act without authority of law and thus liable to be vacated.

7. We would accordingly allow the writ application and quash the entire proceeding. The Managing Committee of the School shall be deemed to be in office and shall be entitled to exercise its functions in accordance with law. The writ application succeeds. There would, however, be no order for costs.

P. K. MOHANTI, J. :— I agree.

Petition allowed.

AIR 1979 ORISSA 143

R. N. MISRA AND B. K. RAY, JJ.

Sarat Chandra Panda, Petitioner v. State of Orissa and others, Opposite Parties.

Original Jur. Case No. 499 of 1978, D/- 6-10-1978.

(A) Orissa Co-operative Societies Act (2 of 1963), Section 32 (1) and (4) — Issue of

notice to a society to show cause against supersession — Condition precedent for. AIR 1973 Mad 460; AIR 1976 Mad 280 and ILR (1973) Kant 1170, Dissented from.

Consultation with the financing bank of a co-operative society is a condition precedent not only when the final step of supersession of the society is contemplated but even for issue of notice to the society to show cause against its supersession. AIR 1973 Mad 460, AIR 1976 Mad 280 and ILR (1973) Kant 1170, Dissented from; AIR 1970 SC 992 Explained and Rel. on. (Para 4)

There can be no doubt that the advised use of the word 'any' in sub-section (4) meant plurality of action. Sub-section (1) of Section 32 contemplates of one final act namely, removal of the Committee from office. If that single act was in the mind of the Legislature while enacting sub-s. (4) there would have been no justification for the use of the word 'any' as an adjective to 'action'. On the other hand, the phrase "any action" would refer to the several steps indicated in sub-sec. (1), namely, formation of tentative opinion, issue of notice giving opportunity to the Committee to state its objection, recording an order in writing for supersession etc. (Para 4)

(B) Orissa Co-operative Societies Act (2 of 1963), Ss. 32 (1) and 4 — Society challenging by writ petition show cause notice on ground of non-fulfilment of pre-condition of consultation with its financing bank — Applicability of bar under Art. 226 (3) to petition — (Constitution of India, Art. 226 (3).)

Where the writ petition is filed by the members of the Committee of Management of a co-operative society governed by the Orissa Co-operative Societies Act to challenge a notice to show cause against its supersession on the ground that the initiation of the proceeding is without jurisdiction as a precondition therefor of consultation with the financing bank of the society has not been satisfied, the bar of Art. 226 (3) cannot be invoked by saying that alternate remedy of revision and appeal is available against the final order of supersession. (Para 3)

Cases Referred: Chronological	Paras
AIR 1977 SC 1944	4
AIR 1976 Mad 280	4
ILR (1973) Kant 1170	4
AIR 1973 Mad 460	4
AIR 1971 SC 293	4
AIR 1970 SC 992	4
(1959) 2 All ER 689 : (1959) 3 WLR 498, Turner's Will Trusts Bridgman v. Turner	4

R. Mohanty, R. C. Patnaik and P. K. Misra, for Petitioner; G. Rath and Addl. Govt. Advocate, for Opposite Parties.

R. N. MISRA, J. :— The Aska Central Multipurpose Co-operative Society Limited, opposite party No. 3, (hereinafter referred to as the 'Society') is a society registered under the Orissa Co-operative Societies Act of 1962 (hereinafter referred to as the 'Act'). Petitioner and opposite parties Nos. 4 to 13 are members of its Committee of Management. The present Committee was formed on 9-1-1977. The Society has as its financing bank the Aska Central Co-operative Bank and as stated in para. 6 of the writ application, the Society is indebted to the Bank. The Committee of Management received a notice dated 14-2-1978 from the Registrar of Co-operative Societies, opposite party No. 2, purporting to be under Section 32 (1) of the Act calling upon it to show cause why it may not be superseded by the Registrar in exercise of his powers under that section. Petitioner contends that as a condition precedent to the issue of notice under Section 32 (1) of the Act, the financing Bank had to be consulted as required by sub-section (4) of Section 32 of the Act and, in the absence of consultation, the initiation of the proceeding is without jurisdiction and has to be quashed.

2. Opposite parties Nos. 4, 6, 7 and 9 have appeared through different counsel and counsel for opposite parties Nos. 4 and 6 at the hearing support the petitioner's stand. The application is opposed by opposite parties Nos. 1, 2 and 11 represented by learned Additional Government Advocate. A counter-affidavit on behalf of these contesting opposite parties has also been filed wherein it has not been disputed that there has been no consultation with the financing Bank before issue of the impugned notice and it has been maintained that such consultation at that stage is not warranted by law. It is further contended that the writ application is premature and since the final order of supersession is open to appeal and revision, alternate remedy is available and this Court should not examine the merit of the matter in view of Article 226 (3) of the Constitution.

3. There does not seem to be any force in the contention of the contesting opposite parties that alternate remedy is available against the final order, because the objection of the petitioner is that the proceeding itself is without jurisdiction as the basic precondition of consultation with the financing Bank has not been satisfied before initiation of the

proceeding. The material question for consideration, therefore, is whether petitioner's contention is acceptable.

4. Sub-sections (1) and (4) of S. 32 of the Act, which are material for our purpose, may now be extracted.

"32. Supersession of Committee and power to disqualify officers of the society :—

(1) If, in the opinion of the Registrar, the Committee of any society persistently makes default or is negligent in the performance of the duties imposed on it by this Act or the rules or the bye-laws, or commits any act which is prejudicial to the interest of the society or its members, or is otherwise not functioning properly, the Registrar may after giving the Committee an opportunity to state its objections, if any, by order in writing, stating reasons therefor, remove the Committee; and

(a) appoint a new committee consisting of one or more members of the society in its place;

(b) appoint one or more Administrators who need not be members of the society; or

(c) appoint any other society with its consent;

to manage the affairs of the society for a period not exceeding two years specified in the order and the said period may, at the discretion of the Registrar, be extended from time to time, so however that the aggregate period does not exceed four years.

xxx xxx xxx

(4) Before taking any action under sub-section (1) in respect of a society, the Registrar shall consult the financing Bank to which it is indebted and consider the opinion, if any, received from such Bank."

According to the petitioner, even before issue of the notice with which steps under Section 32 (1) of the Act have to be initiated, the consultation provided under sub-section (4) of Section 32 of the Act has to take place, while according to the Registrar, sub-section (4) comes into play before actual removal of the committee is ordered. Sub-section (4) provides that consultation has to take place "before taking any action under sub-section (1)". According to the petitioner and those supporting him, 'action' in the absence of a definition must take its normal meaning in common parlance, and the meaning of the term is "a proceeding by which one party seeks in a court of justice to enforce some right against, or to restrain the commission of some wrong by, another party". (See 'Words and Phrases' by John B. Saunders). Reference is also made to 'The Dictionary of English Law' by Earl Jowitt, where 'action' is said to mean "conduct, something done; also the form prescribed by law". The term 'action' is applied to all proceedings in the Court which would have been commenced by writ of the superior courts in common law. Sub-section (1) contemplates of a single act of removal of a committee and if the committee is removed from office, the Registrar has three alternatives to choose for filling of the vacancy, i. e. he may appoint a new committee; appoint one or more administrators not being members of the society; or he may appoint any other society with its consent. Sub-section (1), therefore, contemplates of act of removal of the committee from office. Therefore, if the Legislature had actually intended to say that before the order of removal of the Committee was made, consultation was to take place, nothing stood in the way of specifically indicating so. Emphasis is placed upon the language used in sub-sec. (5) of S. 32 of the Act, where it has been stated :—

"If the Registrar, while making an order under sub-sec. (1),.....".

If in sub-sec. (4) the relevant point of time of consultation was making of an order under sub-sec. (1), the Legislature did not lack words to express itself in the same way as in sub-sec. (5).

Emphasis is again placed on the use of the word 'any'. There is no dispute that the use of the word 'any' connotes a concept of plurality. In 'Words and Phrases', 'any' is said to be a word of very wide meaning and prima facie the use of it excludes limitation. The term 'any person' came to be interpreted in the case of Re: Turner's Will Trusts, Bridgman v. Turner (1959) 2 All ER 689, to mean "including an unascertained or unborn person". "Any property" used in S. 14 (1) of the Hindu Succession Act was indicated by the Supreme Court in the case of V. Tulasamma v. Sesha Reddi, AIR 1977 SC 1944, to cover "any and every kind of property". The term "any prohibition" in S. 111 (d) of the Customs Act of 1962 was interpreted by the Supreme Court in the case of Sk. Mohd. Omer v. Collector of Customs, Calcutta, AIR 1971 SC 293, to mean "every type of prohibition". There can, therefore, be no doubt that the advised use of the word 'any' in sub-sec. (4) meant plurality of action. Sub-sec. (1) of S. 32 contemplates of one final act as we have already taken note of namely, removal of the Committee from office. If that single act was in the mind of the Legislature while enacting

sub-sec. (4) there would have been no justification for the use of the word 'any' as an adjective to 'action'. On the other hand, the phrase "any action" would refer to the several steps indicated in sub-sec. (1), namely, formation of tentative opinion, issue of notice giving opportunity to the Committee to state its objection, recording an order in writing for supersession etc. The law as contained in Section 32 of the Act appears in several similar Acts of other States. Learned Additional Government Advocate, therefore, relies upon two decisions of the Madras High Court and one of the Karnataka High Court in support of his stand that the stage of consultation comes only before the actual order of removal is passed. In the case of P. M. V. Co-op. Agricultural Credit Society v. Joint Registrar of Co-operative Societies, Tirunelveli, AIR 1973 Mad 460, a learned single Judge was construing the provision of S. 72 (1) (a) and (6) of the Madras Co-operative Societies Act of 1961, S. 72 (1) (a) provides :—

"If, in the opinion of the Registrar, the Committee of any registered society, is not functioning properly or wilfully disobeys or wilfully fails to comply with any lawful order or direction issued by the Registrar under this Act or the rules, he may, after giving the committee an opportunity of making its representations, by order in writing dissolve the committee and appoint either a person (hereinafter referred to as the special officer) or a committee of two or more persons (hereinafter referred to as the managing committee) to manage the affairs of the society for a specified period not exceeding two years."

Sub-sec. (6) of the Madras Co-operative Societies Act makes it obligatory on the Registrar to consult the financing Bank to which the Society is indebted before taking any action under sub-sec. (1). The learned single Judge in the Madras case referred to above observed (at p. 461) :—

".....What consultation is contemplated under sub-sec. (6) of S. 72 does not evade analysis. Obviously, such consultation begins after the Registrar is subjectively satisfied on objective materials placed before him that a prima facie case has been made out for the purpose of superseding the co-operative society. It is only at that point of time that the necessity for consulting the financing bank arises....."

The question strictly did not fall for consideration on the rival contentions raised by the parties in the said case. In the case of K. Thangavelu v. Joint Registrar of Co-operative Societies, AIR 1976 Mad 280, the observation in the earlier single Judge case was quoted with approval and the learned single Judge observed (at p. 281) —

"But on due consideration of the matter, I am inclined to think that, having regard to the object of the provision under S. 72 (6) which requires the consultation of the financing bank, such consultation is necessary before the final order is passed under S. 72 (1). At the stage of the issue of the above show cause notice no one knows as to what is going to happen ultimately. It is only when the first respondent makes up his mind after due enquiry in relation to the irregularities referred to in the show cause notice, that the financing bank has to be consulted with regard to the action proposed to be taken. If the consultation is before the issue of show cause notice and if the first respondent ultimately finds that the irregularities referred to in the show cause notice have not been established, the consultation earlier obtained will become a mere formality and it would be a sheer waste of time. The matter is also clear if we consider the question of prejudice that will be caused to the petitioner. The petitioner can complain that the consultation has not been made only if the enquiry arising out of the show cause notice ultimately results in an order of supersession under S. 72 (1)....." (Underlining is ours for emphasis).

The other case where a similar view has been taken is of the Karnataka High Court reported in ILR (1973) Kant 1170, construing S. 30 which is the corrresponding provision in the Mysore Act. These cases have referred to an earlier decision of the Supreme Court in the case of Joint Registrar of Co-operative Societies v. P. S. Rajagopal Naidu, AIR 1970 SC 992, where supersession of the managing committee under S. 72 of the Madras Act was in issue. After referring to the provision in S. 72 of the Madras Act, the Court observed (At p. 995) :—

"It is significant that S. 72 (1) does not contain any mention of Ss. 64 to 67 which appear in S. 70 (1) and of Sections 65, 66 and 67 which are expressly mentioned in S. 85 (1). If the intention of the Legislature was that the supersession of the Committee under S. 72 can be ordered by the Registrar only after recourse to Ss. 64, 65, 66 and 67, there is no reason why language analogous to S. 70 (1) or S. 85 (1) containing an express mention of the aforesaid sections, should not have been employed. An audit under S. 64 has to be done every year in view of the

mandatory form of the language of that S. 64. But as regards Ss. 65 and 66 the Registrar has been given the discretionary powers to make an inquiry or an inspection in accordance with those sections, there is no duty or obligation cast on him for doing so before he proceeds to take action u/s. 72. All that is required by S. 72 (1) (a) is that the Registrar should form an opinion that the Committee of any Registered society is not functioning properly or has wilfully disobeyed or failed to comply with any lawful order or direction issued by him .....The requisite opinion has indisputably to be formed honestly and after applying his mind by the Registrar to the relevant materials before him. The only condition precedent for taking action u/s. 72 (1) is that the Registrar must consult the financing bank to which the society is indebted (vide sub-sec. (6)). There is no other requirement or condition precedent laid down by the Legislature which the Registrar must fulfil before he acts in the matter of supersession of the Committee....." (Underlining is ours).

There is dispute as to what exactly is the effect of the above paragraph of the Supreme Court decision. While in the Madras decisions this has been referred to as meaning the final order of removal, it is contended before us by petitioner's counsel that the Court actually intended to say that before any action in the matter of supersession of the Committee was taken. If the Supreme Court did not intend the entire process of removal to be in view, the learned Judges would have had no difficulty to say "in the matter of supersession or removal of the Committee", instead of "before he acts in the matter of supersession of the Committee". The Court obviously intended to refer to the entire process beginning with formation of opinion and ending with removal of the Committee. We are inclined to agree with the submission advanced before us that the principle indicated by the Supreme Court was not properly stated in the two Madras decisions and the Karnataka decision and proper interpretation of sub-sec. (4) of S. 32 of the Act would mean that before the entire process indicated in S. 32 (1) of the Act commences, consultation is necessary.

5. Learned Additional Government Advocate relied upon the observation in the later Madras decision that the Legislature could not have intended consultation at the earlier stage because by then it was not known whether the Registrar would actually pass an order of removal. After forming a tentative opinion, he proceeds to give the Board of Management an opportunity of showing cause and after the cause shown is considered, the Registrar comes to a more definite opinion in the matter. It is at that stage only that consultation is warranted. To meet this contention, counsel challenging the action of the Registrar have contended that initiation of a proceeding under S. 32 (1) of the Act has a very adverse effect on the working of the society. Many of the co-operative societies have monetary dealings, and once it circulates that the Board of Management is in jeopardy on account of the proposed action of the Registrar to remove it from office, the business of the Society is adversely affected. Therefore, unless there is a strong prima facie case, no action is warranted and the Legislature advisedly asked for consultation with the financing Bank from the very commencement of the proceeding. There can be no doubt that the financing Bank has a large stake in the right functioning of a society and, therefore, the mandatory provision in sub-sec. (4) is provided. It is not the contention of the learned Additional Govt. Advocate that sub-sec. (4) is not mandatory. In fact, after the Supreme Court decision referred to above that sub-sec. (6) of S. 72 of the Madras Co-operative Societies Act is mandatory, there is no scope for such a contention.

6. As admittedly the Registrar had no consultation with the financing bank, we must hold that a mandatory requirement of the law has not been complied with by the Registrar which would give him jurisdiction to issue the notice under S. 32 (1) of the Act. The notice accordingly is liable to be quashed. The writ application is allowed and the impugned notice is quashed. The petitioner will have his costs of the proceeding. Hearing fee is assessed at rupees one hundred to be recovered from opposite parties 1 and 2 only.

B. K. RAY, J. :— I agree.

Petition allowed.

AIR 1979 ORISSA 147

R. N. MISRA AND P. K. MOHANTI, JJ.

Collector of Puri, Appellant v. Kamala Kanta Das, Respondent.

First Appeal No. 47 of 1970, D/- 1-5-1979.*

(A) Land Acquisition Act (1 of 1894) S. 23 — Land leased by State Govern-

*(Against decision of B. Misra, Dist. J., Puri, D/- 5-12-1969.)

ment — Acquisition of leasehold interest — Market value — Determination of — Leases granted by State Government contemporaneously can be utilised as good guidance for determining market value. ILR (1976) Cut 1392 and AIR 1979 SC 366, Referred. (Para 4)

(B) Land Acquisition Act (1 of 1894), Sec. 23 — Acquisition of leasehold interest under State Government — Valuation made in respect of leasehold interest only — Compensation not liable to be apportioned between the State Government and lessee. (Para 5)

(C) Land Acquisition Act (1 of 1894), S. 23 (2) — Acquisition of land under Orissa Act 18 of 1948 — Claimant entitled to solatium on principles of Section 23 (2) in view of compulsory nature of acquisition. (1969) 35 Cut LT 535 (SC), Rel. on; AIR 1968 SC 1425, AIR 1973 SC 689, Referred. (Para 6)

Cases Referred : Chronological Paras

AIR 1979 SC 366 : 1979 Cri LJ 154	5
ILR (1976) Cut 1392	5
AIR 1973 SC 689	6
(1969) 35 Cut LT 535 (SC)	6
AIR 1968 SC 1045	5
AIR 1968 SC 1425	6
AIR 1965 SC 1923	5
AIR 1964 Orissa 222	6
AIR 1960 Punj 317 (FB)	5

G. B. Patnaik, Addl. Govt. Advocate for Appellant; R. C. Patnaik and P. K. Misra, for Respondent.

R. N. MISRA, J.:— The Collector of Puri has carried this appeal against the award of the learned District Judge of Puri passed under Orissa Act 18 of 1948.

2. Under three separate notifications issued under Orissa Act 18 of 1948 in the manner indicated below, 50 acres of lands of the respondent were acquired for the purposes of Capital construction at Bhubaneswar:—

(i) 8-8-1950 — 13.752 acres.
(ii) 15-11-1952 — 20.200 acres.
(iii) 31-3-1953 — 16.048 acres.

The claimant asked for a total compensation of Rs. 4,69,900 in the following way:—

(i) Market value of 50 acres of lands at Rs. 7,000/- per acre.	Rs. 3,50,000/-
(ii) Solatium at 15% of the market value.	Rs. 52,500/-
(iii) Damage on account of loss of trees.	Rs. 2,000/-
(iv) Damage to other property on account of acquisition.	Rs. 55,400/-
(v) Damage for change of business.	Rs. 10,000/-

The competent authority offered compensation at the rate of Rs. 75 per acre and the Arbitrator by his award dated 30th of June, 1962, determined the market value at Rs. 400 per acre and awarded a total compensation of Rs. 28,750. The award was assailed before this Court in M. A. No. 95 of 1962 and by judgment dated 16th of December, 1963, a Bench of this Court allowed the appeal, set aside the award and remitted the matter to the Arbitrator for further hearing and a fresh disposal in accordance with law. After remand, the Arbitrator has awarded Rs. 2,32,138 towards the value of the lands and Rs. 34,820.70 paise as solatium. According to the Arbitrator, the market value per acre of land in respect of the acquisition made in 1950 is Rs. 1,000; for the land acquired in 1952 the market value is Rs. 5,250; and for the land acquired in 1953 the market value is Rs. 7,000 per acre. This award is assailed in appeal.

3. At the hearing Mr. G. B. Patnaik, learned Additional Government Advocate, raises three contentions:—

(i) The determination of market value per acre of land at Rs. 7,000 is based on no evidence and thus is liable to be vacated.

(ii) The acquired property being leasehold interest under Khurda Khasmahal, the State Government as owner of the land had also an interest in the property and thus the entire compensation could not have been given to the claimant as a lessee.

(iii) Under the provisions of Orissa Act 18 of 1948, solatium is not payable.

4. For the purpose of determining the market value of the lands, the Arbitrator had mainly relied upon the premium charged by the State Government in leasing out its lands to people in the neighbourhood. It may not be out of place to mention that the Government Assessor who happened to be an Executive Engineer gave the opinion that market value per acre of land would be Rs. 7,000. Instead of relying upon the Assessor's opinion, the Arbitrator relied upon certain lease deeds executed by the State. Ext. 8 is a lease of July, 1953, which is almost contemporaneous to the last item of acquisition. There the value per acre of land worked out at Rs. 10,800. Ext. 6 is a lease of the year 1956 where the same

rate was adopted. The Arbitrator found that the foundation stone for the location of the Capital was laid in 1948 by the then Prime Minister of India and by 1953-54 lands belonging to the State Government were being leased out for residential purposes at Rs. 10,000 per acre. In that view of the matter, the Arbitrator determined the market value of the land at Rs. 10,000 for the acquisition of the year 1953, but since the claimant asked for Rs. 7,000 per acre, he accepted the same as reasonable. In regard to the acqusitions of 1950 and 1952, keeping the market value of 1953 in view, the Arbitrator reduced the same by adopting Rs. 5,250 per acre in 1952 and Rs. 1,000 per acre in 1950.

There is no justification for the argument of learned Additional Government Advocate that the leases granted by the Government in 1953-54 are not available to be accepted as guideline. The claimant's interest in the property was leasehold under the State Government. The leases relied upon are also leases granted by the State Government for the same purpose. We are, therefore, of the view that the leases granted by the State Government contemporaneously can be utilised as good guidance for determining the market value. The deductions made from the market value of 1953 for the earlier acquisitions also seem to be reasonable. The first contention of learned Additional Government Advocate in the premises must be rejected.

5. Undoubtedly, the lands acquired were leasehold interest. A learned single Judge of this Court in the case of Republic of India v. Prafulla Kumar Samal, ILR (1976) Cut 1392, examining the status of a Khasmahal lessee held—

".....Rights of a lessee in Khasmahal lands are in no way different from those which one has in his own private land. Clause (15) of the lease deed confers a right of renewal on the lessee, and as has been pointed out earlier, the said right cannot be denied by the lessor. Besides the lessee's right in the Khasmahal land being heritable and transferable the lessee can create a permanent right of tenancy in his holding. Thus, in all respects the rights of a lessee are just similar to those of an owner of a private land (see 1935 Cut LT 34, Munshi Abdul Kadir Khan v. Munshi Abdul Latif Khan and 1937 Cut LT 67, Madhushudan Swain v. Durga Pd. Bhagat). ..... Their Lordships of the Supreme Court in the decisions reported in AIR 1965 SC 1923 (Mohammad Amir v. Municipal Board, Sitapur) and AIR 1968 SC 1045 (Special Land Acquisition and Rehabilitation Officer v. M. S. Seshagiri Rao) have held that a lessee in respect of Khasmahal land is the owner of the same. The same view has also been expressed in a decision reported in AIR 1060 Punj 31 7(FB)....."

The decision has been affirmed by the Supreme Court in the case of Union of India v. Prafulla Kumar Samal, AIR 1979 SC 366. It is true that the decision was rendered in a criminal case as pointed out by learned Additional Government Advocate. But for the principle which is relevant no distinction lies between a criminal case and a civil case. Since what was acquired was lessee's interest, the Arbitrator was not called upon to determine the market value of the entire land. In fact, the foundation for fixing the market value was Government leases and, therefore, it would be reasonable to accept the stand taken by the claimant's counsel that the valuation adopted in respect of the three acquisitions was representing the leasehold interest and not the entire rights over the lands. In the premises, the compensation determined by the Arbitrator was not liable to be apportioned between the owner of the property and the lessee. The second contention of learned Additional Government Advocate has also to be rejected.

6. The last contention is that solatium is not payable under Orissa Act 18 of 1948. Section 23 (1) of the Land Acquisition Act of 1894 has been specifically applied. It is true that the concept of solatium is in Section 23 (2) of the Land Acquisition Act and that provision has not been extended to Orissa Act 18 of 1948. According to learned Additional Government Advocate, solatium was not payable and the Arbitrator went wrong in awarding solatium. Reliance is placed on some observations of a Bench decision of this Court in the case of State of Orissa v. Baishnab Sahu, AIR 1964 Orissa 222. On the other hand, the claimant's counsel relies upon the decision of the Supreme Court rendered in appeal from AIR 1964 Orissa 222 (supra) reported in (1969) 35 Cut LT 535 (State of Orissa v. Baishnab Sahu). The Supreme Court stated:—

".....As the arbitrator had to take into account the principles of the Land

Acquisition Act, we think the above figure should be augmented by 15% by way of solatium in view of the compulsory nature of the acquisition....."

What was taken into account for awarding solatium was the nature of the acquisition and not the concession of the State Government as referred to by Chief Justice Narasimham in AIR 1964 Orissa 222 (supra) that in regard to acquisition of lands for the Hirakud Dam Project Government were agreeable to pay solatium.

Reliance has also been placed on the claimant's side on two decisions of the Supreme Court. In the case of Balammal v. State of Madras, AIR 1968 SC 1425, the Court took the view that if the land was available to be acquired under two Acts and one provided better compensation than the other, a situation giving rise to the application of Article 14 of the Constitution would arise. That view was accepted by a seven-Judge Bench of the Supreme Court in the case of Nagpur Improvement Trust v. Vithal Rao, AIR 1973 SC 689. It is unnecessary to examine the matter from the point arising in the latter two decisions of the Supreme Court referred to above. It is appropriate, in our view, to follow the guideline indicated by the Supreme Court in the Orissa decision (1969-35 Cut LT 535) where in respect of an acquisition under the Act solatium had been awarded. Therefore for the acquisitions under Act 18 of 1948, the claimant is entitled to fair market value and fair market value would be the market price and solatium keeping in view the compulsory nature of acquisition. The third contention of learned Additional Government Advocate must, therefore, also be rejected.

7. All the contentions advanced in support of the appeal having been rejected, the appeal must be dismissed as without merit. Respondent shall be entitled to his costs in this Court.

P. K. MOHANTI, J.:— I agree.

Appeal dismissed.

AIR 1979 ORISSA 150

B. K. RAY AND J. K. MOHANTY JJ.

Satyabadi Pradhan, Petitioner v. Tahasildar, Digapahandi and others, Opposite Parties.

O. J. Case No. 602 of 1976, D/- 6-2-1979.

DW/EW/C134/79/KSB

(A) Constitution of India, Art. 226 — Amended by Constitution (Forty-Second) Amendment Act, 1976 — Effect of amendment on scope of exercise of writ jurisdiction — Another remedy open for redress of injury — Writ petition not maintainable for redress of injury in question. (Para 6)

(B) Constitution of India, Art. 226 (1) and (3) — Interpretation of — Violation of any principle of natural justice, in the absence of exclusion thereof specifically or by implication by any statute, amounts to illegality within Art. 226 (1) (C) — S.D.O. not only condoning delay of five years in presentation of appeal but setting aside ex parte order without affording any opportunity of hearing to petitioner — Alternative remedy would not operate as bar to maintainability of writ petition. (Paras 9, 10, 11)

Cases Referred : Chronological	Paras
1978 Tax LR 1726 (Ker)	8
AIR 1977 Andh Pra 250 (FB)	7
AIR 1977 Guj 113 (FB)	7, 8
AIR 1977 Kant 191	8
AIR 1971 SC 40 : 1971 Lab IC 8	7
AIR 1971 SC 1558 : 1971 Tax LR 706	7
AIR 1969 SC 556 : 1969 All LJ 596	7
(1969) 1 All ER 208 : (1969) 2 AC 147, Anisminic Ltd. v. Foreign Compensation Commission	7
AIR 1967 SC 549	7
AIR 1958 SC 86	7
AIR 1955 SC 233	7
AIR 1918 PC 135	10
AIR 1917 PC 179 : 16 All LJ 57	10

P. Palit and R. Mohapatra, for Petitioner; Y. S. N. Murty and Addl. Standing Counsel, for Opposite Parties.

J. K. MOHANTY, J.:— By this writ petition under Art. 226 of the Constitution of India petitioner seeks to quash the order under Annexure 6 passed by opposite party No. 2, the Sub-Divisional Officer, Berhampur in O. E.A. No. 1 of 1976 and the consequential notice under Annexure 7 issued by opposite party No. 1, the Tahasildar-cum-O.E.A. Collector, Digapahandi in C. P. No. 1281 of 1966. Petitioner further prays for issue of a writ of mandamus and/or any other appropriate order prohibiting and/or restraining the opposite parties either from taking any action or in any manner interfering with the possession and enjoyment of the petitioner over the disputed property by virtue of the aforesaid order.

2. The case of the petitioner is that his ancestors purchased certain lands

locally known as Gangasagar bila along with the disputed land measuring about A 4.77 decimals in Khasra No. 13 and Khewat No. 22 of mouza Gada Chaitanpur from one Bhagirathi Pattanaik and others by a registered sale deed dated 28th May, 1919. The lands were Darmila Inam lands belonging to Bada Khemandi Estate. The disputed land was initially recorded as a tank. But in course of time the same was changed into a cultivable land and was in exclusive possession of the petitioner. On 1-6-1953 the Bada Khemandi Estate vested in the State. After vesting neither the ex-intermediary nor any other person filed any application under Ss. 6, 7 and 8 (3) of the Orissa Estates Abolition Act (hereinafter called the 'Act') for settlement of the disputed land within the prescribed period. According to the petitioner, the time for making application was extended by the Government from time to time and on 22-9-1966 the father of the petitioner filed an application under Ss. 6 and 7 of the Act which was registered as C. P. No. 1281 of 1966 before the Tahasildar-cum-O.E.A. Collector, Digapahandi and on 21-2-70 notices were issued. Thereafter on 9-4-1970 the Tahasildar-cum-O.E.A. Collector directed the Revenue Supervisor to visit the spot personally and conduct a local enquiry. On enquiry, as it was found that names of some other persons had been entered in the preliminary R.O.R. as co-rayats (Khatadars), notices were issued to the said Khatadars, but they endorsed no objection. The Tahasildar-cum-O.E.A. Collector (opposite party No. 1), after considering the report of the Revenue Supervisor, allowed the application of the petitioner, settled the land with him, fixed Rs. 4.50 as fair and equitable rent with effect from 1-6-1953 and directed the petitioner to pay salami equal to three times of the rent, as the petitioner's application was not made in time. He, accordingly, directed preparation of the rent roll. On 21-9-70, i.e. after the appeal period was over, the rent roll was signed and the petitioner was directed to deposit Rs. 64.41. Petitioner duly deposited the sum. After the settlement of the disputed land with the petitioner, petitioner was regularly paying rent and cess to the Government and obtaining receipts therefor. Thereafter in the year 1971, he mortgaged the said land to the Land Mortgage Bank and got a loan of Rs. 4,000 for development of cultivation in the said land. In the years 1972-73 and 1974-75 opposite party No. 1 also sanctioned loan of Rs. 600 for purchasing bullock cart and Rs. 400 for development of the said land respectively to the petitioner. In the year 1975 petitioner also got a loan of Rupees 1,500 from Canara Bank on mortgage of the said land for purchasing fertilisers etc. The allegation of the petitioner is that opposite parties 4 to 11 in order to harass him falsely initiated M. C. Irrigation Case No. 9 of 1975 under Irrigation Act before opposite party No. 1, even though by that time the tank had lost its character and became cultivable land and the land was getting water for cultivation purposes from the nearby Ghodahada Canal. Accordingly notice for payment of water tax from 1975-76 was served on the petitioner with respect to the said land. During the pendency of the aforesaid M. C. Irrigation Case, on 18-2-1976 opposite parties 4 to 11 filed Orissa Estates Abolition Appeal No. 1 of 1976 against the order of opposite party No. 1, settling the land with the petitioner under Annexure 1 dated 17-8-70 passed in C. P. No. 1281 of 1966, before opposite party No. 2, the Sub-Divisional Officer, Berhampur as per the executive instructions of the Government for settlement of lands under Ss. 6 and 7 of the Act along with an application under Section 5 of the Limitation Act to condone the delay (which was more than 5 years). The said O.E.A. Appeal No. 1 of 1976 was posted to 9-3-76 and on that day opposite party No. 2 without giving any notice to the parties or without calling for the records of the case, has condoned the delay of about more than 5 years and remanded the case to opposite party No. 1 for fresh disposal in accordance with law — vide his order under Annexure 6. In pursuance of the order of opposite party No. 2 under Annexure 6 dated 9-3-76, opposite party No. 1 has issued a notice under Annexure 7 to the petitioner in C. P. No. 1281 of 1976. These Annexures 6 and 7 are now under challenge in this writ petition.

3. Mr. Palit, learned counsel appearing for the petitioner, contends that the opposite party No. 2 has no power to condone the delay of about more than 5 years; that the Limitation Act has no application to this case; that the petitioner having acquired a vested right in the land, notice should have been issu-

ed to him before disposal of the case ex parte; and that the opposite party No. 2 having passed the order arbitrarily and capriciously behind the back of the petitioner without giving any notice to the parties, the same is in violation of the principles of natural justice and liable to be quashed.

4. On behalf of opposite parties Nos. 5 to 10 several objections on factual aspect of the case have been taken. But their main objection is to the maintainability of the writ petition. Mr. Y. S. N. Murty, learned counsel appearing for the opposite parties, contends that the petitioner having failed to exhaust the alternative remedy of a revision before the Collector against the order of opposite party No. 2, the Sub-Divisional Officer, Berhampur, as per the executive instructions of the Board in G. O. No. 14399-E. A-II-110/63-R dated 2nd March, 1964 under which the disputed land was settled with the petitioner on salami basis, there is a bar to entertain and decide this petition under Art. 226 (3) of the Constitution and this petition abates under S. 58 (2) of the Constitution (Forty-Second Amendment) Act, 1976. Mr. Murty further contends that only in cases for enforcement of any of the rights conferred by the provisions of Part III of the Constitution or for redress of injury of substantial nature when there is contravention of any of the provisions referred to in sub-cls. (b) and (c), this Court shall have power to issue directions, orders or writs and that in any case the violation of principles of natural justice cannot be considered as an illegality in the context of sub-cl. (c). It is in view of this objection that the preliminary question as to the maintainability of this writ petition has to be considered.

Mr. Palit, learned counsel for the petitioners, vehemently contends that in this case not only the petitioner was not given any chance of contesting the case, but the question of limitation (the delay was more than 5 years) was decided without any notice to the parties. He further argues that unless a particular statute or provisoon of law specifically or by necessary implication excludes the application of the principles of natural justice, it would be illegality if in the proceedings any principle of natural justice has been violated and if it has resulted in substantial failure of justice and cl. (3) of Art. 226 will be no bar in this case to grant relief.

5. In order to appreciate the arguments of both sides it is necessary to set out the provision of Art. 226 as it stood before amendment and after the amendments which are relevant:—

Art. 226 before Amendment

"226 (1). Notwithstanding anything in Art. 32 every High Court shall have power, throughout the territories in relation to which it exercises jurisdiction, to issue to any person or authority, including in appropriate cases any Government, within those territories directions, orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, or any of them, for the enforcement of any of the rights conferred by Part III and for any other purpose.

(1A) The power conferred by cl. (1) to issue directions, orders or writs to any Government, authority or person may also be exercised by any High Court exercising jurisdiction in relation to the territories within which the cause of action, wholly or in part, arises for the exercise of such power, notwithstanding that the seat of such Government or authority or the residence of such person is not within those territories.

(2) The power conferred on a High Court by cl. (1) or cl. (1A) shall not be in derogation of power conferred on the Supreme Court by cl. (2) of Art. 32."

Amended Art. 226.

"226 (1). Notwithstanding anything in Article 32 (but subject to the provisions of Article 131-A and Article 226-A). every High Court shall have power throughout the territories in relation to which it exercises jurisdiction to issue to any person or authority, including in appropriate cases, any Government, within those territories directions, orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari or any of them—

(a) for the enforcement of any of the rights conferred by the provisions of Part III; or

(b) for the redress of any injury of a substantial nature by reason of the contravention of any other provision of this Constitution or any provision of any enactment or Ordinance or any order, rule, regulation, bye-law or other instrument made thereunder; or

(c) for the redress of any injury by reason of any illegality in any pro-

ceedings by or before any authority under any provision referred to in sub-cl. (b) where such illegality has resulted in substantial failure of justice.

(2) The power conferred by clause (1) to issue directions, orders or writs to any Government, authority or person may also be exercised by any High Court exercising jurisdiction in relation to the territories within which the cause of action, wholly or in part, arises for the exercise of such power, notwithstanding that the seat of such Government or authority or the residence of such person is not within those territories.

(3) No petition for the redress of any injury referred to in sub-clause (b) or sub-clause (c) of clause (1) shall be entertained if any other remedy for such redress is provided for by or under any other law for the time being in force."

Note:— (The bracketed portion has been amended by the Constitution (Forty-third Amendment) Act, 1977).

Section 58 (1) and (2) of the Constitution (Forty-Second Amendment) Act is quoted below for reference.

"58 (1) Notwithstanding anything contained in the Constitution, every petition made under Art. 226 of the Constitution before the appointed day and pending before any High Court immediately before that day (such petition being referred to in this section as a pending petition) and any interim order (whether by way of injunction or stay or in any other manner) made on, or in any proceedings relating to, such petition before that day shall be dealt with in accordance with the provisions of Art. 226 as substituted by S. 38.

(2) In particular, and without prejudice to the generality of the provisions of sub-sec. (1) every pending petition before a High Court which would not have been admitted by the High Court under the provisions of Art. 226 as substituted by S. 38 if such petition had been made after the appointed day, shall abate and any interim order (whether by way of injunction or stay or in any other manner) made on, or in any proceedings relating to such petition shall stand vacated."

Under S. 58 (2) every pending petition before the High Court which could not have been admitted under Art. 226 as now substituted by the 42nd Amendment Act if made after the appointed day, that is, 1st February, 1977, must abate. The question which now arises is as to whether under the amended Art. 226, the present petition could be entertained by this Court.

6. Under Article 226 (1) as it stood before the amendment the writ jurisdiction could be exercised not only for enforcement of fundamental rights but for 'other purposes'. But after amendment of Art. 226 (1) by Constitution (Forty-Second Amendment) Act, 1976 not only the scope of the writ jurisdiction has been restricted to cases covered by sub-cls. (b) and (c) of Art. 226 (1), but further restriction has been put by Art. 226 (3) by providing that no such petition for redress of any injury referred to in sub-clauses (b) and (c) of clause (1) shall be entertained if any other remedy for such redress is provided for by or under any other law for the time being in force. As is evident, the restriction is not attracted in case of enforcement of fundamental rights falling under Art. 226 (1) (a), but is restricted to sub-cls. (b) and (c) only. Further the writ jurisdiction for specified purpose as provided in clauses (b) and (c) of Art. 226 (1) can be exercised if there is no other remedy for such redress provided for by or under any other law for the time being in force. These are restrictions on the jurisdiction of the Court and thus will have to be strictly construed. Two questions thus arise for consideration, namely, (1) what is the true import of the words 'any other remedy' used in clause (3) of Art. 226, and (2) whether the words "any illegality" used in sub-clause (c) of Art. 226 (1) would include violation of principles of natural justice. It is urged on behalf of the petitioner that by the words "any other remedy" used in clause (3) is meant remedy which is equally adequate or efficacious for the purpose of redressing the injury caused and that violation of principles of natural justice in a proceeding contemplated in sub-clause (c) of Art. 226 (1) resulting in substantial failure of justice is an illegality.

7. Mr. Palit, learned counsel appearing for the petitioner, cited two Full Bench decisions of Andhra Pradesh and Gujarat High Courts in support of his contentions. In AIR 1977 Andh Pra 250 (FB), (Government of India v. National

Tobacoo Co. of India Ltd. Calcutta) the entire gamut of Art. 226 which is newly substituted by the 42nd Amendment, the scope and amplitude of S. 58 of the Amendment Act and its impact on pending writ petitions etc. came up for consideration. It was held (at pp. 260, 261):—

"However, this is not to say that an action, when it contravenes any administrative instructions, cannot under any cricumstances be challenged under Art. 226 of the Constitution. When such acts are in violation of fundamental rights or in contravention of any other provision of the Constitution or any provision of any statute or Ordinance, they can certainly be questioned. But then, that challenge would come under sub-clause (a) or the first limb of sub-clause (b), because an action thereon would be for enforcement of a fundamental right or on a complaint of contravention of any other provision of the Constitution or a provision of any enactment or Ordinance.

Now coming to sub-clause (c), broadly stated, it would apply to illegalities in proceedings. The words "under any provision referred to in sub-clause (b)" occurring therein refer to and govern "proceedings by or before any authority." That is to say, the illegality will have to occur in any proceeding by or before any authority provided under any provision of the Constitution, any enactment, Ordinance or under any order, rule, regulation, bye-law made under the Constitution or enactment or Ordinance. If a particular proceeding before a certain authority is provided by any provision referred to in sub-clause (b) and if any illegality resulting in substantial failure of justice occurs therein, then the matter comes under sub-clause (c). The illegality in order to attract sub-cl. (c) need not necessarily be in the course of the proceeding before the concerned authority. even if the order, decision or adjudication given by the authority in such proceeding is vitiated by any illegality, then also it comes within the ambit of sub-cl., (c). Thus, illegalities not only in the course of the proceedings but also in the final adjudication of the proceedings contemplated by any provision referred to in sub-clause (b) would attract sub-clause (c). However, before a writ petition is entertained under this sub-clause, it must be alleged and shown that the alleged illegality has resulted in substantial failure of justice causing injury to the aggrieved person.

Here we must consider the nature of the "illegality" postulated by sub-cl. (c). A contention has been raised by the standing counsel for the Central Government and one of the Government Pleaders that "illegality" in sub-clause (c) has a very limited connotation. Reliance was placed in this connection on Hari Vishnu v. Ahmad Ishaque, AIR 1955 SC 233 and Union of India v. J. N. Sinha, AIR 1971 SC 40. It was argued that it could be said that there would be illegality only when there is any contravention of any of the provisions referred to in sub-cl. (b) and in no other circumstances it could be said that the proceedings are vitiated by illegality. It was further argued that in any case the violation of principles of natural justice cannot be considered as an illegality in the context of sub-clause (c). We cannot accede to this very narrow construction of the term "illegality." In the first place, it should be noted that the Parliament has itself given liberal connotation to it by using the word 'any' before "illegality". Further, it is a futile argument to say that only when there is contravention of any of the provisions referred to in sub-clause (b) it can be said that there is any illegality. If that were the intention of the Parliament, we see no need or justification for having, sub-clause (c) separately. If the learned Government Pleader's point of view were to be accepted, sub-clause (c) would become redundant and otiose. The words 'under any provision referred to in sub-clause (b),' as we have already said, 'refer to proceedings by or before any authority' and not to 'illegality.' Any illegality which vitiates such proceedings and which results in substantial failure of justice would attract sub-clause (c). If there is illegality of any nature in the proceeding it comes under this sub-clause. Further, if in the proceedings the principles of natural justice have been violated, that could also be 'illegality' provided the particular statute under which the proceedings have been taken by the authority concerned specifically excludes the application of the principles of natural justice. Unless there is such express exclusion or exclusion by necessary, intendment, it must be taken that the principles of natural

justice would apply to all proceedings before authority. Several times if these principles are violated it would result in grave miscarriage of justice causing substantial injury to persons. Therefore, it can be safely concluded that unless a particular statute or provision of law specifically or by necessary implication excludes the application of the principles of natural justice, it would be 'illegality' if in the proceedings any principle of natural justice has been violated and if it has resulted in substantial failure of justice. Needless to say that each case will have to be tested in the light of its own facts."

Considering the implication of Art. 226(3), the Court held :—

" xx xx xx

The bar contained in clause (3) does not apply to petitions which are filed for enforcement of any of the rights conferred by the provisions of Part III of the Constitution. The bar placed by clause (3) applies only to petitions which seek redressal of injuries referred to in sub-clauses (b) and (c) alone.

xx xx xx

Clause (3) specifically states that for redressal of any injury referred to in sub-clauses (b) and (c) no writ petition shall be entertained if any other remedy for such redress is provided for by or under any other law for the time being in force. The "other remedy" contemplated by clause (b) could not necessarily be one which is provided under any statute, ordinance, order, rule, regulation, bye-law etc., the breach of which is complained of. It would be sufficient if that other remedy is provided for by or under any other law for the time be-in force.

xx xx xx

But it should be remembered that the "other remedy" must be capable of affording such redress as is postulated under sub-clauses (b) and (c). If the other remedy is not capable of giving to the aggrieved person similar redress as is contemplated by sub-clause (b) or sub-clause (c), then it cannot be considered to be a bar.

xx xx xx

The words "any other remedy for such redress" are significant and meaningful and they clearly bring out the intention of the Parliament that only that other remedy which is truly and really capable of giving such redress as is postulated in sub-clauses (b) and (c) would be a bar to the maintainability of the writ petition. Needless to say that in order to find out whether there is such a bar to the entertainment of a writ petition, the court will have to examine the facts and circumstances of each case and the redressal that is sought and the nature of the other remedy that may be available under any other law for the time being in force. It is impossible and undesirable to lay hard and fast rules in this behalf."

In AIR 1977 Guj 113 (FB) (A'bad Cotton Mfg. Co. Ltd. v. Union of India) their Lordships have held (at pp. 121, 123, 124):—

"The jurisdiction under Article 223 (1) before the amendment was very wide as this writ jurisdiction could be exercised not only for enforcement of fundamental rights but for 'other purposes' and even where there was existence of other remedies it was only as a matter of self-restraint that this extraordinary jurisdiction was not exercised when adequate alternative relief existed by recourse to ordinary remedies created by the law.

xx xx xx

After the amendment, Article 226 (1) has been restricted by the three sub-clauses under Article 226 (1). Not only the scope of the writ jurisdiction is restricted by the specified purpose which is substituted in the place of 'other purposes' in clauses (b) and (c), but a further fetter is added under Article 226 (3) that no such petition for redress or injury referred to in sub-clauses (b) and (c) of clause (1) shall be entertained if any other remedy for such redress is provided for by or under any other law for the time being in force. A bare perusal shows that this fetter is not attracted to a petition for enforcement of fundamental rights falling under Article 226 (1) as it is restricted to sub-clauses (b) and (c) only. The second feature which must be borne in mind is that this is a fetter to the entertainment of the petition itself because now the writ jurisdiction for the specified purpose in clauses (b) and (c) of Article 226 (1) has to be exercised if there is no other remedy for such redress provided for by or under any other law for the time being in force. Formerly, by a

self-limitation the discretion was exercised not to entertain writ petitions when alternative remedy existed but now when a constitutional fetter is created, the Court would have no jurisdiction if alternative remedy for such redress is provided for by or under any other law. This being a fetter on the jurisdiction of the Court will have to be strictly interpreted. Even though the words 'any other remedy' had been used, it is obvious that 'any other remedy' has to be for redress of the injury for which this writ jurisdiction is conferred and, therefore, it must be equally adequate or efficacious so that qualitatively and quantitatively the same relief would be given for redress of the injury to the petitioner. Therefore, the adequate efficacious remedy is always implict if the remedy is to be for redressing the injury as effectively as could be done in the writ petition. The third important feature is that such a remedy must have been provided for by or under any other law for the time being in force which makes it implicit that this must be a direct remedy specifically provided by or under the specific law in force under which the impugned action is taken or order is made.

xx xx xx xx

The amplitude of the fetter would depend on the amplitude of such alternative remedy which is provided for direct attack by or under the other law in question and not on any general remedy of a civil suit by way of a collateral attack.

xx xx xx xx

Although the writ jurisdiction has been restricted by specifying the particular purpose in clauses (b) and (c) for which now the writ jurisdiction could be exercised, the grounds for such supervisory writ jurisdiction are still contraventions of constitutional or other provisions of law including orders, rules, regulations, bye-laws or other instruments made thereunder or the illegalities committed by the authorities acting under those provisions. Even this new ground would show that the distinction between a real and purported order which is an ultra vires order substantively or procedurally by not remaining within the limited bounds or the mandated area or because of non-compliance of fundamental essential provisions of law or principles of natural justice which would make such orders nullities or ex facie without jurisdiction would be all the more material.

xx xx xx xx

If in England where the Parliament was supreme and where it had introduced non-certiorari clauses in the Act of the Parliament, this distinction had been adopted by the House of Lords in the decision in Anisminic Ltd. v. Foreign Compensation Commisison, (1969) 1 All ER 208 so that statutory tribunals and authorities would be kept within their limited bounds or the mandated area and would not become absolute, the same material distinction between a real and a purported order must be adopted when our constitutional amendment under Article 226 (3) has not introduced the non-certiorari clause but has only introduced a mere fetter as to the stage at which the writ jurisdiction should be exercised after exhausting the alternative efficacious normal remedy under the law.

xx xx xx xx

When the petitioner is to be asked to exhaust his alternative remedies provided under the Act before entertaining the writ petition this distinction would always be material where the order is a nullity as being ex facie without jurisdiction or in non-compliance with the provisions of the Act or the essential principles of justice or on any other ground as explained in Tarachand Gupta's case, AIR 1971 SC 1558 (1565) or Bhopal Sugar Industries case, AIR 1967 SC 549 or Mohd. Nooh's case, AIR 1958 SC 86 (94) and is, therefore, a purported order or nullity. In such a context the alternative remedy would be a futile remedy because it did not affect the inherent nullity in the challenged decision, which would result in the material distinction that the party may appeal against such decision but he was not bound to do so. Therefore, in such cases where the challenge is on the ground that the order is an ultra vires order, the question of exhausting alternative remedy could hardly arise as the petitioner could straightway seek remedy of judicial review. These settled principles would be all the more applicable after this constitutional fetter where the emphasis is now on full redress of injuries for which specified purpose only this extraordinary remedy is created

so that in such substantial injuries consisting of non-compliance with other constitutional or statutory provisions or illegalities which go to the root so as to result in failure of justice when committed by authorities and tribunals acting under those provisions, it would be a poor consolation to a citizen to be told in cases of such purported orders to avail of such remedy which he is not bound to exhaust and which would not be efficacious at all but a futile remedy in case the order is confirmed as it would still remain a nullity."

Mr. Palit cited another decision of the Supreme Court reported in AIR 1969 SC 556 (Baburam Prakash Chandra Maheshwari v. Antarim Zila Parishad now Zila Parishad, Muzaffarnagar) wherein it has been held:—

"Existence of alternative remedy is no bar to writ petition, where it is alleged that the Tribunal acted under provision of law which was ultra vires or where it is alleged that it acted in violation of principles of natural justice."

But this is a decision when Article 226 (3) was not in the statute book. In Halsbury's Laws of England, Third Edition, Vol. 30 page 718 it has been observed:—

"All persons exercising judicial or quasi-judicial functions must have due regard to the dictates of natural justice. These require that the parties to the proceedings shall be duly notified when and where they may be heard and shall then be given full opportunity of stating their views, the matters in dispute being decided honestly, impartially and without bias by a tribunal no member of which has any interest, either pecuniary or otherwise, in the matter."

8. Mr. Murty, learned counsel appearing for the opposite parties, cited a Division Bench decision of Karnataka High Court reported in AIR 1977 Kant 191 (Krishna Gowda v. M. Sheikh Suleman Sab) wherein it has been held (at page 192):—

"However attractive the argument of the learned counsel for the appellant appears to be, this appeal is devoid of merit. Article 226 (1) of the Constitution as amended by the 42nd Amendment has made substantial change with regard to the scope of Writ petitions under Article 226. Under the said Article as it now stands, the High Court has power to issue any writ or directions only for the enforcement of any rights conferred by the provisions of Part III; or for the redress of any injury of a substantial nature by reason of the contravention of any other provisions of the Constitution or any provision of any enactment or Ordinance or any order, rule, regulation, bye-law or other instrument made thereunder; or for the redress of any injury by reason of any illegality in any proceedings by or before any authority under any provision referred to in sub-clause (b) where such illegality has resulted in substantial failure of justice. It will thus be seen that for obtaining redress of any injury caused by reason of any illegality in any proceedings by or before any authority, such illegality should have resulted in substantial failure of justice.

It is undoubtedly true that any order made in violation of the Rules of Natural Justice is void. But the order does not automatically stand vacated. The aggrieved party has to move the Court and obtain a declaration or order of that nature declaring that the order is one made in contravention of the rules of natural justice and therefore void. In the instant case, the learned counsel for the appellant has not been able to show any illegality in the order made by Bhimiah, J. The learned Single Judge has stated that the Tribunal had no jurisdiction to review its order passed on 21-8-1975 as it has not been conferred with any power to review its earlier orders. On that short question the Writ Petition was allowed and the order dated 2-1-1976, impugned therein, was quashed."

But this decision does not support the contention of Mr. Murty. Rather, it says that though an order made in violation of the Rules of Natural Justice is void, the aggrieved party has to move the Court and obtain a declaration or order declaring that the order is one made in violation of the Rules of Natural Justice and therefore void.

The next decision of a Division Bench of the Kerala High Court cited by Mr. Murty is reported in 1978 Tax LR 1726 wherein it has been held (at p. 1730):—

"We have so far dealt with the arguments on the merits. Counsel for the respondents raised a preliminary objection that in view of clause (3) of Arti-

cle 226 after its amendment by the Constitution 42nd Amendment, alternative remedy of revision under Sec. 131 of the Customs Act is available to the appellants and therefore the writ petition is not entertainable, and should abate under S. 58 of the Constitution Amendment Act. On the terms of the provisions, the argument appears to be well founded, and we are inclined to accept the same. Counsel for the appellants drew our attention to the decision of the Gujarat High Court in A'bad Cotton Mfg. Co. v. Union of India (AIR 1977 Guj 113) (FB) to the effect that the alternative remedy, in order to bar the entertainment of a writ petition under Art. 226 (3), must be adequate and effective, both qualitatively and quantitatively. We find it rather difficult to read this limitation into the terms of Article 226 (3), having regard particularly, to the purpose and the object of the 42nd Amendment and the terms of the constitutional provision. We are inclined to accept the objection of counsel for the respondents and to dismiss the appeal and the writ petition on this ground as well. As the appellants have no case on the merits, we do not wish to express our final and concluded view on the preliminary objection."

In the above case, the decision reported in AIR 1977 Guj 113 (FB) has been dissented from, but absolutely no reasons have been given as to why they have differed, as would be seen from the above quotation.

9. Therefore, on a consideration of the aforesaid decisions, we agree with the view expressed by the Full Bench of the Andhra Pradesh and Gujarat High Courts referred to above and hold that (1) liberal construction must be given to the term 'illegality' in the context of sub-cl. (c) and unless a particular statute or provision of law specifically or by necessary implication excludes the application of the principles of natural justice, it would be 'illegality' if in the proceedings any principle of natural justice has been violated which has resulted in substantial failure of justice and each case will have to be considered in the light of its own facts; and (2) that the words 'any other remedy for such redress' are significant and meaningful and they clearly bring out the intention of the Parliament that only that other remedy which is truly and really capable of giving such redress as is postulated in sub-cls. (b) and (c) would be a bar to the maintainability of the writ petition and in order to find out whether there is such a bar to the entertainment of a writ petition, the Court will have to examine the facts and circumstances of each case and the redressal that is sought and the nature of the other remedy that may be available under any other law for the time being in force. It is not possible to lay down hard and fast rules in this regard and each case would be judged on its own facts.

10. In this case, as already mentioned, opposite party No. 2, the Sub-Divisional Officer, Berhampur, has not only condoned the delay (which is more than 5 years) without hearing the petitioner, but also has set aside ex parte the order passed by opposite party No. 1 dated 17-8-70 settling the disputed land in favour of the petitioner. It is now well settled that time barred appeal should not be entertained without notice to the opposite party. In AIR 1917 PC 179 (Krishnasami Panikondar v. Ramasami Chettiar), it has been held:—

"The practice of admitting a time-barred appeal without notice to opposite party and allowing the question of sufficiency of cause shown for admitting it beyond limitation, to be raised at the hearing is open to grave objection. It may lead to a needless expenditure of money and an unprofitable waste of time, and thus create elements of considerable embarrassment when the Court comes to decide on the question of delay. It is urgently expedient to adopt a procedure which will secure at the stage of admission, the final determination (after due notice to all parties) of any question of limitation affecting the competence of the appeal."

In AIR 1918 PC 134 (Sunderbai v. Collector of Belgaum) it has been held:—

"When a memorandum of appeal is presented beyond the prescribed period of limitation, the proper order which a Judge should endorse upon it would be to the follwing effect:

"Presented for admission on the (date when the memorandum of appeal was handed into the office of his Court). Let notice go to the respondents (date of the order)." It is very expedient to adopt a procedure which should secure at the stage of admission the final determination (after due notice to all parties) of any question of limitation affecting the competence of the appeal."

11. The S.D.O., opposite party No. 2, has committed grave illegality in condoning the delay without affording any opportunity of hearing to the parties. He has also set aside the order of opposite party No. 1 ex parte. Thus there is flagrant violation of principles of natural justice and the illegality committed by the opposite party No. 2 resulted in substantial failure of justice. Therefore, in the peculiar facts and circumstances of the case, the alternative remedy will not be a bar to entertain this writ application.

12. In the result, therefore, the order dated 9-3-76 under Annexure 6 and the notice issued by Opposite Party No. 1 under Annexure 7 are quashed with a direction to Opposite Party No. 2 the S.D.O., Berhampur, to hear O.E.A. No. 1/76 afresh first on the question of limitation and then on merit, in case delay in filing the appeal is condoned after affording opportunity to the parties of being heard and thereafter to dispose of the appeal in accordance with law.

13. In the circumstances of the case there will be no order for costs.

B. K. RAY, J.:— I agree.

Writ petition allowed,

AIR 1979 ORISSA 159

S. ACHARYA, J.

Adhikari Gopinath Das, Petitioner **v.** Nirmal Chandra Mohanty and others, Opposite Parties.

Civil Revn. No. 65 of 1978, D/- 9-4-1979.*

Orissa Consolidation of Holdings and Prevention of Fragmentation of Land Act (21 of 1972), Secs. 4 (4) and 51 — Civil P. C. (5 of 1908), O. 39, R. 1 — Bar on Civil Suits — Suit for injunction restraining defendants from interfering with plaintiff's possession of land falling within consolidation area — Suit remains in abeyance — No permanent injunction but temporary injunction can be granted. (Paras 4 to 7)

Cases Referred : Chronological Paras

AIR 1974 SC 1920 6

K. C. J. Ray, for Petitioner; P. K. Misra, for Opposite Parties.

ORDER:— This revision arises out of the order dated 5-12-1977 of the Munsif, Puri in Original Suit No. 179 of 1976-I. By the impugned order the court below has decided that the suit has abated under the Orissa Consolidation of Holdings and Prevention of Fragmentation of Land Act, 1972 (Orissa Act 21 of 1972) (hereinafter referred to as the 'Act'), as the area comprising the suit lands has come under the Consolidation Proceedings.

2. The reliefs prayed for in this suit are: (i) realisation of damages caused to the plaintiff due to the unlawful trespass and illegal acts of the defendants on the suit land; (ii) restraining the defendants by a permanent injunction not to commit any further act of damages or to interfere with the possession of the plaintiff over the suit lands; and (iii) for other consequential reliefs.

3. The learned counsel appearing for the petitioner contends that the prayer for permanent injunction or the interlocutory injunction which has already been granted in the suit, and the prayer for recovery of damages for the illegal acts of the defendants on the suit lands are not matters within the purview of the powers of the Consolidation Officers, and Sections 4 and 51 (2) of the Act have no application to suits asking for such reliefs. The learned counsel appearing for the opposite parties, however states that in suits for permanent injunction and for recovery of damages from the defendants for their alleged illegal acts, the court will have to necessarily adjudicate upon the right, title and interest of the plaintiff in the suit land, which matters are exclusively within the jurisdiction of the Consolidation Officer and hence the civil court shall have no jurisdiction to entertain such suits, and such suits already instituted shall abate or stand terminated in their entirety under Sections 51 (2) and 4 (4) of the Act and interlocutory orders passed in such suits shall be of no effect or force.

4. The jurisdiction of Civil Court to try cases of civil nature is not excluded unless cognizance of the entire suit is barred either expressly or impliedly. Statutes ousting the jurisdiction of the civil courts must be very strictly construed, and every presumption should be made in favour of the jurisdiction of the civil courts, and exclusion of its jurisdiction is not be readily inferred unless the exclusion is either explicitly expressed or clearly implied

*(From order of S. C. Panigrahi, Munsif Puri, D/- 5-12-1977).

Sub-section (4) of Section 4 provides that:—

"every suit and proceedings for declaration of any right or interest in any land situate within the consolidation area in regard to which proceeding could be or ought to be started under this Act, which is pending before any Civil Court, whether of the first instance or appeal, reference or revision shall, on an order being passed in that behalf by the Court before which such suit or proceeding is pending stand abated:
Provided ....."

Section 51 of the Act provides:—

"Notwithstanding anything contained in any other law for the time being in force, but subject to the provisions contained in sub-section (3) of Section 4 and sub-section (1) of Section 7—

(1) All questions relating to right, title, interest and liability in land lying in the consolidation area, except those coming within the jurisdiction of Revenue Courts or authorities under any local law for the time being in force, shall be decided under the provisions of this Act by the appropriate authority during the consolidation operations and

(2) No Civil Court shall entertain any suit or proceeding in respect of any matter which an officer or authority empowered under this Act is competent to decide."

These are the only two relevant provisions in the Act and which apply to this case.

5. A suit with a prayer for permanent or interlocutory injunction restraining any person from causing any damage to or illegal acts on the property belonging to or in the possession of another and/or for realisation of damages on that account is not directly covered under the purview of Section 4 (4) or Section 51 (2) of the Act. Ouster of jurisdiction of the civil court to issue a permanent injunction or temporary injunction and/or to direct payment of damages for illegal acts is not explicitly expressed in the aforesaid provisions of the Act.

6. Mr. Misra, the learned counsel for the opposite parties, however, states that the prayer for perpetual injunction can only be granted by the decree made at the hearing and upon the merits of the suit, as provided under sub-section (2) of Section 37 of the Specific Relief Act, and that being so a civil court cannot grant perpetual injunction in respect of a suit land within the area covered by the consolidation proceedings, as that would necessarily require adjudication and final decision on the questions of right, title and interest in that suit land, which questions cannot be adjudicated by the civil court during the consolidation proceedings. There is force in the above submissions. In suits for permanent injunction and for damages arising out of the illegal acts of the defendants in respect of such suit lands, the court has necessarily to adjudicate finally the right, title and interest of the plaintiff in the suit land. The civil court cannot decide finally issues on right, title and interest in respect of suit lands during the consolidation proceedings. So the civil court cannot proceed to decide whether to grant or not to grant perpetual injunction prayed for in the suit. But as the jurisdiction of the civil court to entertain suits with such prayers is not ousted either explicitly or by clear implication Section 51 (2) will not be a bar for the civil court to entertain such a suit, but it will not finally decide the questions on right, title and interest in the suit land so long the consolidation proceedings remain in force in respect of the area comprising the suit lands and hence it cannot grant or refuse to grant the prayer for perpetual injunction or damages as prayed for in the suit. Such a suit shall only stand abated under Section 4 (4) till the publication of the Notification under Section 41 or sub-section (1) of Section 5 of the Act. Abatement of the suit under Section 4 (4) of the Act does not mean that the suit comes to an end or that it terminates upon the publication of the notification issued, under sub-section (1) of Section 3 of the Act. From the language of Section 4 it is clear that suits coming within the purview of sub-section (4) cannot proceed for final decision so long the consolidation proceedings are in progress. The word 'till' in the first paragraph of Section 4 and the observations in paragraph 11 of the decision reported in AIR 1974 SC 1920 fortify my above view. Therefore, such a suit remains in abeyance for the time being, and so long the consolidation operations are in force no final decision either to grant or not to grant permanent injunction or damages as

stated above can be given by the Civil Court in such a suit.

7. It is contended by Mr. Ray, the learned counsel for the petitioner, that though the petitioner's prayer for permanent injunction and realisation of damages cannot be granted for the time being on the above considerations, there is nothing to prevent the Civil Court to grant the prayer for temporary injunction in order to save the plaintiff from illegal trespass upon his land or from real or threatened illegal acts or destruction or damage to his property. In this connection Mr. Ray contends that for granting temporary injunction, the court is not required to hear the suit on merit or to decide finally the issues of right, title or interest of the plaintiff in the suit land. There is weight and substance in the above submission of Mr. Ray. Temporary injunctions are such as to continue until a specified time or until the further order of the court, and they may be granted at any stage of the suit and are regulated by the Code of Civil Procedure, as provided under sub-section (1) of Section 37 of the Specific Relief Act. In order to assess the prayer for temporary injunction, the Court may have to consider whether the plaintiff has any right, title or interest in the suit land. Considerations of these questions for the purpose of granting or refusing a prayer for temporary injunction and findings on such questions would be merely prima facie incidental, and ancillary, only for the purpose of assessing the prayer for temporary injunction and not for anything else, and the said findings shall not be of any avail or effect for any other purpose.

There is another angle from which the matter should also be viewed. The jurisdiction of the Civil Court is neither expressly nor impliedly ousted under the Act to entertain a prayer for temporary injunction. It would be unrealistic, far-fetched and against the canons of judicial practice and propriety to apply the theory of implied ouster of civil court's jurisdiction to entertain a prayer for temporary injunction on the plea that consideration of the said prayer would involve prima facie determination of right, title or interest in the suit property. Ouster of civil court's jurisdiction in respect of such a matter would encourage and perpetuate illegal acts, and persons actually suffering from or threatened with such a wrong cannot get any protection of law, which is their right to get from the courts of law, and hooligans and perpetrators of crime will have the upper hand over the law-abiding citizens, as apart from the civil court no other institution or authority can issue temporary injunction to prevent such acts or threats under the existing law. The legislator while engrafting Sections 4 and 51 of the Act could never have intended that citizens, suffering from or being threatened with such wrongs should be left without any remedy during the progress of the consolidation proceedings. The prima facie findings of the civil court on the question of right, title and interest in such a matter will hold good only for that matter, and will not in any way fetter the Consolidation Officer to arrive at his own finding on the said issues during the consolidation proceedings. There is absolutely no possibility of a conflict of jurisdiction. If the Consolidation Authorities legally arrive at a different finding on the said issues, the civil court, on being moved by the appropriate party, may rescind, annul or modify its order of temporary injunction in accordance with the lawful decision of the Consolidation Authorities. But so long that is not done, the order of temporary injunction passed by the civil court shall hold good for all intents and purposes, as that is an order passed by a court of competent jurisdiction.

8. In this case, on the petition of the plaintiff under Order 39, Rule 1, Civil P. C. dated 4-8-1976, Misc. Case No. 386/76 was started, and by the ex parte order dated 5-8-1976 the opposite parties were restrained from putting any rubbles, stones or earth on any portion of the suit property, or from constructing any road thereon, or from committing any act of waste or damage till the final disposal of the Misc. Case. That order continued till 15-12-1977 when the said Misc. Case was to be taken up for final hearing in the presence of both the parties. On that date it was ordered that as the suit had abated on 5-12-1977, as per order impugned in this Civil Revision, this Misc. Case became infructuous, and it was dismissed on that consideration.

9. The basis of the dismissal of the Misc. Case is illegal and incorrect, as on the abatement of the suit the Misc.

Case started on the petition under Order 39, Rule 1, Civil P. C. did not become infructuous. For reasons stated above, the suit in which the petition for temporary injunction has been filed has not terminated or put an end to; at present it has merely remained in abeyance and in this suit the court has jurisdiction to grant or refuse a prayer for temporary injunction. That being so the order dismissing the Misc. Case is illegal and incorrect. So in the interest of justice I, in exercise of my inherent jurisdiction, deem it just and proper to set aside the said order and restore the miscellaneous case to the file of the court below. Accordingly the ex parte order of injunction dated 5-8-1976 is restored, and the court below is hereby directed to proceed to dispose of the Miscellaneous Case in accordance with law on giving notice to both the parties.

10. The Civil Revision is disposed of accordingly. Each party shall bear his own cost of this revision.

Order accordingly.

AIR 1979 ORISSA 162

R. N. MISRA AND P. K. MOHANTI, JJ.

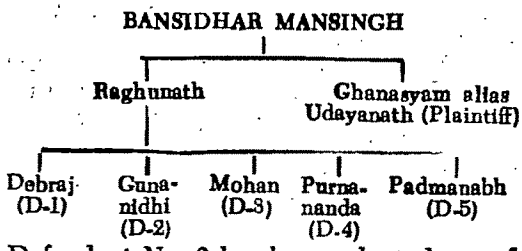
Debaraj Pradhan and others, Appellants v. Ghanshyam and another, Respondents.

First Appeal No. 239 of 1970, D/- 1-5-1979.*

Hindu Law — Joint Family — Acquisitions standing in the name of all individual members — Does not constitute joint family property — One who asserts acquisitions as joint family property must prove availability of sufficient nucleus — Failure to do so — Presumption of equality of interest under S. 45, T. P. Act arises. (T. P. Act (4 of 1882), S. 45). (Paras 8, 10)

B. K. Pal and B. Pal, for Appellants; D. Mohanty, for Respondents.

R. N. MISRA, J. :— Defendants 1 and 3 to 5 have carried this appeal against the judgment and decree of the learned Subordinate Judge of Nayagarh in a suit for partition. The relationship of the parties is available from the genealogy given below :



Defendant No. 2 has been adopted out of the family. 'Ka' Schedule property with an extent of 4.36 acres admittedly constitutes the ancestral assets. Kha to Chha schedule properties were acquired jointly in the names of plaintiff and defendants 1, 3, 4 and 5 between 17-9-1955 and 10-12 1965 and the particulars of these acquisitions appear from a chronological statement below:—

(See statement on next page).

Plaintiff claimed half share in the 'Ka' schedule property as also in the properties described in 'Kha' to 'Chha' schedules on the allegation that the acquired property had been purchased out of joint family nucleus.

2. There was no dispute from the side of the defendants about the plaintiff's moiety share in the 'Ka' schedule property. They, however, maintained that in the six items of acquired property each of them, i. e. plaintiff, defendants 1, 3, 4 and 5 had one-fifth share and they had no objection to plaintiff getting partition of his share on such basis. They pleaded that each of them had contributed towards the consideration of the acquired property and they relied upon a Panch Faisala (Ext. C) dated 28-7-1967 in which plaintiff had accepted one-fifth share of each of the defendants in these properties.

3. At the trial, plaintiff examined himself as P. W. 5 and five more witnesses in support of his stand. Defendants examined 6 witnesses also including defendant No. 1 (D. W. 6). They examined the vendor of Exts. 3 and 4 as D.W. 1, the vendor of Ext. 1 as D. W. 3 and the vendor of Ext. A as D. W. 4. They also proved Ext. C by examining D. Ws. 2 and 5.

4. The learned Trial Judge, however, did not accept the claim of one-fifth share by each of the defendants in the acquired property and on a finding that defendants had failed to prove that joint family nucleus had not been utilised for acquisition of these properties, he accepted plaintiff's claim of a moiety share therein. Defen-

*(Against Judgment and decree of R. C. Jena, Sub. J., Nayagarh, D/- 26-8-1970.)

Sl. No.	Date	Exhibit	Particulars.
1.	17-9-1955	4	45 decimals of land acquired for Rs. 100/ in the name of all the five from D. W. 1.
2.	27-3-1957	2	32 decimals of land (Schedule 'Kha') purchased by all the five members for a consideration of Rs. 675/-.
3.	5-1-1962	3	88 decimals of land (Gha Schedule) purchased by all the five members for a consideration of Rs. 2,000/- from D W. 1.
4.	9-4-1965	B	some homestead land ('Una' Schedule) purchased for Rs. 400/- in the name of all the five.
5.	5-8-1965	A	some homestead land purchased for Rs. 1,000/. in the names of all the five members from D W. 4. (described in Chha Schedule.)
6.	10-12-1965	1	13 decimals of land in 'Chha' Schedule purchased for Rs. 200/- in the names of all the five members from D.W. 3.

dants have carried this appeal against the said decree.

5. Mr. Pal for the appellants concedes that there is no dispute in regard to the ancestral 'Ka' Schedule property and reiterates the claim of the defendants to one-fifth share in the acquired properties covered by 'Kha' to 'Chha' schedules. As already indicated, these properties were acquired under six separate sale deeds between 17-9-1965 and 10-12-1965. Of these, the acquisitions under Exts. A and B are homestead property and the rest are cultivable lands.

6. The legal position is well settled that property standing in the name of individual members of a joint family would not constitute joint family property. One who asserts that such property takes the character of joint family asset has to show that the joint family had sufficient nucleus available for acquisition of the property and on such fact being proved, the burden shifts on to the individual member claiming the property to be his self-acquisition to show that joint family nucleus was not utilised for the acquisition. The learned Subordinate Judge clearly went wrong in placing the burden on the defendants to prove the fact of non-availability of nucleus. It was for the plaintiff to plead and prove that the family had surplus joint family nucleus which was available for utilisation as consideration for the sale deeds. The joint family property was a little more than four acres of land. The joint family had many members. The evidence regarding income of the joint family property is very meagre. In fact many of the plaintiff's witnesses have clearly admitted that they have no knowledge about it. Even if the entire evidence of the plaintiff be accepted, it leads to the position that one cart-load of paddy remains surplus after meeting the family requirement. There is no evidence as to what would have been the price of one cartload of paddy so as to find out the surplus assets of the joint family property year to year so as to provide sufficient nucleus for acquisition. On this analysis we must hold that the plaintiff has failed to establish availability of joint family nucleus which could constitute the considerations for the acquisitions. As already indicated, the money spent for the acquisitions was about Rs. 4,400/-. It is difficult for us to hold that the joint family had that nucleus in the course of the period of ten years.

7. D. Ws. 1, 3 and 4 have categorically proved that the vendees, i. e. five of the members of the family, had contacted them for the respective purchases and these members separately paid their shares of the consideration and it had been stipulated that they would be co-purchasers. D. W. 1 who is the vendor of two sale deeds being Exts. 3 and 4 has categorically stated:—

"..... In the said sale deed (Ext. 4) there were five vendees and each of them had 1/5 share in the said land and each of them paid Rs. 20/- towards consideration money. The plaintiff paid Rs. 20/- towards his share."

Similarly, with reference to Ext. 3, he has stated :—

"About 8 years back, I sold them the 'Cha' Schedule land for Rs. 2,000/- by registered sale deed in which in similar manner each of the said vendees had 1/5 share and accordingly they paid Rs. 400/- each towards the consideration money. The plaintiff paid Rs. 400/- towards his share.

All the vendees paid me the consideration money and I gave them possession of the said lands."

In cross-examination, he has further stated :—

"All the vendees prior to such purchase talked with me that each of them will have equal share in said purchased lands and accordingly they will pay their shares of contribution....."

D. W. 3, being the vendor of Ext. 1, has stated:—

".....All the vendees were present when that sale deed was executed and registered. They purchased said land in five equal shares. Out of the consideration money, plaintiff paid me Rs. 40/- and defendants paid Rs. 160/-. I delivered possession to them."

D. W. 4, the vendor of Ext. A, has stated :—

"About 5 years back myself and Laxman Baral sold the 'Cha' schedule land to plaintiff and defendants except defendant No. 2 for Rs. 1,000/- by a registered sale deed. The defendant No. 1 attended when that sale deed was executed and registered. I cannot say what was the extent of share of each of the vendees in that purchased land....."

Reliance has been placed on the evidence of D. W. 4 by Mr. Mohanty for the plaintiff-respondent for his contention that the statement in Exts. A and B that each of the members had one-fifth share had been manipulated into the document at the instance of defendant No. 1. Defendant No. 1 has been examined as D. W. 6. It has been suggested to him in cross-examination that he had interpolated subsequently the statement into Exts. A and B relating to specific share of each of the purchasers. A reference to the sale deeds does not show that the statement was incorporated into the two sale deeds subsequently. It is not the plaintiff's case that defendant No. 1 alone was looking after the acquisition of the properties so as to get an opportunity of incorporating a statement to the prejudice of the plaintiff. In these circumstances, we do not think, the stand of the plaintiff that the statement in Exts. A and B that each of the purchasers has equal share is an interpolation or that it had been so stated in the documents at the instance of defendant No. 1, is acceptable.

Ext. 6 is a sale deed by plaintiff and some of the defendants selling admittedly joint family property for Rs. 2,000/-. Therein, the necessity for the sale has been stated to be to pay up the loan made for purchase of joint family homestead. On the basis of this statement and the evidence of D. W. 4 it has been claimed by Mr. Mohanty that the consideration money under Ext. A came out of the sale proceeds of Ext. 6. Ext. A is dated 5-8-1965 while Ext. 6 is dated 20th of July, 1966, the time-lag is about eleven months. D. W. 4 has clearly stated that four months after executing Ext. A, the consideration money had been received. In the circumstances, it becomes difficult to hold that the consideration for Ext. A came out of the sale proceeds of joint family lands under Ext. 6.

8. Section 45 of the T. P. Act provides :—

"..... In the absence of evidence as to the interests in the fund to which they were respectively entitled, or as to the shares which they respectively advanced, such persons shall be presumed to be equally interested in the property."

This being the legal position, if the plaintiff could not establish as to what was the fund out of which the consideration money had been paid, and what share in that fund each of the parties had, the legal presumption has to work.

9. Added to these, is an admission of the plaintiff under Ext. C that in the acquired property, each of the five members had equal share. Ext. C is a Panch Faisala dated 28-7-1967. Admittedly the document required registration and being an unregistered document cannot be utilised as a document surrendering interest. The genuineness of the document has been proved beyond doubt. Even plaintiff, as P. W. 5, has stated:—

".....I never agreed in said Panchayat that I have 1/5 share in said purchased land. In that Panchayati this paper marked Ext. C was written in which I have signed....."

D. Ws. 2 and 5 have proved that plaintiff voluntarily signed in the document after understanding the contents. From the narration of Ext. C it appears that the name of the plaintiff was not appearing in some of the revenue records and in terms of the document, defendants admitted plaintiff's one-fifth share and agreed to plaintiff being recorded in respect of such share. Even if Ext. C may not operate as a document of title, it is certainly an acknowledgment of a fact and as a previous statement of the plaintiff it can be utilised. It corroborates the defence version.

10. In view of this state of the materials on record, we are inclined to agree with the submissions of Mr. Pal for appellants that in the property acquired under the six sale deeds plaintiff and each of the four defendants being defendants 1, 3, 4 and 5 have one-fifth share. The decree of the trial Court allowing a moiety share to the plaintiff in the 'Ka' schedule property is affirmed. So far as 'Kha' to 'Chha' schedule properties are concerned, i. e. in regard to the acquisitions under the six sale deeds indicated above, plaintiff and each of defendants 1, 3, and 5 have one-fifth share. Plaintiff is, therefore, entitled to a preliminary decree for partition in regard to one-fifth share in these acquired properties. The appeal succeeds to that extent and the preliminary decree is accordingly varied. We make no order for costs.

P. K. MOHANTI, J.:— I agree.

Appeal allowed.

AIR 1979 ORISSA 165

R. N. MISRA AND P. K. MOHANTI, JJ.

Union of India and another, Appellants v. Orissa Textile Mills Ltd. and another, Respondents.

First Appeal No. 175 of 1970, D/- 19-4-1979*.

(A) Railways Act (1890), Ss. 73, 78-B — Who can sue — Contract Act (1872), S. 41 — Insured goods sent by Railway — Insurance agreement providing that Insurer would stand subrogated to the rights and remedies available to the sender — Goods damaged during transit due to fault of Railway — Claim settled by Insurer — Claim against Railway by sender and insurer — Maintainability — S. 41, applicability.

Held, Section 41 is not attracted on the facts — Contention that sender has no right of suit against Railway has no force — Held further that, as the steps taken by the sender were available to enure to the benefit of the Insurer, notice that had been issued under S. 78-B of the Railways Act by the sender could be availed of by the Insurer, although no notice was in fact issued by the Insurer, and the latter (Insurer) could also take action in its own name. (Para 7)

*(From order of K. M. Subudhi, 1st Addl. Sub. J. Cuttack D/- 28-4-1970.)

FW/GW/C981/79/VBB

(B) Railways Act (1890), S. 73 Proviso — General responsibility of railway administration as a carrier — Statutory immunity in respect of damages arising out of stated causes — Burden of proof — (Evidence Act (1872), Ss. 101-104).

It is for the carrier to establish that the damage occurred in spite of use of reasonable foresight and care. Under the law, it was for the Railway Administration to plead immunity and if denied, establish the plea by proof. Immunity can be claimed only by further proving that reasonable foresight and care had been used. The burden, therefore, is squarely on the Railway Administration to come under the umbrella of protection of immunity. (Para 9)

(C) Railways Act (1890), S. 73 — Damage to cotton by fire and water — Proof of extent of loss.

It was for the plaintiffs to establish the extent of loss. In a case of this kind, assessment of loss is bound to be somewhat arbitrary and speculative. (Para 10)

B. K. Pal, for Appellants; S. S. Basu, for Respondents.

R. N. MISRA, J.:— Defendants — the Union of India representing the Central Railway and the South Eastern Railway — have carried this appeal against the judgment and decree of the First Additional Subordiate Judge at Cuttack decreeing plaintiffs' suit for damages.

2. The Orissa Textile Mills Limited (hereinafter referred to as the 'Company') is a public company having its registered office and factory at Choudwar, off Cuttack. A hundred bales of F. P. cotton procured by the Company were consigned in perfect condition from Shendurni, a station located on the Central Railway, to Charbatia, a station on the South Eastern Railway, for being delivered to the Company under Invoice No. 1 and Railway Receipt No. 218917 dated 6-2-1968. During transit, the consignment was badly damaged by fire and water and open delivery was given to the Company on assessment basis on 11-5-1968 vide Ext. 8 indicating damage to the consignment in the following way:

(i) damage to 7 bales at 50%
(ii) damage to 55 bales at 40%
(iii) damage to 38 bales at 12%

Claim was lodged by the company as required under the provisions of the Railways Act. As the consignment had been insured with the London and Lanchashire

Insurance Co. Limited (hereinafter referred to as the 'Insurer'), the Company claimed the damage from the Insurer and the same was amicably settled. The Insurer became subrogated to the rights and remedies of the Company and became entitled to recover the loss arising out of the damages. Notice under S. 80 of the Civil P. C. was given and the suit came to be filed on 23-7-1965 by the Company and the Insurer as plaintiffs.

3. The two Railways filed separate written statements but their defence was almost identical. According to them the Insurer had not been validly subrogated to the rights and remedies of the Company and had, therefore, no right of suit. In the absence of notice under S. 78-B of the Railways Act by the Insurer, the suit by it was not tenable. There was no negligence or misconduct on the part of the employees of the Railway Administration of both the Central and the South Eastern Railway in dealing with the consignment. It was conceded that the consignment had been booked at Railway risk. In course of transit, after the consignment left the station of booking, the same had been transhipped to a broad-gauge wagon at Pachora and the consignment was found to be in order. After the wagon carrying the consignment reached Cuttack Railway Station, it was being carried to the Company's Railway siding in a Down O. T. M. Pilot train on 19-12-1963 and in course of that movement while the train was passing the west cabin of the Nergundi Railway Station, fire was first noticed in the wagon. The train was stopped, the wagon was isolated and water was poured into the wagon to extinguish the fire, at the earliest opportunity. It was admitted that the cause of fire is not known and may have been due to some live sparks coming into the wagon carrying the consignment. Ext. 8 had been prepared on the basis of guess work and no actual assessment had been made. As such without actual proof of loss, plaintiffs were not entitled to the damages claimed.

4. At the trial, four witnesses were examined on the side of the Company and two on behalf of the Railways. The Bill, the letter of subrogation, the power-of-attorney by the Company in favour of the Insurer, notice under S. 78-B of the Railways Act by the Company to the Railways, were marked as Exs. 1 to 4 respectively. The assessment certificate was marked as Ext. 8. Certain other documents were also produced by the plaintiffs.

5. The learned Trial Judge on the basis of the evidence placed before him came to hold :—

(i) the consignment of cotton when booked was in good and sound condition;

(ii) damage was caused during transit;

(iii) the plaintiffs were entitled to compensation for damage;

(iv) even if the suit was hit on account of want of notice under S. 78-B of the Railways Act so far as the Insurer was concerned, it was maintainable qua the Company;

(v) even if the Company had been paid by its Insurer, its right to sue was not wiped out on that account; and

(vi) the right to sue for damages inherent in the contract between the Railways and the Company did not stand superseded or annulled.

Accordingly a decree for the entire claim has been given which is assailed in appeal by the Union of India representing the two Railways.

6. Mr. Pal for the appellants advances the following contentions:—

(i) On the case as made out, the Insurer only was entitled to maintain the suit and the Company had no subsisting cause of action. Reliance in support of this point is placed on S. 41 of the Contract Act.

(ii) Notice under S. 78-B of the Railways Act having not been given by the Insurer, the suit at its instance was not maintainable.

(iii) The immunity provided under S. 73 of the Railways Act was applicable to the facts of the case and, therefore, no liability could be fastened as against the carrier.

(iv) The certificate of damage could not be the sole basis for award of compensation, the law being that the compensation claimed has to be commensurate to the damage.

7. The letter of subrogation has been marked as Ext. 2 and the material part thereof reads thus:—

"In consideration of your paying to us a sum of Rs. 16,833.70 in respect of the undermentioned goods insured with you under Certificate No. 177, we (the Company) hereby assign and transfer to you all our rights, title and interest in respect of the said goods, and all rights or claims against any person or persons in respect thereof.

And we also authorise you to use our name in any action or proceedings you may bring in relation to any of the matters

hereby assigned and transferred to you, and we undertake for ourselves to concur in any matters or proceedings which you may deem expedient or necessary in any such action or proceeding, and to execute all documents which may be necessary, and generally to assist therein by all means in our power.

We further undertake, if called upon by you to do so, ourselves to undertake any such action or proceedings that you may direct on your behalf; it being understood that you are to indemnify us and any other persons whose names may necessarily be used against any costs, charges or expenses which may be incurred in respect of any action or proceedings that may be taken by virtue of this Agreement.

....."

Section 41 of the Contract Act provides:—

"When a promisee accepts performance of the promise from a third person, he cannot afterwards enforce it against the promisor."

According to Mr. Pal for the Railways, between the Company and the Insurer there existed a contract in terms of which any damage to the consignment was to be made good by the Insurer. Since the Company and the Insurer admitted that the damages under the contract of policy has been paid to the Company by the Insurer, the principle in S. 41 of the Contract Act is attracted. We are not at all impressed by Mr. Pal's argument. Admittedly, the Company had a contract with the carriers for the transhipment of the consignment of cotton. That contract was for the carriage of the goods from one point to another covered by the two Railways. If the contract failed to work out under certain contingencies, there arose liability for compensation. It is not the case of the Railway Administration that the contract of the Company with them had been performed by the Insurer. As just indicated, the contract which was the outcome of promise was for transhipment and the Company did not expect performance thereof by the Insurer. On the facts, S. 41 of the Contract Act is not attracted. The solitary decision on which Mr. Pal relied does not also appear to hold the field in regard to the real ambit of S. 41 of the Contract Act.

Ext. 2 contains these two material terms: (i) the Company authorises the Insurer to use the Company's name in any action or proceeding the Insurer may bring in relation to any of the matters assigned or transferred to the Insurer and the Company further undertook to concur in any matter or proceeding which the Insurer may deem expedient and necessary; and (ii) it also undertook, if called upon by the Insurer, to do so by itself but in that event the Insurer was to indemnify the Company as against costs, charges or expenses which may be incurred. Ext. 2 does not seem to be an assignment. There is no transfer of title in the goods and all that had been agreed upon was that the Insurer would stand subrogated to the rights and remedies available to the Company. Under these premises, there is no force in Mr. Pal's contention that the Company had no right of suit.

8. Admittedly the notice under S. 78-B of the Railways Act, which is a condition precedent to maintaining a claim for damages, had not been issued by the Insurer. According to Mr. Pal, non-issue of such a notice made the suit by the Insurer non-maintainable. Law is fairly settled that notice under S. 78-B of the Railways Act is obligatory. We have already found that in terms of Ext. 2, the Company's right of suit had not been extinguished and the Insurer could require the Company to file the suit. Thus the suit by the Company as laid is a valid one and even if the Insurer be found not to be entitled to sue, the suit cannot be dismissed though the Insurer may not get the benefit under the decree.

There, however, arises an interesting aspect for examination at this juncture. Under Ext. 2, the Insurer could use the name of the Company in the suit. The Insurer could also take action in its own name in view of the fact that Company's right had been transferred to it. The Insurer had no privity of contract with the carrier. It entered into a contract with the Company — the consignor and the consignee — to cover the risk of consignment over the transit. There is no requirement in law that subrogation should be made at any particular point of time but should be before institution of the suit. In a given case, it was open to one to subrogate his right or remedies in respect of a claim even at the time of institution of the suit. For instance, in the instant case, if Ext. 2 had been entered into just before institution of the suit, would the question of want of notice under S. 78-B of the Railways Act strictly arise? The claim is one and the claimant is also one, i. e. the Com-

pany. Just because the Company has subrogated its right to the Insurer, the Insurer has come into the field. In fact, being the subrogee, the Insurer has stepped into the shoes of the Company to exercise its rights and remedies. In the premises, steps taken by the Company are available to enure to the benefit of the Insurer and the notice that had been issued under S. 78-B of the Railways Act by the Company can be availed by the Insurer. No authority has been cited by Mr. Pal to us that this could not in law be done. While we reiterate our agreement with Mr. Pal's contention that notice under Section 78-B of the Railways Act was a condition precedent to the institution of the suit, we do not agree that in a set of facts as before us, it would not be open to the Insurer to take advantage of the notice issued by the Company. The second point advanced by Mr. Pal has, therefore, to be overruled.

9. Section 73 of the Railways Act provides :—

"Save as otherwise provided in this Act, a railway administration shall be responsible for the loss, destruction, damage, deterioration or non-delivery in transit, of animals or goods delivered to the administration to be carried by railway, arising from any cause except the following, namely :—

(a) to (h) .....

(i) fire, explosion or any unforeseen risk;

Provided that even where such loss, destruction, damage, deterioration or non-delivery is proved to have arisen from any one or more of the aforesaid causes, the railway administration shall not be relieved of its responsibility for the loss, destruction, damage, deterioration or non-delivery unless the administration further proves that it has used reasonable foresight and care in the carriage of the animals or goods."

Under the scheme of the Railways Act, as a bailee, in respect of the goods entrusted to it for carriage at carrier's risk, the Railway is liable for damages. S. 73 of the Railways Act provides statutory immunity in respect of damages arising out of stated causes, but the proviso makes it abundantly clear that it is for the carrier to establish that the damage occurred in spite of use of reasonable foresight and care. Under the law, it was for the Railway Administration to plead immunity and if denied, establish the plea by proof. The proviso makes the position clear that immunity can be claimed only by the further proving that reasonable foresight and care had been used. The burden, therefore, is squarely on the Railway Administration to come under the umbrella of protection of immunity. According to the Railways, as pleaded in the written statement, the consignment was in perfect condition until it left Cuttack for the Company's siding. It has been specifically admitted that the cause of fire is not known. D. W. 1 is a railway employee who came to prove that the engine of the train which carried the suit consignment had been fitted with a spark arrester. In cross-examination, he has, however, stated :—

"I cannot give the exact date when I examined the engine which carried the wagon. We have a register showing the date and details of examination. The said register is not available. I examined daily 12 outgoing engines and 5 stationary engines. I do not remember which engine carried the suit consignment. I also cannot say from which station that engine carried the goods. I examined the engine at Khurda Road."

In this view of the evidence and in the absence of the register, it cannot be said that the engine of the train which carried the suit consignment actually had a spark-arrester.

No witness has been examined to prove the facts pleaded in the written statement regarding the happening of the damage. Therefore, the Court is entitled to hold that the Railway Administration failed to lead evidence that there was use of reasonable foresight and care. The burden which squarely lay on the Railway Administration has not been discharged. The immunity of S. 73 of the Railways Act is consequently not available.

10. There is no dispute before us that the plaintiffs are entitled to reimburse themselves for the loss caused to them. Ext. 8 was on the basis of summary assessment. There is oral evidence to show that at the time Ext. 8 was prepared on the basis of estimated damage, the bales were still packed and the packing material around the bales had not been opened. In the circumstances, it must be held that Ext. 8 does not really represent a true and definite estimate of damage.

Mr. Basu for the plaintiffs concedes that it was for the plaintiffs to establish the extent of loss. Though there is general evidence that there has been loss, and we

can assume that there has been loss on account of the fact that cotton has been damaged by fire as also water, the extent of damage has not been clearly proved. Taking advantage of this position, Mr. Pal contends that the plaintiffs' suit must be dismissed. In the facts of the case, we do not think it would be fair and just to dismiss the entire suit, when damage as a fact has not only been conceded in the note of assessment (Ext. 8), but also in the pleading itself. Mr. Basu argued that to prove specific loss in the instant case would have been difficult, keeping in view the fact that the entire cotton was mixed up in the Stores and in due course carried for the purpose of ginning and spinning. While we do not agree with Mr. Basu's submission, we think it would be appropriate to make an assessment of the loss instead of accepting the plaintiffs' claim. An assessment of loss in a case of this type is bound to be somewhat arbitrary and speculative and the method which we adopt keeps the matter within the same limits.

Ext. 8 shows that all the hundred bales had been damaged though damage in respect of some of the bales was more while in respect of others it was less. This aspect could be seen from the assessment certificate and we must assume that D. W. 2 had used his good senses in doing that assessment. The exact quantum of damage, however, could not possibly be assessed, as we have indicated, without opening the packings. Keeping this lacuna in view and being cognisant of the position that for the failure to prove actual loss, plaintiffs are to suffer, we reduce the plaintiffs' claim by a net amount of Rs. 3,000/- (three thousand) which means, plaintiffs would be entitled to a decree for a sum of Rupees 12,845.53. The reduction of Rs. 3,000/- has been arrived at by reducing the claim under the first head of the Schedule by Rs. 500/-, the second head of the Schedule by Rs. 1,750/- and the third head of the Schedule by Rs. 750/-.

11. The appeal is allowed in part and the decree granted by the trial court is modified to the extent indicated. The net result, therefore, is plaintiffs' suit shall be decreed for Rs. 12,845.53 paise with costs throughout. Plaintiffs shall not be entitled to any pendente lite interest in the trial court the same having not been granted in the decree under appeal, but future interest shall run from the date of the decree till payment.

P. K. MOHANTI, J. :— I agree.

Appeal partly allowed.

AIR 1979 ORISSA 169

R. N. MISRA AND P. K. MOHANTI, JJ.

Rajkishore Baral, Petitioner v. Commissioner of Endowment and others, Opposite Parties.

O. J. C. Nos. 1431 and 1432 of 1978, D/- 15-1-1979.

Orissa Hindu Religious Endowments Act (2 of 1952), S. 27 — Appointment of non-hereditary trustees — It is an administrative act — Necessity of inquiry.

Where there is no dispute about the public nature of an institution and the non-existence of hereditary trustees, the necessity of an enquiry cannot be spelt out from the provisions of S. 27. Strictly speaking, the appointment is an administrative act. Therefore, there could be no warrant for the contention that any one is entitled to be heard and without affording a hearing the appointment could not have been made. (Para 4)

While this is the legal position, ordinarily an inquiry as to the fitness of the persons to be appointed as trustees would be necessary, otherwise undesirable persons and persons not fit enough to act as trustees or having disputes with the endowment itself may come into the management. (Para 5)

Cases Referred: Chronological Paras

AIR 1976 SC 1059 4

AIR 1970 Orissa 141 : 36 Cut LT 897 4

A. R. Tripathy, for Petitioner; S. Mohanty, A. S. Naidu, S. Misra-2, B. Das and N. K. Acharya, for Opposite Parties.

R. N. MISRA, J. :— A common petitioner has filed these two separate writ applications challenging the order of the Additional Assistant Commissioner of Endowments constituting a board of non-hereditary trustees and the order of the Commissioner refusing to revise the same on an application under Section 9 of the Orissa Hindu Religious Endowments Act of 1951 (hereinafter referred to as the 'Act') in respect of two separate deities. The first writ application is in relation to Sri Swapneswar Dev while the other one is in respect of Sri Kunjabehari Dev, both

located in village Anda within Khurda area of the district of Puri.

2. Petitioner maintains that he is a member of the Hindu public interested in the good administration of the two endowments. The Additional Assistant Commissioner by his order dated 17-7-1978, constituted a board of non-hereditary trustees as provided under S. 27 of the Act. Petitioner maintains that there should have been an appropriate inquiry before the appointment was made and the members of the Hindu public of the locality should have been heard. As there has been no inquiry and members of the Hindu public have not been consulted and their opinion has not been gathered, the constitution of the board of non-hereditary trustees was bad. Aggrieved by the appointment, the petitioner along with some others moved the Commissioner of Endowments in revision but the Commissioner erroneously refused to interfere.

3. Two affidavits have been filed in opposition — one by the Commissioner of Endowments and the other on behalf of the board of non-hereditary trustees constituted under the impugned order. In the return filed by the Commissioner, it has been stated that there are three Hindu temples in the locality, being Sri Saileswar Dev, Sri Kunjabehari Dev and Sri Swapneswar Dev, and for the purposes of managing the affairs of all the three deities a board of non-hereditary trustees was being formed from 1950. Five non-hereditary trustees had been jointly appointed for all the three temples on 7-11-1969. Their terms expired on 5-11-1972, but no fresh appointment had been made. Several applications were received from the villagers making serious allegations regarding mis-management of the affairs of the three deities. The Inspector of Endowments of Khurda was deputed to enquire into the allegations and he submitted a detailed report after local inspection on 4-6-1978. It transpired that two of the non-hereditary trustees were already dead and the remaining ones were not looking after the affairs of the deity properly. The Inspector suggested that three sets of non-hereditary trustees — one for each institution — should be separately appointed and in his report of 30th of June, 1978, copy whereof is annexed to the counter affidavit of the Commissioner, he sent his recommendations. The Additional Assistant Commissioner took into consideration the said report and took his own decision in the matter of constitution of the board.

In the other counter affidavit by the members of the non-hereditary trustees, the constitution of the board has been claimed to have been in accordance with law.

4. Section 27 (1) of the Act provides for appointment of non-hereditary trustees and the provision runs thus :—

"The Assistant Commissioner shall, in cases where there is no hereditary trustee, appoint non-hereditary trustee in respect of each religious institution other than maths and specific endowments attached thereto and in making such appointments, the Assistant Commissioner shall have due regard to the claims of persons belonging to the religious denomination for whose benefit the said institution is chiefly maintained."

No inquiry as such has been contemplated by the statute in the matter of constitution of a board of non-hereditary trustees. Reliance is, however, placed by Mr. Tripathy for the petitioner on a Bench decision of this Court in the case of Bhramarbar Santra v. State of Orissa, (1970) 36 Cut LT 897 : (AIR 1970 Orissa 141), in support of his contention that an inquiry is contemplated before a board can be constituted. In the reported decision, the claim laid was that the institution was an excepted temple and had hereditary trustees. Therefore, no jurisdiction was vested in the authority to appoint a board of non-hereditary trustees to the detriment of the hereditary trustees in management. In that background, this Court observed (at p. 145 of AIR) :—

"Section 27 (1) thus gives power to Asst. Endowments Commissioner to appoint non-hereditary trustees. The condition precedent to the exercise of jurisdiction is the non-existence of hereditary trustees in respect of the religious institution. Before the Asst. Commissioner seizes jurisdiction to appoint non-hereditary trustees in respect of a religious institution, he must have come to a finding that (i) institution is public and (ii) it has no hereditary trustees."

For the purpose of finding out as to whether these conditions are satisfied, obviously an inquiry becomes necessary. In the instant case, however, there is clear material to show that there have been several boards of non-hereditary trustees from 1950 and it is not claimed that the institution is a public one or that it has heredi-

tary trustees. In such circumstances, we do not think the observations relating to inquiry in the reported decision of this Court can have any support to lend for Mr. Tripathy's submission. It is true that the decision of this Court has been upheld by the Supreme Court in AIR 1976 SC 1059, and in para. 26 of the judgment, keeping the facts in view, the Court observed (at p. 1064) :—

".....For the exercise of the power by the Assistant Commissioner under this section, it is, therefore, absolutely necessary that either there should be no dispute about the public nature of the institution and the non-existence of hereditary trustees or in case, there is a dispute about any of these matters, a prior determination of such dispute under S. 41 of the Act has been made. Without such preliminary determination if an appointment of a non-hereditary trutee is made under S. 27 of the Act and a direction is given regarding delivery of possession of the institution etc. under S. 68 of the Act, it would be manifestly illegal and without jurisdiction. A careful scrutiny of the provisions of the Act makes this position amply clear. As pointed out by the High Court, Section 27 does not in terms provide that Assistant Commissioner should make an enquiry as to whether the institution is public or private and whether there are hereditary trustees of the institution or not. These questions have to be gone into under Section 41 of the Act which specifically deals with the investigation and decision of disputes in respect thereof. Consequently, a prior determination under S. 41 that the institution is public and has no hereditary trustee is a sine qua non for appointment of trustees under S. 27 of the Act."

From the aforesaid para. it is very clear that where there is no dispute in regard to these two aspects, the necessity of an inquiry cannot be spelt out from the provision of S. 27 of the Act.

The Supreme Court dealing with the corresponding provision of the Andhra Pradesh Charitable and Hindu Religious Institutions and Endowments Act of 1966 has laid down that in the matter of appointment of non-hereditary trustees of temples the authority do not perform a quasi-judicial function. Strictly speaking, therefore, the appointment is an administrative act. Therefore, there could be no warrant for the contention of the petitioner that he was entitled to be heard and without affording a hearing the appointment could not have been made.

5. While the legal position is as indicated above, ordinarily an inquiry as to the fitness of the persons to be appointed as trustees would be necessary, otherwise undesirable persons and persons not fit enough to act as trustees or having disputes with the endowment itself may come into the management and thus the interest of the endowment would be prejudiced. S. 27 of the Act provides that in the matter of making of an appointment, due regard to the claims of persons belonging to the religious denomination for whose benefit the institution is chiefly maintained has to be given. In order to find out this aspect of the matter, very often an inquiry may also be necessary. In the instant case, the Endowment Inspector appears to have made an inquiry of that type. Since it is an administrative act, we cannot agree with Mr. Tripathy's submission that unless an inquiry is done by the Additional Assistant Commissioner himself, he was precluded from making the appointment on the basis of the report of the Inspector.

6. All the contentions advanced appear to be without force and the writ application must accordingly be dismissed. We make no order for costs.

P. K. MOHANTI, J. :— I agree.

Petition dismissed.

AIR 1979 ORISSA 171

P. K. MOHANTI, J.

Bhubaneswari Bewa and others, Petitioners v. State of Orissa and another, Respondents.

Civil Revn. No. 203 of 1978, D/- 4-12-1978.*

(A) Civil P. C. (5 of 1908), O. 22, R. 4, O. 22, R. 9 — Abatement of appeal — Application to set aside abatement — Delay — Condonation — "Sufficient Cause" — (Limitation Act (36 of 1963), S. 5.)

Mere allegation that appellants did not come to know about death of deceased respondent till they were informed by other side does not constitute sufficient cause. They have to prove that they were diligent and vigilant about lis by estab-

*(Against Order of K. C. Rath, Dist. J., Baripada, D/- 5-4-1978.)

lishing facts which prevented them from knowing about death earlier. (Paras 11, 14)

Under Order 22, R. 4 C. P. C. a duty is cast upon the plaintiff or the appellant, as the case may be, to bring on the record legal representatives of a deceased defendant or respondent where death takes place during the pendency of the lis in order that no decrees may be passed against deceased persons. If for failure to bring legal representatives on the record within the period of limitation, the suit or the appeal abates, it is for the applicant to get the abatement set aside on proof of sufficient cause. Where he allows the period of limitation to expire, he has to satisfy the court about the existence of circumstances contemplated by S. 5 of the Limitation Act justifying condonation of delay. The reason is that a valuable right accrues to the party against whom the suit has abated and the order of abatement should not be set aside as a matter of course. An applicant must, therefore, satisfy the Court that he was prevented by sufficient cause from taking timely steps to continue his suit which had abated on account of the death of a party. (Para 7)

(B) Limitation Act (36 of 1963), Articles 120, 121 — Limitation for substitution of L. Rs. and for setting aside, abatement — It commences from date of abatement and not from date of knowledge of death. (Para 8)

Cases Referred:	Chronological	Paras
AIR 1978 Cal 394		11
AIR 1968 All 255		11
AIR 1964 SC 215		11
AIR 1960 Punj 335 (FB)		11
AIR 1924 Pat 607		11

S. Mohanty and S. D. Das, for Petitioners; S. S. Mohanty, Addl. Standing Counsel and P. K. Dhal, for Respondents.

ORDER :— This civil revision is directed against an order of the learned District Judge of Mayurbhanj-Keonjhar allowing the prayer of the appellants in Title Appeal No. 5-M of 1975 for substitution in place of the deceased respondent and for setting aside abatement.

2. The deceased Brundaban Behera as plaintiff filed Title Suit No. 73 of 1972 in the court of the Subordinate Judge, Baripada against the opposite parties for declaration of occupancy right over the land described in Sch. 'A' of the plaint and for confirmation of possession over the same.

3. The State of Orissa represented by the Collector, Mayurbhanj was the defendant No. 1 and the Sarpanch of Pedagadi Grama Panchayat was the defendant No. 2 in the suit. They filed written statement contending, inter alia, that the suit land being communal in character, no occupancy right could be acquired over the same and that after abolition of the estate, the suit land vested in the State Government and was transferred to the Pedagadi Grama Panchayat.

4. The learned Subordinate Judge decreed the suit declaring that the plaintiff would have exclusive possession over the suit land so far as rearing and catching of fish are concerned, but the villagers would have the right of user of the water of the tank for bathing, drinking and irrigation purposes in case of drought.

5. Aggrieved by the decision, the opposite parties jointly filed the aforesaid Title Appeal before the learned District Judge on 1-3-75. During the pendency of the appeal, the plaintiff-respondent died on 24-12-76. An intimation about the death was given by the Advocate for the respondent on 25-8-77. On 28-9-77 the opposite parties filed petitions under O. 22, R. 4 C. P. C. for substitution of the legal representatives of the deceased respondent and under O. 22, R. 9 (2) C. P. C. for setting aside the abatement. They also filed a separate petition under S. 5 of the Limitation Act for condonation of delay. The ground taken for condonation of delay was that the fact of death was not known to the opposite parties and that they came to know about the same for the first time on 25-9-77 from the memo filed by the respondent's Advocate in Court. The legal representatives of the deceased respondent filed counter contending that the opposite parties were fully aware of the death of the deceased respondent and that there was no sufficient cause for condonation of delay. It was alleged that opposite party No. 2 who is the Sarpanch of Pedagadi Grama Panchayat is a close neighbour of the deceased respondent and was present at the time of his death and had attended his sudhi ceremony. It was accordingly contended that the opposite parties were fully aware of the death of the deceased respondent and there was no justification for condonation of delay.

6. The learned District Judge allowed the application for substitution and set aside the abatement after condoning the delay. The reasonings adopted by him were as follows :—

(1) There was no material on the record, except the counter affidavit filed by the proposed legal representatives, to show that opposite party No. 2 really knew about the death of the deceased respondent.

(2) Even if the opposite party No. 2 knew about the death of the respondent, his knowledge cannot be utilised against opposite party No. 1 to say that the latter also had knowledge about the death; and

(3) A petition for setting aside abatement can be filed within sixty days from the date of knowledge and such petition in the instant case having been filed on 28-9-77 it was in time.

7. Under Order 22, R. 4 C. P. C. a duty is cast upon the plaintiff or the appellant, as the case may be, to bring on the record legal representatives of a deceased defendant or respondent where death takes place during the pendency of the lis in order that no decrees may be passed against deceased persons. If for failure to bring legal representatives on the record within the period of limitation, the suit or the appeal abates, it is for the applicant to get the abatement set aside on proof of sufficient cause. Where he allows the period of limitation to expire, he has to satisfy the court about the existence of circumstances contemplated by S. 5 of the Limitation Act justifying condonation of delay. The reason is that a valuable right accrues to the party against whom the suit has abated and the order of abatement should not be set aside as a matter of course. An applicant must, therefore, satisfy the Court that he was prevented by sufficient cause from taking timely steps to continue his suit which had abated on account of the death of a party.

8. Under Article 120 of the Limitation Act a period of 90 days is allowed for making an application for substitution. The period of limitation is to be computed from the date of the death of the deceased defendant or respondent. Under Article 121 of the Limitation Act a period of 60 days is allowed for an application to set aside abatement. The period of limitation is to be computed from the date of abatement. If no application for substitution is made within the period of limitation, the suit or appeal abates automatically and no formal order of abatement is necessary.

9. The death of the deceased respondent occurred on 24-12-76 and the applications for substitution and for setting aside abatement were made on 28-9-77. Thus the abatement had taken effect and the limitation for an application to set aside abatement had expired long prior to the presentation of the application.

10. The sole ground taken by the opposite parties for condonation of delay was that they were not aware of the death of the respondent until 25-8-77 when the intimation about the death was given to the court by the Advocate engaged by the deceased respondent.

11. The mere allegation that the opposite parties did not come to know of the death of the deceased respondent prior to the intimation of death furnished by the other side cannot constitute a sufficient cause for the setting aside of abatement. They have to prove further that they were diligent and viligant regarding the lis. The abatement of the appeal would be a prima facie evidence of their negligence and/or lack of vigilance. Hence they have to satisfy the court by stating and establishing facts which prevented them from knowing about the death earlier. They had to state reasons which, according to them, led to their not knowing of the death of the deceased respondent within a reasonable time and to establish those reasons to the satisfaction of the Court. This view gains support from a decision of the Supreme Court in the case of Union of India v. Ram Charan AIR 1964 SC 215. In that case the Union of India preferred an appeal on 6th of April, 1955. The respondent Ram Charan died on 21st of July, 1957. On 18th March, 1958 an application was made by the appellant to the High Court under O. 22, R. 4 read with S. 151 C. P. C. stating that Ram Charan died on 21st July, 1957 and the Divisional Engineer, Telegraphs, Ambala Cantonment came to know about the death on 3rd Feb., 1958. The application for substitution was opposed and was dismissed by the High Court on the ground that the Union of India had failed to show that it was prevented by any sufficient cause from continuing the appeal. That order was maintained by the Supreme Court on appeal. It is pertinent to quote the observations of their Lordships which are as follows (at p. 219) :—

"It is true, as contended, that it is no duty of the appellant to make regular enquiries from time to time about the health or existence of the opposite party, but it

does not mean that the mere fact of the appellant's coming to know of the respondent's death belatedly will, by itself, justify his application for setting aside the abatement. That is not the law. R. 9 of O. XXII of the Code requires the plaintiff to prove that he was prevented by any sufficient cause from continuing the suit. The mere allegation about his not coming to know of the death of the opposite party is not sufficient. He had to state reasons which, according to him, led to his not knowing of the death of the defendant within reasonable time and to establish those reasons to the satisfaction of the Court, specially when the correctness of those reasons is challenged by the legal representatives of the deceased who have secured a valuable right on the abatement of the suit."

The decision of the Supreme Court was followed in the case of the State of U. P. v. Nauratan Singh AIR 1968 All 255, wherein it was observed as follows (at pp. 257, 258):—

"On account of India being a welfare State the activities both of the Central and the State Governments have considerably increased since the coming into force of the Constitution and they have become involved in numerous litigations both as plaintiff and defendant and in cases in which they figure either as plaintiff or appellant and in particular when such litigation is expected to have a protracted life it is expected of them to be more vigilant than before so that compliance with the provisions of the Code may be made in time.....

.....If despite the making of effort the Government is not able to gather the information as to the death of a defendant or a respondent in time a case under S. 5 of the Limitation Act may be made out. But a mere allegation that the Government did not come to know of the death of a defendant or respondent — as the case may be — prior to the information of death furnished by the other side can, in my humble opinion, not constitute a sufficient cause for the setting aside of the abatement."

In the case of Dittu Ram Eyedan Firm v. Om Press Co. Ltd. AIR 1960 Punj 335 a Full Bench of the Punjab High Court observed that before ignorance of death can be deemed to be a good ground, there must exist good grounds for ignorance not attributable to negligence. When law imposes an obligation on a person to bring the legal representatives of deceased opponent on the record within the prescribed period, mere want of knowledge of death will be insufficient to secure him against consequences of abatement of his suit or appeal; he has further to show absence of want of care. When reasonable vigilance is a duty, unqualified ignorance cannot be deemed venial. Want of information may be overlooked if want was not induced by neglectful indifference or blameworthy remissness. Allowing oneself to remain in the dark cannot be treated as persuasive ground for condonation of delay.

In the case of Phulwati Kumari v. Maheshwari Prasad Singh AIR 1924 Pat 607 a Division Bench of the Patna High Court held that the appellant must keep himself informed of any devolution of interest that may have taken place by reason of death of any of the respondents and it was not sufficient merely to say that the appellant had no knowledge of the death of the respondents till many months later. The abatement of an appeal gave a very important right to the opposite party against whom the appeal abated and the Court should not set aside an abatement without sufficient reasons.

Similar view has been expressed in the case of Nripati Nath Dutt v. Smt. Rajlakshmi Biswas AIR 1978 Cal 394.

12. In the instant case, the opposite parties have not shown any cause at all except saying that they were not aware of the death. It was specifically alleged by the petitioners in their counter affidavit that opposite party No. 2 being a co-villager and close neighbour of the deceased respondent was present at the time of his death and that he had been invited to attend the sudhi ceremony and thus he was fully aware of the death on the very date of death. These assertions went unchallenged. According to the opposite parties the suit land has been transferred by opposite party No. 1 to the Grama Panchayat and the opposite party No. 2 is the Sarpanch of the Grama Panchayat. He was therefore vitally interested in the result of the litigation. His negligence will have the same consequences as the negligence of the opposite party No. 1.

13. The finding of the learned District Judge that limitation for a petition for setting aside abatement is to be computed from the date of knowledge of death is contrary to law. Art. 121 of the Limitation Act specifically provides that the limita-

tion is to be computed from the date of abatement. Therefore in considering the question of limitation the date of the knowledge would not be relevant. In the Supreme Court case cited above, their Lordships held that the limitation for an application to set aside abatement of a suit starts on the death of the respondent and not from the date of knowledge thereof by the appellant.

14. Applying the principles laid down in the aforesaid decisions, I hold that the opposite parties have not been able to establish that they were prevented by any sufficient cause from making the application for setting aside abatement within the period of limitation. The learned District Judge illegally exercised his jurisdiction and acted with material irregularity in setting aside the abatement.

15. I would, therefore, allow this civil revision and set aside the impugned order. The applications filed by the opposite parties for substitution in place of the deceased respondent and for setting aside the abatement be rejected. In the circumstances, I make no order as to costs.

Revision allowed.

AIR 1979 ORISSA 175

N. K. DAS, J.

Abdul Rasid Khan, Petitioner v. Sk. Rahimtulla and others, Opposite Parties.

Civil Revn. Nos. 509 and 510 of 1978, D/- 14-5-1979.*

Civil P. C. (1908), Ss. 151, 47 — Execution of decree for possession — Person not party to suit filing petition under S. 151 claiming that he is real owner and in possession of property — Petition not maintainable — Proper remedy is to file appeal with leave of the appellate court or to file a separate suit — He has no locus standi to move executing Court under its inherent powers, objecting execution — Executing court cannot go behind the decree.

(Paras 6, 7)

Cases Referred: **Chronological Paras**

(1975) 1 Cut WR 178 : AIR 1976 Orissa 11 — 6

AIR 1971 SC 374 — 6

Y. S. N. Murty, for Petitioner; A. Mohanty, N. Prusty, A. K. Tripathy, R. N. Sinha, S. N. Sinha and P. K. Routray, for Opposite Parties.

ORDER:— Both the revisions have been filed against the same order. In C. R. 509/78 the prayer is in a concise form and this has been clearly stated in C. R. 510/78. Both the revisions are the same, the latter being in a clarified form only. So, both the revisions are considered to be one.

2. The petitioner filed an application under Section 151 of the Civil P. C. in an execution case. The said petition has been rejected and as against that order the revision has been preferred. The decree-holders in O. S. No. 48/71-I, which was instituted on 11-5-1971 and finally disposed of on 22-6-1976, are executing the decree. The decree directs opposite party No. 6 to deliver vacant possession of the suit premises, failing which he is to be evicted through the process of Court. In that execution case, the present petitioner filed petitions under Section 151, Civil P. C. which have been rejected.

3. In O. S. No. 48/71-I, the petitioner filed a petition to be added as a party, but the said petition was rejected. The matter was carried by him to this Court, but to no effect. Thereafter, he instituted O. S. No. 96/73-I for declaration that he is the real purchaser of 'Kha' schedule property by virtue of sale-deed dated 10-8-1970 and opposite party No. 6 is only a Benamidar and that he is not bound by the decision in O. S. No. 48/71-I. A declaration has been made in that suit that the transaction under Ext. I is Benami and the present petitioner is the owner of the property and is not bound by the decision in O. S. No. 48/71-I. He now claims to be in possession of the suit house stating that opposite party No. 6 has no concern in it and since the decree-holders are trying to evict him, he has prayed for restraining the process-server from delivering possession of the same to the decree-holders.

4. Objection has been made by the opposite parties that the present petitioner is a man of the judgment-debtors and Sk. Sobhan was never a Benamidar. As the petitioner was not a party to O. S. No. 48/71-I and his petition for being added as a party having been rejected, he cannot resist the delivery of possession. It has

*(From orders of U. N. Padhi, Sub. J. Balasore, D/- 5-10-1978 and 3-11-1978).

further been asserted that the petitioner cannot invoke the inherent jurisdiction of the Court without filing a fresh suit.

5. The plaintiffs in O. S. No. 48/71-I have prayed for delivery of possession as per the direction in the decree passed in their favour. Opposite party Nos. 1 to 4 are brothers. Opposite party No. 4 sold his share to opposite party No. 5. Opposite party No. 5 is said to have sold the disputed property to opposite party No. 6. On 11-5-71, opposite party Nos. 1 to 3 filed O. S. No. 48/71-I. They prayed for declaration of title and for repurchase under Section 4 of the Partition Act along with recovery of possession from opposite parties 5 and 6. The present petitioner filed an application to be added as a party in that suit on 12-11-71. This was rejected. The matter came up to High Court in revision and the revision was dismissed. Thereafter, the petitioner filed O. S. No. 96/73-I alleging that opposite party No. 6 was his Benamidar. All the present opposite parties were parties to that suit and ex parte decree was obtained by the petitioner on 1-3-74. Thereafter, O. S. No. 48/71-I was also decreed. Execution was levied by the decree-holders in O. S. No. 48/71-I in Execution Case No. 17/77. In this Execution Case the present opposite parties 1 to 3 prayed to take possession of the suit property alleging that the petitioner was in possession on behalf of the judgment debtor-opposite party No. 6. This petitioner filed an application in that Execution Case alleging that he is the title holder and the Execution Case can no longer proceed against opposite party No. 6. The executing court rejected this petition on the ground that the petitioner is a third party and has no locus standi to file the petition under S. 151 C.P.C.

6. It is contended by the counsel for the petitioner that after obtaining decree in O. S. No. 96/73-I, the petitioner filed a petition in O. S. No. 48/71-I stating that the property belongs to him and should not be affected by the decree. No orders were passed on that petition and O. S. No. 48/71-I has been decreed. He has not agitated this matter in higher court, nor has he filed any appeal against the decree in O. S. No. 48/71-I, even though he was prejudicially affected by the decree. In Smt. Jatan Kanwar Golcha v. Golcha Properties Pvt. Ltd., AIR 1971 SC 374, it has been held that it is well settled that a person who is not a party to the suit may prefer an appeal with the leave of the appellate court and such leave should be granted if he would be prejudicially affected by the judgment. This decision has also been followed by a Division Bench of this Court in Teja Singh v. A. D. M. (Executive), Sundargarh, (1975) 1 Cut WR 178. It was open to the petitioner to ask for leave to appeal to the appellate court and if he is prejudicially affected, leave was to be granted, as has been held by the Supreme Court in the case referred to above. But the petitioner did not take recourse to this position.

7. It is well settled that a Benamidar is bound by the decision against the real owner, so also a Benamidar can represent the real owner. But the question involved in the present revisions is that the petitioner was not a party to O. S. No. 48/71-I and has obtained a decree subsequently. The decree in O. S. No. 48/71-I is being executed and the executing court cannot go behind the decree and has to execute it as it stands, unless the decree is nullity. Undoubtedly the court which passed the decree has jurisdiction to pass such a decree and the decree is not against a dead man. Simply because the Court did not implead the present petitioner as a party to that suit, it cannot be said that the decree is a nullity or without jurisdiction. There was ample opportunity for the present petitioner to challenge the validity of the decree either on the ground of res judicata or on any other relevant ground of law by instituting a separate suit when the petitioner did not choose to prefer an appeal with the leave of the appellate court against the decree in that suit. The petitioner has now filed the petitions under S. 151 C. P. C. and the executing court has rightly held that the petitioner has no locus standi to move the executing court on the grounds stated in his petitions and the executing court cannot go behind the decree which still stands as a valid decree and has not been declared by a competent court as invalid and the decree has also not yet been set aside. The order of the executing court does not appear to be illegal nor there has

been illegal exercise of jurisdiction, or material irregularity in exercise of jurisdiction. Accordingly, I hold that there is no compelling reason to interfere with the orders of the court below.

8. The revisions, therefore, fail and are accordingly dismissed. In the circumstances of the case, there will be no order as to costs.

Petitions dismissed.

AIR 1979 ORISSA 177

R. N. MISRA AND P. K. MOHANTI, JJ.

Dhaneswar Mahanty and others, Appellants v. Sitanath Das and others, Respondents.

First Appeal No. 157 of 1970, D/- 30-4-1979.*

(A) Limitation Act (1963), Art. 65 — Possession beginning with permission — It can never become adverse unless hostile animus was expressed at any particular time to the knowledge of owner. (Para 5)

(B) Limitation Act (1963), Art. 65 — Suit by A for title and possession of house against B — B found to be in permissive possession — Suit decreed — B is not entitled to compensation for repairs unless they were undertaken by him at request of A and on express understanding that they would be paid for by A. (Para 6)

B. K. Pal and B. Pal, for Appellants; S. Mohanty and A. S. Naidu, for Respondents.

MISRA, J.:— Defendants are in appeal against the decree passed by the learned Subordinate Judge of Puri allowing plaintiffs' claim for title and recovery of possession of the disputed property.

2. Plaintiffs filed a suit on 1-12-1965 alleging that the disputed property which is a house and the property appurtenant to it within municipal holding No. 426 of Ward No. 8 of Puri Town happened to be their ancestral property. Defendants 1 to 3 are close relations of the plaintiffs. Father of defendants 2 and 3 came to seek service at Puri and was allowed to remain with the plaintiffs' father in the disputed house as an act of compassion. He continued to live there till his death in 1930. Defendant No. 3 was then a small boy and was brought up in the house by a maid servant who died in 1960. Plaintiffs' father died in 1936 and their mother lived in the disputed house till she was moved to the village in 1956. The house was under the occupation of the maid servant and was taken care of by defendant No. 1. Defendant No. 1 got service in Radhaballavi Math. In 1961, plaintiff No. 1 came to know that defendant No. 1 had got himself mutated in the municipal records without plaintiffs' knowledge. As plaintiffs were living away with plaintiff No. 1 who was serving elsewhere, this fact had not been known earlier. On plaintiff No. 1's application, his name was mutated in the municipal record. When plaintiff No. 1 ultimately wanted to settle down at Puri on permanent basis in 1962 when he superannuated from service, he required the defendants to deliver vacant possession. Defendants did not do so though they had promised and, therefore, ultimately the suit was filed.

3. Defendants filed separate written statements, but essentially took the same defence. They pleaded that the suit was barred by limitation and they had acquired title by adverse possession. They further pleaded that they had undertaken substantial repairs to the house at their cost.

4. Several issues were framed and at the trial plaintiffs examined 3 witnesses including plaintiff No. 1 and defendants examined 4 witnesses. Khatian and municipal records were exhibited on the side of the plaintiffs. The learned Subordinate Judge ultimately held that plaintiffs had title to the property and their anterior title had not been lost by adverse possession of defendants. He found that the defendants had lived in the house as licensees and accordingly decreed the suit.

5. Mr. Pal for the appellants strenuously contended that the judgment of the trial court was wrong and the learned trial Judge should have accepted the defence plea of acquisition of title by adverse possession. Defendants did not clearly plead as to how they came into possession of the property. Inasmuch as the property belonged to the plaintiffs from the time of their ancestors, and the defendants

*(From decision of B. Mohapatra, Sub-J., Puri, D/- 16-3-1970.)

were not able to show the manner of their getting into possession of the property and in view of the relationship between the parties, the learned trial Judge rightly accepted the plaintiffs' case that defendants were permissive occupants. Once possession began with permission, it could never become adverse unless hostile animus was expressed at any particular time to the knowledge of the plaintiffs. In the written statements of the several defendants, there was no plea as to when such hostile animus was exhibited. Plaintiffs admitted that defendants were living for more than thirty years in the house, but mere living for a long time extending over the statutory period would not lead to acquisition of title. In our view, the learned Subordinate Judge came to the right conclusion regarding plaintiffs' title. The suit having been filed on 1-12-1965, the burden lay on the defendants to show loss of title of the plaintiffs and the learned Subordinate Judge came to the correct conclusion on the basis of the evidence on record that defendants had failed to discharge their burden.

6. So far as the repairs to the house are concerned, defendants have failed to prove that such repairs were at the behest of the plaintiffs and on the understanding that plaintiffs would bear the same. Even if defendants had undertaken the repairs, once they failed to establish that the repairs had been undertaken at the request of the plaintiffs and with the express understanding that the same would be paid for, defendants are not entitled to ask for compensation. In the circumstances, we agree with the findings of the learned Subordinate Judge that the plaintiffs have title to the property and since the defendants have failed to establish any right or interest in the property, they are liable to be evicted and a decree for eviction has been appropriately passed against them. There is absolutely no merit in the appeal and it must accordingly be dismissed. We make no order for costs in this Court.

MOHANTI, J.:— I agree.

Appeal dismissed.

AIR 1979 ORISSA 178

S. ACHARYA AND J. K. MOHANTY, JJ.

Dinamani Das and others, Appellants v. Bimbadhar Padhan and others, Respondents.

Misc. Appeal No. 91 of 1974, D/- 12-7-1979.*

Civil P. C. (1908), S. 48 — Execution petitions levied within time — J. D. persistently took objections on the ground of certain defects in decree — Proper forum amended decrees from time to time after dismissal of execution petitions — Question of limitation raised by J. D. under S. 48 when fresh execution petition filed — Provisions not attracted.

Due to dismissal of two successive execution petitions not for any fault of the decree-holder, but due to persistent objections of the judgment-debtor, the decree-holder had to wait for filing fresh execution petition till preparation of proper final decree by the Court, so it cannot be said that decree-holder did not levy proper execution of the decree within prescribed period, when he filed fresh execution petition immediately after preparation of the proper final decree. The drawing up of the decree is essentially the function of the Court and its office and it would be unreasonable to penalise the party for the fault of the Court or its office. The plea of laches cannot be foisted against a person who all through remains vigilant and is not guilty of waiver of his right by acquiescence, conduct or neglect. AIR 1961 SC 832, Foll. (Paras 5, 7)

Cases Referred: Chronological Paras

AIR 1961 SC 832 7

AIR 1950 Orissa 125 (FB) 7

B. H. Mohanty, S. K. Mohanty and P. K. Sahu, for Appellants; R. C. Patnaik, S. Kr. Dey and P. K. Misra, for Respondents.

ACHARYA, J.:— The appellants in this appeal are some of the judgment-debtors and the substituted legal heirs of the deceased judgment-debtors in Title Suit No. 81/48 which was a suit for foreclosure of a mortgage bond. The original judgment-debtors by a petition

*(From order of J. M. Mohapatra, Addl. Dist. J., Cuttack, D/- 4-5-1974.)

under Ss. 47, 48 and 151 C.P.C. challenged the maintainability of the Execution Case No. 47/70 on the ground that the same was barred under S. 48 C. P. C. and Art. 36 of the Limitation Act. That petition was registered as Misc. Case No. 90/70, and by order dated 24-8-73 the learned Subordinate Judge, Kendrapara dismissed the said petition with costs. The judgment-debtors thereupon preferred an appeal against the said decision, and the Additional District Judge, Cuttack, by his order dated 4-5-74 in Misc. Appeal No. 69/73 also dismissed the said appeal with costs. This appeal has been preferred against the said order.

2. The preliminary decree in the suit (T. S. No. 81/48) was passed in favour of the plaintiffs on 17-3-49. The final decree, directing the defendants to deliver possession of the mortgaged property to the plaintiffs, was passed on 18-11-53. After the final decree was drawn up, the judgment-debtors filed an application under S. 11 of the Orissa Moneylenders Act which was allowed, and the court directed amendment of the final decree. In spite of the said order, the final decree drawn up previously was not amended. On 22-2-56 the plaintiffs-decree-holders filed Execution Case No. 59/56 to execute the final decree. The judgment-debtors filed a petition in the said execution case under S. 47 C.P.C. That petition having been dismissed the judgment-debtors filed Misc. Appeal No. 47/56, and the appellate court directed amendment of the preliminary decree as also the final decree, and dismissed the aforesaid execution case on that ground. The preliminary and the final decrees were accordingly amended on 4-12-56 and 19-12-56 respectively. Thereafter the decree-holders again levied execution of the amended final decree on 5-8-57. But on the application of the judgment debtors under Ss. 47 and 151 C.P.C. the executing court held that the preliminary decree and the final decree were not in the proper form. The decree-holders' appeal against the said order was dismissed. On the above finding that the preliminary and the final decrees were not in the prescribed form, the said decrees were amended on 13-9-65. The judgment-debtors again preferred objection against the amended decrees and that matter and matters connected therewith remained pending in different courts for a long time, and ultimately a fresh final amended decree was drawn up and signed on 23-6-70. Soon thereafter the present execution case was levied on 26-6-70, but as Title Appeal No. 58/70, filed by the judgment-debtors against one of the previous orders of the executing court, was pending, this execution case was stayed at the instance of the judgment-debtors. After the dismissal of Title Appeal No. 58/70, the judgment-debtors filed a petition under Sections 47, 48 and 151 C.P.C. in the executing court. On the dismissal of that petition by that court and the appellate court this appeal has been preferred.

3. According to the judgment-debtors, the appellants in this appeal, the execution case filed by the decree-holders in 1970 is barred by limitation in view of the provisions of S. 48 C.P.C. as the same was not filed within 12 years of the date of the final decree, which according to the judgment-debtors is 18-11-53. (This case relates to the period when S. 48 C.P.C. was in force). The above objection has been overruled by both the courts below.

4. It is contended by Mr. B. H. Mohanty, the learned counsel for the appellants, that as under the provisions of the Civil Procedure Code the decree has to bear the date on which the judgment was pronounced, the decree in this case shall be construed to have been passed on 18-11-53, which is the date on which the judgment in the case was pronounced, and accordingly, the execution case filed in the year 1970 is barred by limitation provided under S. 48 C.P.C. According to Mr. Mohanty the words "date of decree sought to be executed" in S. 48 C.P.C. should be construed with reference to O. 27, R. 7 C.P.C., and so the date of the decree shall be the date on which the judgment was pronounced, and not the date on which the decree was actually drawn up and signed, and hence an application for execution filed after 12 years from the date of the judgment has to be dismissed under S. 48 C.P.C.

5. In this case, undisputedly the first execution case filed by the decree-holders in 1956 and the second execution case filed by them in 1957 were

both in time and both these execution cases were dismissed not due to any fault, negligence or delay on the part of the decree-holders but because of certain defects in the decrees prepared by the court or its officers. The decree-holders certainly had no hand in the preparation of the said defective decrees, and the said defects were due to fault and/or negligence of the court or its officers. The court on the application of the judgment-debtors twice dismissed the execution cases on the ground of defective decrees and on those occasions it amended the decrees. After the dismissal of the second execution case on the ground of the defective decree the decree-holders, till 23-6-70, did not have a clear picture of the decree to be executed in this case, as the judgment-debtors persisted in raising different objections against the decree in the different forums. Due to the dismissal of the execution petitions, not for any fault of the decree-holders, but due to the persistent objections of the judgment-debtors, the decree-holders must have suffered substantially in various ways, and so they had no other way but to wait till the preparation of the proper final decree by the court on 23-6-70 after the various objections of the judgment-debtors in connection with the decree were resolved in the different forums. So it cannot be said that the decree-holders did not levy proper execution of the decree within the prescribed period. The drawing up of the decree is essentially the function of the court and its office and it would be unreasonable to penalise the party for the fault of the court or its officers. The law of limitation visits a person who by his fault, conduct or neglect has rendered stale his rights or reliefs granted to him by law. The plea of laches cannot be foisted against a person who all through remains vigilant and is not guilty of waiver of his right by acquiescence, conduct or neglect.

6. Moreover, if the contention of Mr. Mohanty, that on the delivery or pronouncement of the judgment the decree itself is expressed and for the execution of the decree it is not obligatory on the part of the decree-holder to file the copy of the formal decree drawn up by the court and so the period of limitation for the execution of the decree has to be computed from the date of the pronouncement of the judgment, is accepted as correct, then the court could not have dismissed the execution proceeding on the ground that the decrees prepared in the case were defective. After the dismissal of the first execution case, the decree-holders again levied execution of the amended decree in time. When that again was dismissed on the same ground of defect in the decree, the decree-holders preferred an apppal. But that also was dismissed. In the facts of this case the court without dismissing the execution case should have kept the same alive directing and allowing the decree-holders to amend the execution petition on the line of the amended decree.

7. Mr. Mohanty cited majority decision reported in AIR 1950 Orissa 125 (FB) (Sri Ramachandra Mardaray Deo v. Bhalu Patnaik), and contended that as the date of the decree is the date of the judgment, the execution case instituted in 1970 cannot be allowed to proceed as provided in S. 48 C.P.C. That decision is not on the point in question; the facts on which the said decision was rendered and the question raised and decided in that case are entirely different. In that case their Lordships were construing the expression "the date of decree" occurring in Article 182 of the old Limitation Act. The first petition for execution in that case was not filed within the period prescribed under Art. 182 of the Limitation Act but was filed within 3 years of the drawing up of the formal decree by the court. In this case admittedly the decree-holders filed two successive execution petitions within time, and the said execution cases were dismissed for no fault of the decree-holders as stated above, and the judgment-debtors successively opposed the execution of the decree on the ground of the defective decree, and the court, finding that the decrees prepared were not in order, dismissed the execution cases and amended the decrees from time to time, and the matter relating to the preparation of a proper decree remained pending in different courts till 23-6-70, soon whereafter the present execution case was filed by the decree-holders. As the decision in Ramachandra Mardaray Deo's case is distinguishable on the

above-mentioned grounds we do not consider it safe to apply that decision to decide the precise point arising for consideration on the peculiar facts of this case. The salutary observation of the Supreme Court in Jagat Dhish Bhargava's case (AIR 1961 SC 832), that the litigant deserves to be protected against the default committed or negligence shown by the court or its officers in the discharge of their duty, is directly applicable to this case. In the facts and circumstances of this case the decree-holders deserve to be protected against the default committed or negligence of the court or its officers in the preparation of the formal decree, and so the present execution case instituted in 1970 cannot be stalled under the provisions of S. 48 C.P.C. To thwart such an execution proceeding will amount to travesty of justice and would burlesque the provisions of S. 48 C.P.C.

8. On the above considerations, we do not find any merit in this appeal and it is accordingly dismissed with costs.

J. K. MOHANTY, J.:— I agree.

Appeal dismissed.

AIR 1979 ORISSA 181

B. K. RAY AND J. K. MOHANTY, JJ.

Radhamohan Dev and another, Appellants v. Nabakishore Naik and others, Respondents.

First Appeal No. 12 of 1970, D/- 18-5-1979.*

Civil P. C. (1908), S. 92 — Religious endowment — Private Trust — Mismanagement and maladministration by trustee — Suit lies under S. 92 — Court can form a proper scheme for managing the affairs of the endowment. (Hindu Law — Religious and charitable endowments). (Paras 9, 10)

Cases Referred: Chronological	Paras
AIR 1968 SC 915	8A
(1937) 41 Cal WN 728: AIR 1937 Cal 338	8A
AIR 1925 PC 139: 23 All LJ 537	8A
AIR 1920 Cal 210	8A

B. K. Pal, B. Pal and A. Mohanty, for Appellants; R. N. Sinha, S. N. Sinha and P. K. Routray, for Respondents.

*(Against order of G. H. Panda, Addl. Sub. J., Puri, D/- 17-9-1969.)

J. K. MOHANTY, J.:— Plaintiffs, whose suit has been decreed in part by the Subordinate Judge, Puri in O. S. No. 4/61 of 1969/66 (I), have preferred this appeal against that part of the decree which has gone against them.

2. Plaintiff No. 2 Parbati Dei claiming herself as a marfatdar of the family deity Sri Radhamohan Dev (plaintiff No. 1) filed the suit for giving her 4 annas share in the sebayati right of plaintiff No. 1; for partition of the sebayati interest of herself and of defendants Nos. 1 to 6 or, in the alternative, for joint possession of all the deity's properties described in Schs. 'A' and 'B' of the plaint; for framing of a scheme for the proper management of the affairs of plaintiff No. 1 by allowing each of the sebayats to have his term in proportion to his right over the endowed properties; for setting aside the alienations of the devottar properties effected by defendants Nos. 2 and 3 in favour of defendants Nos. 7 to 9 which are described in schedule 'C' of the plaint; for recovery of possession of the properties described in Schedule 'C' of the plaint; for a direction to defendant No. 3 to furnish accounts of the deity's properties from the date of his management i.e. 30-8-63 till the date of filing of the suit; for awarding costs of the suit; and for an injunction against defendant No. 3 not to alienate any of the deity's properties.

3. The case as disclosed from the plaint is as follows: Plaintiff No. 1 is the family deity of plaintiff No. 2 and defendants Nos. 1 to 6. Plaintiff No. 2 is the daughter of late Bharat Naik, who was one of the founders of the deity. Bharat Naik's son is Nabakishore (defendant No. 1). Bharat Naik's brother was Babajee. Babajee's two sons are Biswanath (defendant No. 3) and Kasinath (defendant No. 2) and two daughters are Nilamani (defendant No. 5) and Ujyolmani (defendant No. 6). Defendant No. 4 Radhamani is the widow of Babajee. Bharat and Babajee continued to live jointly after the death of their father Brundaban Naik. They by their industry and perseverance acquired huge landed properties which were their secular properties. As they were men of religious temperament, they installed plaintiff No. 1 as the family deity and purchased large ex-

tent of immovable properties in the name of plaintiff No. 1. They also acquired huge moveable properties for the use of the deity and dedicated both moveable and immovable properties to plaintiff No. 1 which are fully described in Schedules 'A' and 'B' of the plaint and Sch. 'A' properties stood recorded in the revenue papers and municipal records in the name of plaintiff No. 1. After the death of Bharat Naik in 1960, defendant No. 1 and Babajee and his sons, effected partition of their secular properties by a deed dated 30-8-63. But at the time of partition, plaintiff No. 2 was not given any share nor she was consulted. On her demand for a share, defendant No. 1 agreed and executed a deed of partition in her favour on 28-3-66. Hence she (plaintiff No. 2) got her due share from the family properties which were secular in character. Bharat and Babaji, who were the founders of plaintiff No. 1, continued to exercise the right of sebayats of the deity till their death. During the lifetime of Bharat and Babaji, as they became old and unable to manage the affairs of the deity and the endowed properties, they on 26-12-57/16-1-58 executed a registered deed (Ext. 1) in favour of defendants 1 and 3 for the management of the endowed properties and the affairs of the deity. The said document was only a power of attorney and by that the founders did not cease to have any interest as sebayats over the deity's affairs. As both the founders continued to be the sebayats of the deity till their death, the plaintiff No. 2 is entitled to succeed to the sebayati right of her father and as such she had 4 annas interest in the sebayati right of the family deity. After the death of Bharat, on 30-8-1963 Babajee and defendants 1 and 2 executed another registered deed styled as "Seba Samarpana Patra" (Ext. 4) in favour of defendant No. 3. It is mentioned in the said deed that the three executants had no time to look after the management of the endowment and as such they transferred their sebayati rights in favour of defendant No. 3, who was considered to have more time to look after the sebapuja of the deity. Though styled as "Seba Samarpana Patra", the document was only a power of attorney and as the plaintiff No. 2 is not a party to the deed, her sebayati interest is not affected by the execution of such a deed by other defendants. The deity has vast landed properties to the extent of 73 acres which are fully described in Schedule 'A' of the plaintiff. The income of the landed properties was quite sufficient for the maintenance of the deity's affairs and since the installation, the deity was never in want, rather there was surplus from the income of the properties. Defendant No. 3 after taking over management is not incurring the prescribed expenditure for the daily and periodical Nities of the deity, but he is spending the income of deity for his own personal purposes and is asserting his personal right over the deity's properties. Defendant No. 3 and his brother defendant No. 2 have alienated the properties of the deity in favour of defendant Nos. 7 and 9 which are fully described in Schedule 'C' of the plaint. As the properties are devottar properties and as the deity has no want, the said alienations are invalid and are to be set aside. As the defendant No. 3 is mismanaging the affairs of the deity, and he is out to sell the other properties of the deity, the plaintiff No. 2 was obliged to file the suit for the aforesaid reliefs.

4. Only defendant No. 3 contested the suit and the other defendants remained ex parte. Defendant No. 3 in his written statement stated as follows: Admittedly Bharat and Babajee were the founders of the family deity and they built the temple to consecrate plaintiff No. 1 and settle the properties with the deity. Both the founders executed a registered deed (Ext. 1) whereunder defendants 1 and 3 became the sole trustees of the deity and the entire management of the deity's affairs. So defendant Nos. 1 and 3 in their turn were also authorised to nominate their successors and as such the founders had no powers in them and they could not have any residuary control, right, title or interest in respect of such marfatdari right of plaintiff No. 1. It is on account of this Bharat, the father of plaintiff No. 2 had absolutely no interest over the sebayati right of plaintiff No. 1 and the plaintiff No. 2 has no interest in the affairs of plaintiff No. 1 and hence the

suit as laid is not maintainable. It is alleged that the plaintiff No. 2 appears to have been set up by some interested persons to lay a false claim to the properties. Defendants 1 and 3 were appointed as the trustees by the trust deed dated 26-12-1957 and they took over management of the deity's affairs. Defendant No. 1, one of the trustees, has transferred all his interest in favour of defendant No. 3 by another Seba Samarpan Patra on 30-8-1963 (Ext. 4) to which the other members of the family, namely, the father of defendant No. 3 and his brothers and the mother of defendant No. 1, gave their consent. Hence after 30-8-1963 defendant No. 3 is the sole trustee of the endowed properties and none else has any interest therein. Defendant No. 3 has denied all the plaint allegations regarding mismanagement etc. and asserted that the seba puja and the Nities are being performed as usual and he is not liable to render accounts to plaintiff No. 2 as she has no interest in the endowment. Defendant No. 3 specifically pleaded that the properties described in Schedule 'C' have been alienated in the best interest of the deity and that cannot be set aside. As plaintiff No. 2 has no interest in the deity and its affairs, her suit on false averments should be dismissed with costs.

5. Learned trial court's findings are as follows:—

(1) That the dedication made in favour of the deity by the founders is absolute and the preperties are absolute devottar properties.

(2) That the plaintiff No. 2 has no right, title or interest over the deity's sebayati right as her father alienated the same under Ext. 1.

(3) That the plaintiff No. 2 being a female member of the founders' family, she has an interest in the worship and maintenance of the deity and she has a right to challenge the alienations of the deity's properties and to that extent the plaintiff's suit is maintainable.

(4) That the defendants 1 and 3 are the real sebayats, but the claim of defendant No. 3 to be the sole trustee is left open to be decided in a properly constituted suit.

(5) That the alienation by defendant No. 3 under the sale deed Ext. 2/b in favour of defendant No. 7 and the alienations by defendant No. 2 under Ext. 2 in favour of defendant No. 9 and under Ext. 2/e in favour of defendant No. 8 out of the properties of the deity mentioned in Schedule 'C' of the plaint were invalid and are to be set aside and the deity is to recover possession of the properties by ejecting the alienees; and

(6) That the evidence of mismanagement by defendant No. 3 is very vague and it cannot be said that the allegation of mismanagement is established and, therefore, the question of framing the scheme does not arise.

On the above findings the trial court decreed the plaintiff's suit in part and held:—

"The plaintiff's prayer for a declaration that the transfers effected by the defendants Nos. 2 and 3 in favour of defendants Nos. 7 to 9 as fully described in Sch. 'C' is not binding on the deity i. e. plaintiff No. 1, is hereby allowed and the deity to recover the properties by ejecting the purchasers therefrom. The plaintiff's prayer for declaration of her Sebayati right to the extent of 4 ans., and for framing of a scheme is hereby disallowed."

6. The appellants have filed this appeal against the decision of the Subordinate Judge rejecting the plaintiff No. 2's claim for declaration of her sebayati right to the extent of four annas of the suit endowment and refusing the prayer to frame a scheme for the proper management of the affairs of plaintiff No. 1, as would appear from the appeal memo.

7. During argument Mr. Pal, learned counsel for the appellants, confined his argument mainly to the question that the allegation of mismanagement has been proved by overwhelming evidence and a case has been made out for framing a scheme for the proper management of the affairs of plaintiff No. 1 and the learned court has illegally rejected the claim of the plaintiffs.

Mr. Sinha, learned counsel for the respondent No. 3 (defendant No. 3 in the court below), on the other hand, contended that plaintiff No. 2 has no locus standi to file the suit on behalf of plaintiff No. 1 as she has no inter-

est in the deity or in its affairs and as such the lower court has rightly rejected the claim of plaintiff No. 2 for a declaration that she has interest to the extent of 4 annas share in the sebayati right and the plaintiffs having failed to prove mismanagement, the question of framing a scheme does not arise and moreover this being a private endowment, the court has no jurisdiction to frame a scheme, as prayed for.

8. Mr. Pal in order to substantiate his case of mismanagement contends, firstly, that the learned court has held that the alienation made by defendant No. 3 under Ext. 2/b is not for necessity of the deity and has set aside the alienation of the properties conveyed under Ext. 2/b as not binding on the deity. Similarly the learned court has also held that the properties alienated under Exts. 2 and 2/b by defendant No. 2 were devottar properties and the alienations were not made for the necessity of the deity and has set aside the same and allowed the deity to recover the properties by ejecting the purchasers therefrom. To add to this, defendant No. 3 in his written statement in paragraph 15 has asserted that the alienations of Schedule 'C' properties are valid and are in the interest of the deity and in any event plaintiff No. 2 is not entitled to question the same. Thus defendant No. 3 not only asserted that the alienations made by him are valid, but also has claimed that the alienations made by defendant No. 2, who is a stranger are also valid. On the above grounds alone, the lower court should have held that the properties of the deity have been mismanaged and are not safe in the hands of defendant No. 3 and should have directed framing of a scheme. Secondly, that defendant No. 3, who was examined as D. W. 7, in cross-examination has stated:—

"It is not a fact that the deity is family deity."

Thirdly, that defendant No. 3 after taking over management is not performing daily seba puja and Nities regularly and also is not performing the periodical festival Nities in the manner as it was being performed, and is spending the income from the properties of the deity for his own personal purposes. In support of this contention, Mr. Pal referred to the evidence of P. W. 12, who has stated:—

"The usual nities and the festivals of the deity are not being done."

Plaintiff No. 2, who was examined as P. W. 10 has stated:—

"The defendant No. 3 after taking up management has stopped all the festive occasions. He has stopped the Arua bhog by one time. There were temple servants and they have been disbanded.

xx xx xx xx

Now a days Niti is being performed in the morning and the evening Niti has been discontinued."

D. W. 2, the defendants' own witness has supported the above statements of P. Ws. 10 and 12 and has stated:—

"Now a days the seba puja is not being done in the manner in which manner it was being performed during the lifetime of Bharat Mahajan."

Fourthly, that though defendant No. 3 was called upon by the plaintiffs to produce the accounts of the deity's income and expenditure, he did not produce the same and gave a false explanation that those were with his lawyer and this fact he admits that he has not informed either to the plaintiff or to the court.

In reply, Mr. Sinha submitted that the property alienated under Ext. 2/b is the only instance of transfer. The property, which was a small house and was yelding no profit, was sold to meet the expenses of repairing the temple and for acquiring a land adjacent to the Thakur's garden, and the alienation was for necessity. This will be evident from the evidence of defendant No. 3 (D. W. 7) and from Ext. 2/b. This belated explanation given by defendant No. 3 in his defence was not in the pleadings and appears to be an afterthought and cannot be accepted. Mr. Sinha then submitted that the Nities are being performed regularly and the evidence of the witnesses should not be believed and further defendant No. 3 has not denied that plaintiff No. 1 is not the family deity.

Considering the aforesaid argument of the parties and the evidence on record, we have no doubt in our mind that the sebapuja and the festivals of the deity are not being performed in the manner in which they were being

done and the allegation of mismanagement has been fully established.

8A. Mr. Sinha further submitted that this, being a private devottar Section 92, Civil Procedure Code does not apply to this case and the civil court has no jurisdiction to frame a scheme for the management of the same.

In reply, Mr. Pal referred to Hindu Law of Religious and Charitable Trusts, Third Edition, by Hon'ble Mr. Justice B. K. Mukherjea, page 387 wherein it has been observed:—

"The question whether a suit for framing of a scheme in a family debuttar is at all entertainable by a civil court was elaborately discussed by a Division Bench of the Calcutta High Court in the case of Bimal Krishna v. Iswar Radha ((1937) 41 Cal WN 728) and it was held that a scheme for administration of a private debutter could be framed by a civil court."

In the same page it has been further observed:—

"If a shebait has improperly alienated a trust property, a suit can be brought, by any person interested, for a declaration that such alienation is not binding on the deity."

At page 389 it has also been observed:—

"It has now been decided in a number of authorities that in the case of private charities and religious trusts, the members of the family have the right to move the court for redress, and that it is open to the court in those proceedings to frame a scheme for their administration."

In a decision reported in AIR 1968 SC 915 at p. 918 (Thenappa Chettiar v. Karuppan Chettiar) the Supreme Court has observed:—

"We proceed to consider the next question arising in the appeal, viz., whether the plaintiffs are entitled to ask for the settlement of a scheme even on the assumption that they were not co-founders of the trust. The parties in the case have proceeded on the footing that the trust is a private trust, but the authorities establish that even in the case of a private trust a suit can be filed for the removal of the trustee or for settlement of a scheme for the purpose of effectively carrying out the objects of the trust. If there is a breach of trust or mismanagement on the part of the trustee, a suit can be brought in a civil court by any person interested for the removal of the trustee and for the proper administration of the endowment. — (See, for example, Pramatha Nath Mullick's case, 52 Ind App 245 : (AIR 1925 PC 139) and Mahonar Mookerjee v. Peary Mohan, 24 Cal WN 478 : (AIR 1920 Cal 210). There are also authorities to the effect that Civil Court may frame a scheme in the case of a private endowment at the instance of the parties interested. The question has been discussed by the Calcutta High Court in Bimal Krishna's case, 41 Cal WN 728 : (AIR 1937 Cal 338) and it was held in that case that a scheme for the administration of a private endowment can be framed by a Civil Court. Mookerjee, J. observed in that case that in India the Crown is the constitutional protector of all infants and as the deity occupies in law the position of an infant, the shebaits who represent the deity are entitled to seek the assistance of the Court in case of mismanagment, fraud or maladministration on the part of the shebait and to have a proper scheme for management framed for the administration of the private trust. In Pramatha Nath Mullick's case, 52 Ind App 245 : (AIR 1925 PC 139) to which we have already made reference, the Judicial Committee itself directed the framing of a scheme in the case of a private endowment and the case was expressly remanded to the trial court for that purpose. In the present case the appellants being contributors to the trust are interested in the proper administration of the trust and in our opinion, they have a sufficient right to bring a suit in a Civil Court in case there is mismanagement or breach of trust on the part of the managing trustee and for framing of a scheme."

In the decision reported in AIR 1925 PC 139 : 52 Ind App 245 (Pramatha Nath Mullick v. Pradyumna Kumar Mullick) to which reference has been made by the Supreme Court in the case reported in AIR 1968 SC 915 (supra) it has been held:—

"that the will of the idol as to its location must be respected, and that accordingly the suit should be remit-

ted in order that the idol might appear by a disinterested next friend to be appointed by the Court; that the female members of the family, having the right to participate in the worship, should be joined; and that a scheme for regulating the worship should be framed."

In view of the above discussion, we are of the view that a scheme can be framed even in the case of a private devottar. Mr. Pal next contended that the founders Bharat and Babajee did not appoint defendants 1 and 3 as Sebayats at the time of dedication. Ext. 1 in which defendants 1 and 3 were appointed as sebayats was executed much after in the year 1957 i.e. on 26-12-1957. So it should be deemed that plaintiff No. 2's father continued as a sebayat till his death. This contention of Mr. Pal is unfounded and cannot be accepted in view of the settled principle of law as has been observed in Mukherjee's Hindu Law of Religious and Charitable Trusts, Third Edition, at page 154 which is quoted below:—

"When a man founds a deity, then if he does not appoint a Shebait he himself becomes responsible for the services of the deity. This responsibility is often maintained by a Hindu either by the personal performance of religious duties, or in the case of Sudras by the employment of a Brahmin priest. Even if no Shebait is appointed at the time of dedication, the founder may exercise this power any time before his death and failing him the power can be exercised by his successors as well."

9. The learned lower court has held that the suit is maintainable by plaintiff No. 2 as she is a person interested for the deity. In clause 15 of Ext. 1 it has been mentioned that if any of the parties to the deed or their heirs due to any unforeseen circumstances becomes poor and unable to maintain himself, he will have a right to take the Prasad from out of the offerings of the deity every day. So it cannot be disputed that plaintiff No. 2 is a person interested for the proper administration of the endowment.

10. In view of the aforesaid findings it has been clearly established that the plaintiff No. 2 is entitled to seek the assistance of the court due to the mismanagement and maladministration on the part of the Sebait and to have a proper scheme for management framed for the administration of the affairs of plaintiff No. 1 and its endowment. The appeal is, therefore, allowed to the extent that the defendant No. 3 is removed from the Sebaitship and that a proper scheme for the management of plaintiff No. 1 and its endowment be framed by the Subordinate Judge in consultation with plaintiff No. 2 and defendants Nos. 1 to 6.

11. In the circumstances, there will be no order for costs.

B. K. RAY, J.:— I agree.

Order accordingly.

AIR 1979 ORISSA 186

N. K. DAS J.

S. S. Sahu, Appellant v. Hariprasad Saha and another, Respondents.

Misc. Appeal No. 63 of 1979, D/- 14-5-1979.*

(A) Arbitration Act (1940), S. 34 — Stay of suit — Discretionary — Cannot be claimed as of right — Defendant seeking adjournment to file written statement and is aware of contents of plaint — Defendant, held, not entitled to the discretion of court for stay of the suit. (Paras 5, 6)

(B) Arbitration Act (1940), Ss. 39, 34 — Appeal against order refusing to stay suits — Interference — Unless trial Court's exercise of discretion appears to be capricious or unreasonable, its order will not be interfered with. (Para 7)

Cases Referred: Chronological Paras

AIR 1973 SC 2071	5
(1972) 1 Cut WR 264	5
AIR 1967 SC 249	7
(1965) 31 Cut LT 596 (Orissa)	5
AIR 1960 SC 1156	5, 7
AIR 1957 All 91: 1956 All LJ 841	5
AIR 1955 SC 53	5
1942 AC 130: (1941) 2 All ER 245, Osenton & Co. v. Johnston	7
1896 AC 1: 65 LJ QB 166, Ford's Hotel Co. Ltd. v. Bartlett	5

R. Mohanty, N. Patra A. C. Mohanty and P. K. Misra, for Appellant; S. Mohanti and Prasanta Mohanty, for Respondents.

*(Against order of S. K. Panda Sub. J. Baripada, D/- 31-3-1979.)

GW/GW/D358/79/GSN/SNV

JUDGMENT:— The defendant in a suit for dissolution of partnership is in appeal against rejection of a petition under S. 34 of the Arbitration Act praying to stay the suit.

2. The plaintiffs and defendant constituted the partnership in the name and style of "Shri Shibsankar Saha & Brothers." The plaintiffs filed the suit for dissolution of the partnership and for rendition of accounts. There are charges of misappropriation of the partnership money and violation of the conditions of the partnership and mismanagement against the defendant who is the Managing Partner. A petition was filed for appointment of receiver on the allegation of mismanagement. The defendant took a couple of adjournments to file written statement and objection to the petition for appointment of receiver. Ultimately he filed a petition under S. 34 of the Arbitration Act. The main grounds (sic) on which the partnership deed provided for settlement of disputes by arbitration and hence the suit should be stayed and the matter should be left to the decision of the domestic forum.

3. The learned Subordinate Judge has rejected this petition on the ground that the defendant had already taken steps for progress of the suit and the allegation of misappropriation and mismanagement should be tried by a Civil Court which is discretionary on the part of the court either to stay or not according to the facts and circumstances of each particular case.

4. It is not disputed that the defendant had taken time to file written statement. It is contended by Mr. Mohanty, the learned counsel for the appellant, that the defendant had no sufficient time to get acquainted with the plaintiff's case and, as such, the petition under S. 34 of the Arbitration Act should be allowed even though the defendant had taken steps for progress of the suit and that would not stand in his way. Such a stand has not been taken in the petition filed before the court below. The defendant in his petition under S. 34 of the Arbitration Act has contended that the allegations against him came to his knowledge after the institution of the suit when he was served with summons in the case and those allegations are false and as there is a specific arbitration clause as per para 13 of the agreement, the plaintiffs have no locus standi to file the suit and also the charges and allegations against the defendant come under the purview of cl. 13 of the agreement. On these grounds, he has sought to stay further proceedings of the suit. From the contents of the petition, it would appear that all the allegations made by the plaintiffs were known to the defendant when he received the summons in the case. Even after receiving the summons and notice, he filed petition and asked the Court to grant time to file written statement and time was accordingly granted.

5. It is well settled that the leave to be granted by the Court under S. 34 of the Arbitration Act is discretionary, and a party cannot claim it as of right. In the Printers (Mysore) Private Ltd. v. Pothan Joseph, AIR 1960 SC 1156, the Supreme Court has held that the power to stay legal proceedings under S. 34 is discretionary, and so a party to an arbitration agreement against whom legal proceedings have been commenced cannot, by relying on the arbitration agreement, claim the stay of legal proceedings instituted in a Court, as a matter of right. However, the discretion vested in the Court must be properly and judicially exercised. Ordinarily the Court would direct the parties to go before the tribunal of their choice and stay the legal proceedings instituted before it by one of them. It would be difficult, and it is indeed inexpedient, to lay down any inflexible rules which should govern the exercise of the said discretion. It has been further held in that case that if fraud or dishonesty is alleged against a party it may be open to the party whose character is impeached to claim that it should be given an opportunity to vindicate its character in an open trial before the court rather than before the domestic tribunal, and in a proper case the court may consider that fact as relevant for deciding whether stay should be granted or not.

Relying on the decision Anderson Wright Ltd. v. Moran & Co., AIR 1955 SC 53, this Court in Dalai Raman v. Radhamohan Samantaray (1965) 31 Cut LT 596, has held that in order that a stay may be granted under S. 34 of the Arbitration Act, it is necessary that four conditions should be fulfilled, which are—

(i) the proceedings must have been commenced by a party to an arbitration agreement;

(ii) the legal proceeding which is sought to be stayed must be in respect of matter agreed to be referred to;

(iii) the applicant for stay must be a party to the legal proceedings and he must have taken no steps in the proceedings after appearance. It is also necessary that he should satisfy the Court not only that he is but also was at the commencement of the proceedings ready and willing to do everything necessary for the proper conduct of the arbitration; and

(iv) the Court must be satisfied that there is no sufficient reason why the matter should not be referred to an arbitration in accordance with the arbitration agreement.

This Court also following the aforesaid decision Printers Private Limited case (supra) has held that the relief for stay of legal proceedings instituted in a Court cannot be claimed as a matter of right. Even if the conditions specified in the section are satisfied, the Court may refuse to grant stay if it is satisfied that there are sufficient reasons why the matter should not be referred in accordance with the arbitration agreement. The power to stay legal proceedings is thus discretionary. The discretion must, however, be properly exercised. No inflexible rule can, however, be laid down to govern the exercise of this discretion. It should be exercised according to commonsense and justice.

In Dalai Raman case the defendants applied for time to file written statement and it was held that the acts on the part of the defendants clearly displayed an unequivocal intention on their part to proceed with the suit, and to give up their right to have the matter disposed of by arbitration clause of the agreement and the application for time to file written statement constituted steps in the proceedings. For the aforesaid finding, this Court relied on Ford's Hotel Co. Ltd. v. Bartlett, (1896) A C. 1, and Union of India v. Hans Raj Gupta & Co. AIR 1957 All 91.

Considering a large number of decisions of different High Courts as well as two decisions of the Supreme Court, this Court has held in Bankey Behari Lal v. Hirendralal Adhikari, (1972) 1 Cut WR 264 that when there are charges of fraud, misconduct, and/or misappropriation against the defendant, the matter is a fit one for being tried in Court and the arbitration proceeding is not a suitable one.

The Supreme Court in The State of U. P., v. Janki Saran Kailash Chandra AIR 1973 SC 2071, has held that taking other steps in the suit proceedings connotes the idea of doing something in aid of the progress of the suit or submitting to the jurisdiction of the Court for the purpose of adjudication of the merits of the controversy in the suit and no discretion is available where application for adjournment for filing a written statement is moved as it amounts to a step in the proceeding.

6. The Supreme Court as well as this Court are consistently of the view that if the defendant asks for adjournment to file written statement, it amounts to taking steps in the proceedings of the suit and, as such, he is not entitled to the discretion of the Court for stay of the suit under S. 34 of the Act.

Considering the facts and circumstances of the present case in the light of the aforesaid principle, it is abundantly clear and also not disputed that the defendant had already asked for adjournment to file his written statement and he was also aware of the contents of the plaint. Therefore, he is not entitled to the discretion of the Court for stay of the suit exercising powers under S. 34 of the Arbitration Act. The trial Court has rightly held that when the defendant has taken steps for progress of the suit, the petition for stay should not be granted and the Court was not inclined to exercise its discretion in favour of the defendant.

7. In the case of Printers Private Limited (supra), it has also been held that it is not ordinarily open to the appellate Court to substitute its own exercise of discretion for that of the trial judge; but if it appears to the appellate Court that in exercising its discretion the trial Court has acted unreasonably or capriciously or has ignored relevant facts and has adopted an unjudicial approach then it would certainly be open to the appellate Court — and in many cases it may be its duty — to interfere with the trial Court's exercise of discretion. In cases falling under this class the exercise of discretion by the trial Court is in law wrongful and improper and that would certainly justify and call for interference from the appellate Court. The same view has also been reiterated by the Supreme Court in the case of Uttar Pradesh Cooperative Federation Ltd. v. Sunder Bros., Delhi, AIR 1967 SC 249. It has been held in that case that where the discretion vested in the Court under S. 34 has been exercised by the lower Court, the appel-

late Court would be slow to interfere with the exercise of their discretion. In dealing with the matter raised before it at the appellate stage, the appellate Court would normally not be justified in interfering with the exercise of the discretion under appeal solely on the ground that if it had considered the matter at the trial stage it may have come to a contrary conclusion. If the discretion has been exercised by the trial Court reasonably and in a judicial manner the fact that the appellate Court would have taken a different view may not justify such interference with the trial Court's exercise of discretion. If it appears to the appellate Court that in exercising its discretion the trial Court has acted unreasonably or capriciously or has ignored relevant facts, then it would be open to the appellate Court to interfere with the trial Court's exercise of discretion. For this view, the Supreme Court has relied on Charles Osenton & Co. v. Johnston, 1942 A. C. 130.

In the instant case, from the order of the trial Court, it does not appear that the Court in exercising its discretion has acted unreasonably or capriciously or that relevant facts have been ignored or an unjudicial approach has been made. The discretion exercised by the trial court does not appear to be wrong in law or improper. In view of the dictum of the Supreme Court as stated above, there is no compelling reason to interfere with the decision of the trial Court.

8. In the result, the appeal fails and is dismissed. In the circumstances of the case, there will be no order as to costs.

Appeal dismissed.

AIR 1979 ORISSA 189

R. N. MISRA AND
P. K. MOHANTI, JJ.

Collector, Cuttack, Appellant v. Anasuya Debi, Respondent.

First Appeal Nos. 250 and 251 of 1970, D/- 30-4-1979.*

Land Acquisition Act (1894), S. 28 — Interest — Possession of land taken prior to notification under the Act — Owner is entitled to claim interest from date of dispossession. AIR 1970 Andh Pra 262 (FB), Rel. on. (Paras 5, 6)

Cases Referred: Chronological Paras

AIR 1970 Andh Pra 262 (FB) 5

*(From decision of J. Tyadi, Sub. J., Cuttack, D/- 8-8-1970.)

GW/HW/D354/79/MDH/VBB

Addl. Govt. Advocate, for Appellant; B. K. Pal and B. Pal, for Respondent.

R. N. MISRA, J.:— These two appeals by the Collector of Cuttack are directed against award of interest from the date of dispossession preceding the notification under S. 4 (1) of the Land Acquisition Act, 1894, in a reference under S. 18 of the Act.

2. The learned Subordinate Judge found that dispossession took place in 1961 but by then there was no notification under the Act though acquisition was contemplated. Learned Additional Government Advocate raises two contentions:—

(i) There is no acceptable evidence of dispossession at any time prior to the notification under S. 4 (1) of the Act; and

(ii) There is no power vested in the court for award of interest from a date prior to the notification.

3. The claimant's husband has been examined as P. W. 1 and has clearly stated:—

"State took possession in Feb. 1961, in advance. A saw mill was started on the land acquired and the same functioned in 1964."

The witness was not cross-examined on the point. The Land Acquisition Officer who has been examined as O. P. W. 1 has said:—

"I do not know when possession was taken."

4. That possession had been taken prior to the notification had been admitted in the reference itself. Against column 16, the following fact has been stated:—

"Possession was taken before initiation of land acquisition proceeding by the Forest Utilisation Officer."

In the circumstances, we affirm the finding of the Subordinate Judge that the claimant had been dispossessed in 1961 as proved by her.

5. From the facts of the case it appears that possession had been taken in contemplation of acquisition under the Act. A Full Bench of the Andhra Pradesh High Court in the case of The Revenue Divisional Officer Guntur v. Vasireddy Rama Bhanu Bhupal, AIR 1970 Andh. Pra. 262, has held:—

"Even assuming that the expression taking possession of the land under S. 28 of the Act, would only mean taking possession of the land under or in pursuance of the Act we do not see any reason why the taking of possession of the land prior

to the Land Acquisition proceedings without any objection by the owner (in this case by private negotiation with his consent) followed by valid proceedings under the Act should not be held to be taking possession of the land under the Act. The Act does not prescribe when the Collector representing the Government should take possession of the land. Under S. 16 of the Act he may take possession after he has made an award, but there is nothing in that section or in any other provision of the Act, which prevents the Collector from taking possession of the land earlier with the consent of the owner. .....

At any rate we are of the opinion that interest is payable on equitable principles on the compensation amount from the date when the owner was deprived of his possession ....."

6. We agree with these observations of the Full Bench and hold that the learned Subordinate Judge was justified in directing interest to be paid from the date of dispossession.

7. There is no merit in either of these appeals and both of them are accordingly dismissed with costs.

P. K. MOHANTI, J.:— I agree.

Appeals dismissed.

AIR 1979 ORISSA 190

S. K. RAY C. J.

Draupadi Patel and others, Petitioners v. Mangal Prasad Patel and another, Opposite Parties.

Civil Revn. No. 409 of 1977, D/- 13-4-1979.*

Orissa Merged Territories (Village Offices Abolition) Act (10 of 1963), S. 13 — Orissa Board of Revenue Act (23 of 1951) S. 7 (1) — Power of review conferred by S. 7 (1) of 1951 Act on Board of Revenue can be exercised by it in respect of orders passed under 1963 Act — Therefore Board can review its order passed in appeal under S. 13 of 1963 Act. (Para 3)

Cases Referred: Chronological Paras
ILR (1974) Cut 777 3

H. Patel and A. K. Tripathy, for Petitioners; P. K. Lenka and S. N. Kar, for Opposite Parties.

ORDER:— This is a revision under S. 13 (3) of the Orissa Merged Territories (Village Offices Abolition) Act, 1963 (hereinafter called the 'Act'). The sole question of law raised is that the Board of Revenue acted without jurisdiction in allowing the review application (Review Case No. 5 of 1977) filed before it by reviewing its own order dated 28-3-1977 under which S. A. No. 43 of 1973 had been dismissed, and then proceeding to direct the Collector to dispose of Review Appeal No. 44 of 1971 on merits. To understand the implication of this question, it is necessary to state briefly the history of this litigation.

2. In a proceeding under S. 5 (1) of the Act, 8.29 acres of Bhogra land in village Mangaspur were settled in favour of one Mangal Prasad Patel of Kurla (hereinafter referred to as Patel of Kurla). This proceeding was contested by one bearing the same name, but of a different village Mangaspur (hereinafter referred to as Patel of Mangaspur). This order of the Tahsildar settling the land with Patel of Kurla was passed on 17-10-1970. Being aggrieved thereby, Patel of Mangaspur preferred Revenue Appeal No. 44 of 1971 before the A. D. M., Sundargarh. This appeal was ultimately dismissed for default on 30-5-1973. An attempt was made to restore the said appeal by filing a petition for restoration registered as Misc. Case No. 7 of 1973, but that attempt ultimately failed as Misc. Case No. 7 of 1973 was dismissed on 1-6-1973 ex parte. Patel of Mangaspur, thereafter preferred Second Appeal No. 43 of 1973 from the order dated 1-6-1973 dismissing Misc. Case No. 7 of 1973, before the Board of Revenue. This Second Appeal No. 43 of 1973 was also dismissed for default on 4-1-1974. Later on, on an application being made in that regard the Second Appeal No. 43 of 1973 was restored to file on 22-3-1974. After restoration, some proceedings were initiated for substitution of the legal representatives of the said respondent, namely, Patel of Kurla. This matter of substitution came up to this Court in C. R. No. 246 of 1975. In accordance with the order passed in that Civil Revision the widow of the deceased Patel of Kurla was impleaded making the Second Appeal No. 43 of 1973 ready for hearing. This Second Appeal was dismissed by the Board of Revenue on 28-3-1977. Thereafter an application for reviewing the same was filed on 24-9-1977 which was registered as Review Case No. 5 of 1977. The Board of Revenue by the impugned order dated 24-9-1977 not

*(From order of K. S. Raghupathi Member, Board of Revenue Orissa, D/- 24-9-1977.)

only reviewed its previous order dated 28-3-1977 but directed the Collector to hear Revenue Appeal No. 44 of 1977 on merits.

3. There is no express provision either in the Act or in the rules framed thereunder, conferring power of review on the Board of Revenue hearing appeal under S. 13 of the Act. It is well settled that the power of review cannot be exercised unless statute confers such power. If the matter stood at this stage, then Mr. Patel's contention could be upheld. But there is the Orissa Board of Revenue Act, 1951 (Act 23 of 1951) which confers power of review on the Board of Revenue under S. 7 (1) thereof. The only restriction is that in exercise of such power no order shall be varied or reversed unless notice has been given to the parties interested to appear and be heard in support of such order. The power of the Board of Revenue under this section was considered by this Court in the case of Ramakanta v. Gaji Pratap Singh (ILR (1974) Cut 777). The question was whether the Board of Revenue exercising its jurisdiction under the Orissa Survey and Settlement Act, 1958 had power of review. It was held that the power of review conferred on the Board of Revenue was very wide and was not restricted by any limitations. Reading the Orissa Survey and Settlement Act, 1958 along with the Orissa Board of Revenue Act, 1951, it was held that the power of review conferred by the Orissa Board of Revenue Act on the Board of Revenue can be exercised in respect of orders passed under the Orissa Survey and Settlement Act. In the instant case, the first order of the Board of Revenue was passed under the Act. So reading the provisions of that Act along with the Orissa Board of Revenue Act, 1951 there can be no escape from the conclusion that the power of review conferred by the Orissa Board of Revenue Act can be exercised in respect of orders passed under the Act. The Board of Revenue therefore, had power to review.

4. It is now agreed by both parties that the petition for restoration of Misc. Case No. 7 of 1973 was rejected by the A. D. M., Sundargarh ex parte without notice to the petitioner. By the impugned order, the Board of Revenue has not only allowed Second Appeal No. 43 of 1973 but also Misc. Case No. 7 of 1973 which had been dismissed ex parte and has directed the Collector to hear Revenue Appeal No. 44 of 1971 on merits. The petitioner feels rightly aggrieved by this order by which Misc. Case No. 7 of 1973 has been allowed without giving him any opportunity to be heard in that Misc. Case and, consequently, he also feels aggrieved by the last part of the order directing the Collector to dispose of Revenue Appeal No. 44 of 1971 on merits. I would, therefore, while maintaining the order allowing review application, modify the same to this extent that the A. D. M. is to rehear Misc. Case No. 7 of 1973 after notice to the petitioner and by giving him adequate opportunity to contest the same, and, in case the A. D. M. was satisfied that there were good grounds for restoration, it would be open to him to restore Revenue Appeal No. 44 of 1971 and then to hear it after notice to all parties concerned. That part of the order of the Board of Revenue allowing Misc. Case No. 7 of 1973, restoring Revenue Appeal No. 44 of 1971 and directing the A. D. M. to dispose it of on merits is bad in law and is cancelled.

Civil Revision is partly allowed. There would be no order as to costs.

Revision partly allowed.

AIR 1979 ORISSA 191

K. B. PANDA, J.

Ratna Manjari Das, Petitioner v. Dr. Bhaskar Chandra Das, Opposite Party.

Civil Revn. No. 485 of 1978, D/- 1-3-1979.*

Limitation Act (1963), Sec. 14 read with Section 5 — High Court ordering return of memo of appeal for presentation before proper forum — Delay in taking back memorandum of appeal — Condonation — Validity.

Where the High Court passed an order for return of appeal for presentation in proper Court and the appellant tried to explain the delay in taking back the memorandum of appeal by such vague allegations that "he was busy all along in his official works" and as such was unable to come to instruct his advocate, the same could not be a sufficient ground for extension of time under Section 5 and the delay in obtaining the memorandum of appeal and presenting it in proper Court could not be condoned. AIR 1962 SC 361, Foll. AIR 1963 Pat 407; AIR 1954 All 199; AIR 1961 Raj 162; AIR 1971 Madh Pra

*(Against order of J. Tyadi, Addl. Dist. J., Cuttack, D/- 11-9-1978.)

EW/FW/C411/79/JJS/SNV

243 and AIR 1971 All 234 Disting. (Para 4)

Cases Referred : Chronological Paras

AIR 1978 Orissa 163 1
(1978) F. A. No. 43 of 1976, D/- 27-2-1978 (Orissa) 1
AIR 1971 All 234 5, 6
AIR 1971 Madh Pra 243 5, 6
AIR 1963 Pat 407 5
AIR 1962 SC 361 : 1961 All LJ 815 4
AIR 1961 Raj 162 5
AIR 1954 All 199 5

R. Ch. Mohanty and J. P. Das, for Petitioner; M. Patra and B. Dagara, for Opposite Party.

ORDER:— The sole point for consideration in this civil revision is as to when limitation will run when a court of appeal has ordered return of the memorandum of appeal to be presented in the proper forum arising in the following circumstances: The husband-opposite party had filed a suit (O. S. No. 12 of 1969) under S. 13 (1) (v) and Section 10 (d) of the Hindu Marriage Act, 1955 (Act 25 of 1955) for annulment of his marriage with the petitioner, or in the alternative for a divorce or for judicial separation on the ground that the wife was suffering from venereal disease in a communicable form, the disease not having been contacted from the husband-opposite party.

The main issue in the suit was No. 4 and finally the trying Court held that—

"18. Under the circumstances, when I fail to satisfy myself as required under Section 13 of the Hindu Marriage Act that the respondent was suffering from a disease like syphilis in a communicable form as alleged by the petitioner against her, no decree either under Section 10 (1) (d) or under S. 13 (1) (v) can be passed against the respondent and as such the petition for such a relief by the petitioner is not maintainable. These issues are answered accordingly."

Consequently, the suit was dismissed by the learned Subordinate Judge, Cuttack on 10-11-1975 and a decree followed on 15-11-1975. The husband-opposite party preferred an appeal (First Appeal No. 43 of 1976) before High Court on 16-2-1976.

A Division Bench of this Court while disposing of the matter on 27-2-1978 observed as follows:

"11. 27-2-78. This appeal by the husband is directed against the judgment and decree of the learned Subordinate Judge of Cuttack dismissing his application for dissolution of marriage and in the alternative decreeing either divorce or judicial separation. In the memorandum of this appeal, it has been stated that the appeal is valued at Rs. 1.50 which was the valuation of the original suit. On verification of the record, we find that no such valuation had been put and this statement is a mistake. Yet, for the reasons indicated in our order dated 6-2-1978 in F. A. No. 83 of 1976 : (AIR 1978 Orissa 163) (Nrusingh Charan Nayak v. Smt. Hemant Kumari Nayak) along with which this appeal regarding maintainability had been heard, we hold, that in the absence of a valuation above Rs. 5,000/- in the memorandum of appeal, this appeal does not lie to this Court. We accordingly direct that the memorandum of appeal be returned to the filing advocate for presentation in proper Court."

(Vide judgment D/: 27-2-78 in F. A. No. 43 of 1976)

The Advocate for the appellant took return of the memorandum of appeal on 20-3-1978 and the endorsement of the Deputy Registrar is thus:—

"Returned to the filing adv. for proper presentation in pursuance of Court's order No. 11 D/- 27-2-1978."

Admittedly that very day, that is, 20-3-1978, the appeal was presented in the Court of the District Judge, Cuttack by the Advocate Shri B. Dagara with an application under Section 14 read with Section 5 of the Indian Limitation Act for condonation of delay. The two material paragraphs of that petition are as follows:—

"4. That the appellant has been prosecuting the appeal with due diligence in the Hon'ble Court in good faith that appeal is to lie to the Hon'ble Court against the original order passed under Hindu Marriage Act and subsequently it was found that the Hon'ble Court has got defect of jurisdiction/is unable to entertain the appeal.

5. That as the appellant was busy all along in his official works he was unable to come to Cuttack to instruct his Advocate to return the appeal memo from the Hon'ble High Court and to file the same before this Hon'ble Court."

When the question of limitation was raised on behalf of the wife-respondent (petitioner herein), the learned District Judge disposed it of in favour of the

husband-appellant (opposite party herein) with the following findings:

"The contention of the appellant that the appeal was filed as per the practice prevalent prior to 1978 remains uncontroverted. As per the certified copy of the order dated 27-2-78 passed in F. A. No. 43 of 1976 the first appeal has been returned to the party for the reasons indicated in F. A. No. 83 of 1976 which was decided on 6-2-1978 : (AIR 1978 Orissa 163). Therefore the period during which the first appeal was pending before the Hon'ble High Court should be taken to be the period the appellant was prosecuting the appeal with due diligence in good faith and the period is to be condoned u/s. 14 of the Limitation Act. The appellant's contention is that he is a Government servant remaining outside Cuttack and therefore there was little delay in taking return of the appeal memo from the Hon'ble High Court and filing it in the District Court. According to him during the period he was busy all along in his official work. This statement of the appellant on oath is not controverted by any counter statement on oath. Admittedly the appellant is a Lecturer and his statement that he was busy cannot be disbelieved in the absence of any contrary material. The delay is only two months and odd and it can be condoned u/s. 5 of the Limitation Act as the appellant had sufficient cause for not presenting it within time."

(vide Judgment D/- 11-9-78 of D. J., Cuttack in M. A. 26/78)

2. According to the learned Counsel for the petitioner, even if the pendency of the appeal in the High Court is excluded under Section 14 of the Limitation Act, yet a period of twenty days remains unexplained. But according to the opposite party-husband, he having taken return of the memorandum of appeal on 20-3-1978 and having presented it before the proper forum, that is, the District Judge that very day, there was no delay at all. Hence the question for consideration is if there has been any delay in presenting the appeal before the District Judge or not.

3. Admittedly the High Court by its order dated 27-2-1978 had ordered return of the memorandum of appeal and presentation before the proper forum as quoted above. Further in view of the observation of the High Court it would be held that the husband-opposite party (appellant) was pursuing his remedy with due diligence in the High Court and so he will get the benefit of Section 14 of the Limitation Act till 27-2-1978. But the further delay on the part of the husband-opposite party in taking back the memorandum of appeal from the High Court and presenting it before the District Judge on 20-3-1978 has to be explained and that the appellant had done that by filing an application under Section 14 read with Section 5 of the Limitation Act, the material paragraphs of which have already been quoted, as also the reasoning of the learned District Judge in condoning the delay, the propriety of which has to be judged.

4. It was contended on behalf of the husband-opposite party that no duty is cast on the opposite party to take back the memorandum of appeal till an endorsement of the office for return of the memorandum of appeal (sic) is dated 20-3-1978, there has been no delay at all in presentation of the memorandum of appeal before the District Judge, that having been done on the same day. In support of this, Mr. Patra, learned Counsel for the husband-opposite party relied on O. 7, R. 10 of the Civil P. C. O. 7, Rule 10 of the new Code as amended by Act 104 of 1976 is subject to the provisions of Rule 10A of O. 7, which postulates an application to be filed by the plaintiff for return of the plaint. The Explanation to R. 10 (1) of O. 7 speaks that a Court of appeal or revision may direct, after setting aside the decree passed in a suit, the return of the plaint. Here the High Court has not set aside the decree passed in the suit and therefore the Explanation is inapplicable.

It was further contended by Mr. Patra on the basis of Section 107 of the Civil P. C. that the appellate Court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by this Code on Courts of original jurisdiction in respect of suits instituted therein and so the provisions made in respect of return of plaints as envisaged under O. 7 Rule 10, C. P. C. or under O. 7, Rule 10A, C. P. C. would be applicable to the instant case. As already indicated, O. 7, R. 10 is subject to O. 7, R. 10A and R. 10A postulates—

"10A. Power of Court to fix a date of appearance in the Court where plaint is to be filed after its return.

(1) Where, in any suit, after the defendant has appeared, the Court is of opinion that the plaint should be returned, it shall, before doing so, intimate its decision to the plaintiff.

(2) Where an intimation is given to the plaintiff under sub-rule (1), the plaintiff may make an application to the Court,—

(a) specifying the Court in which he proposes to present the plaint after its return,

(b) praying that the Court may fix a date for the appearance of the parties in the said Court and

(c) requesting that the notice of the date so fixed may be given to him and to the defendant.

(3) Where an application is made by the plaintiff under sub-rule (2), the Court shall, before returning the plaint and notwithstanding that the order for return of plaint was made by it on the ground that it has no jurisdiction to try the suit,—

(a) fix a date for the appearance of the parties in the Court in which the plaint is proposed to be presented, and

(b) give to the plaintiff and to the defendant notice of such date for appearance.

(4) Where the notice of the date for appearance is given under sub-rule (3),—

(a) it shall not be necessary for the Court in which the plaint is presented after its return, to serve the defendant with a summons for appearance in the suit, unless that Court, for reasons to be recorded, otherwise directs, and

(b) the said notice shall be deemed to be a summons for the appearance of the defendant in the Court in which the plaint is presented on the date so fixed by the Court by which the plaint was returned.

(5) Where the application made by the plaintiff under sub-rule (2) is allowed by the Court, the plaintiff shall not be entitled to appeal against the order returning the plaint."

Evidently, O. 7 Rule 10A speaks of return of plaints only and lays down the manner in which it has to be done. Even if by analogy this is extended to cases of memorandum of appeals, it casts a burden on the appellant to take return of the memorandum of appeal and present it before the proper forum. If Mr. Patra's contention is accepted, it would mean as if the burden lay on the High Court to run after the appellant for returning the memorandum of appeal. As soon as the Court expressed its view on 27-2-1978 that the memorandum of appeal should be filed before the District Judge, it was the duty of the appellant to "take return" of the memorandum of appeal and present it before the District Judge. Evidently that was working in the mind of the appellant when he presented the memorandum of appeal before the District Judge on the 20th March, 1978 with an application for condonation of delay under Section 14 read with Section 5 of the Limitation Act. Therefore, the limited point for consideration is if the delay of 21 days, that is, from 27-2-1978 till 20-3-1978 can be condoned under Section 5 of the Limitation Act. True, the learned lower Court has accepted the grounds of delay, in the application of the appellant to the effect that he was busy in his "official works" and so could not come to High Court to take return of the memorandum of appeal and that having not been controverted the plea of the appellant has been accepted. As the records show, the appellant-husband had been represented by lawyers. It was not necessary that he should personally come and take return of the memorandum of appeal. The affidavit filed by the husband-appellant shows that he is a resident of Vani Bihar, P. S. Sahidnagar, District Puri and as such is not a far off place from the seat of the High Court at Cuttack. Again as the High Court record shows it is his Advocate Mr. Dagara who has taken return of the memorandum of appeal. Thus, there was no difficulty on the part of the husband-appellant to instruct his lawyer to take back the memorandum of appeal and present it in the Court of the District Judge, Cuttack which is intervened by only a road. The vague allegation that he was "busy all along in his official works" and as such was unable to come to Cuttack to instruct his Advocate can hardly be a sufficient ground for extension of time under Section 5 of the Limitation Act. As decided in AIR 1962 SC 361 Ramlal v. Rewa Coalfields Ltd. a right has accrued to the successful party which should not be tinkered with on flimsy grounds. Their Lordships have observed in this context thus:

"In construing Section 5 it is relevant to bear in mind two important considerations. The first consideration is that the expiration of the period of limitation prescribed for making an appeal gives rise to a right in favour of the decree-holder to treat the decree as binding between the parties and this legal right which has accrued to the decree holder by lapse of time should not be light-heartedly disturbed. The other consideration which cannot be ignored is that if sufficient cause for excusing delay is shown, discretion is given to the Court to condone delay and admit the appeal.

It is, however, necessary to emphasise that even after sufficient cause has been shown a party is not entitled to the condonation of delay in question as a matter of right. The proof of a sufficient cause is a condition precedent for the exercise of the discretionary jurisdiction vested in the court by S. 5. This aspect of the matter naturally introduces the consideration of all relevant facts and it is at this stage that diligence of the party or its bona fides may fall for consideration; but the scope of the enquiry while exercising the discretionary power after sufficient cause is shown would naturally be limited only to such facts as the Court may regard as relevant. It cannot justify an enquiry as to why the party was sitting idle during all the time available to it.

Considerations of bona fides or due diligence are always material and relevant when the Court is dealing with applications made under Section 14 of the Limitation Act. In dealing with such applications the Court is called upon to consider the effect of the combined provisions of Sections 5 and 14. Therefore, considerations which have been expressly made material and relevant by the provisions of Section 14 cannot to the same extent and in the same manner be invoked in dealing with applications which fall to be decided only under Section 5 without reference to Section 14."

5. Mr. Patra, the learned Counsel for the husband-opposite party cited AIR 1963 Pat 407, Firm Pursottam Das Ganpati Rai v. Gulab Khan; AIR 1954 All 199, Ram Lakhan v. Mst. Tulsha; AIR 1961 Raj 162, Ramchandra v. Union of India; AIR 1971 Madh Pra 243, Brij Mohandas Gokulchand v. Narsinghdas Manoharilal and AIR 1971 234, Rikhab Dass v. Smt. Chandro in support of his contention that till the High Court office made the endorsement on 20-3-78 returning the memorandum of appeal time will not run as against his client. The first two cases, namely, AIR 1963 Pat 407 and AIR 1954 All 199 do not relate to the point at issue. So far as the Rajasthan case (AIR 1961 Raj 162) is concerned, it touches the question and decides it against the husband-opposite party in the following manner:—

"In cases where an order for return of the plaint for presentation to the proper Court is passed it cannot be laid down as a broad proposition of law that the proceedings come to an end within the meaning of Expln. 1 to S. 14 when the plaint is actually returned to the plaintiff. If some acts are to be done by the Court for the purpose of returning the plaint and it takes some time after an order for the return of the plaint is passed the proceedings will be deemed to be pending till that date, but it cannot be laid down as a hard and fast rule that the proceedings only come to an end when the plaint is returned to the plaintiff. If the proceedings are therefore kept pending by the plaintiff's own laches he cannot take advantage of the provisions of Sec. 14, Limitation Act. It is only for the period which is required by the Court for returning the plaint after an order has been passed in that behalf that the plaintiffs can claim exclusion."

6. In the instant case, after the order had been passed on 27-2-1978, the Court had nothing to do with the memorandum of appeal and what had been endorsed by the Deputy Registrar is a clerical job mentioned as a token of having returned the memorandum of appeal to the appellant. In the case reported in AIR 1971 Madh Pra 243, the question was regarding return of plaint. In the facts and circumstances of that case it was held—

"No order was passed by the Shivpuri Court giving any direction to the plaintiff to act in any particular manner. On the contrary, it was the plaintiff who moved the Court on 22-4-1963 to return the plaint. The necessary copy was also filed by him on that very date and the plaint was returned. Thus, there were no laches on the part of the plaintiff and he was entitled to the period up to 22-4-1963 when the plaint

was returned as till that date no endorsement was made by the Court on the plaint and the proceedings had not come to an end in that Court."

But here, as already stated, the facts are entirely different.

The point decided in AIR 1971 All 234 also does not come to the assistance of the husband-opposite party. Therein, it has been held that—

"Time between date of order of return of plaint for its presentation in proper Court and date of such presentation is not counted for exclusion except for reasonable time spent for going to place of proper Court."

Delay due to sickness is not also excusable. Here, as already indicated, the Court of the District Judge is just across the road where the High Court is situated and further the Counsel for the husband-opposite party was competent to take back the memorandum of appeal for presentation before the proper forum.

7. On an assessment of the facts of this case, I am unable to hold that the learned District Judge was correct in condoning the delay in filing the memorandum of appeal before it. As such, I would set aside the order of the District Judge and allow the civil revision. Hearing fee Rs. 150/- (Rupees one hundred and fifty only).

Revision allowed.

AIR 1979 ORISSA 196

K. B. PANDA, J.

Indrajit Singh and others, Appellants v. Mirza Jaliluddin Baig and others, Respondents.

Misc. Appeals Nos. 64 and 69 of 1979, D/- 18-6-1979.*

(A) Arbitration Act (1940), Ss. 13, 30 — Award — Validity — Parties participating in arbitration proceedings without demur — Effect.

It is only inherent lack of jurisdiction or illegality of the contract embodying arbitration clause that could invalidate the award and irregularities in procedure if acquiesced in without demur would preclude a party both from challenging the appointment of the arbitration and passing of the Award at a later stage when it finds that the award is not convenient for it. (Para 12)

(B) Arbitration Act (1940), S. 28 — Extension of time for filing award — Grant of — Validity.

The law is well settled that the Court having jurisdiction to entertain applications for filing of award has jurisdiction to grant extension of time under S. 28. (Para 15)

(C) Arbitration Act (1940), Ss. 13, 30 — Arbitration proceedings — Jurisdiction of arbitrator — Scope — Whether dissolution of partnership can be subject-matter of arbitration.

Where in a suit for dissolution of partnership and rendition of accounts of partnership business, the Court referred the dispute as such to arbitration, the arbitrator could not be said to have gone beyond the scope of reference in deciding the question of dissolution when the parties never objected to the decision of the question by the arbitrator. In such a case, it could not be said that dissolution of partnership was entirely a matter within the jurisdiction of the Court and reference of the dispute to the arbitration was bad in law when the High Court in an earlier miscellaneous appeal in the suit by the parties ruled that the same could be decided by the arbitrator. The decision of the High Court being between the same parties was binding on the parties. (Paras 16, 17)

Cases Referred: Chronological	Paras
AIR 1979 Delhi 97	7
AIR 1978 Cal 37	6
AIR 1976 SC 1745	6, 7, 10
AIR 1975 SC 230	7, 11
(1975) 41 Cut LT 714	18
AIR 1973 Ker 237	15
(1973) 39 Cut LT 330 : AIR 1973 Orissa 214	18
(1972) 1 Cut WR 264	17
(1972) 1 Cut WR 951	7, 11
AIR 1968 Pat 150 (FB)	15
AIR 1965 Cal 42	7
AIR 1963 SC 90	6, 10
AIR 1963 Guj 141	6
AIR 1962 SC 1810	6, 10
AIR 1960 SC 629	15
AIR 1958 Cal 415	7
AIR 1954 Orissa 29	15
AIR 1954 Orissa 234	7
AIR 1953 Cal 488	7
AIR 1920 PC 123	7, 10, 11
(1889) 61 LT 629 (CA), Joplin v. Postlethwaite	17
(1876) 3 Ind App 209 (PC)	11

G. Rath, Devanad Misra and Deepak Misra (in M. A. No. 64 of 1979) and

*(Against judgment and decree of R. S. P. Patnaik, Sub-Judge, Cuttack, D/- 20-2-1979).

M. N. Das, M. M. Das and N. M. Misra (in M. A. No. 69 of 1979), for Appellants; B. K. Mohanty, Ch. P. K. Misra, B. P. Das, P. K. Ray, B. K. Misra, R. N. Mohanty No. 2, S. C. Mohapatra, A. K. Sahu, R. C. Patnaik and G. A. R. Dora (in both Appeals) and S. Rath (in M. A. No. 69 of 1979), for Respondents.

JUDGMENT: — These are two Miscellaneous Appeals under S. 39 of the Indian Arbitration Act, 1940 (hereinafter referred to as the Act) against the judgment and decree of the Subordinate Judge, Cuttack dismissing Title Suit No. 167 of 1975 by making the Award a Rule of the Court on 20-2-1979 in the circumstances stated hereunder.

2. Syed Maqusud Ali, appellant in Misc. Appeal No. 69/79 had filed as the sole plaintiff Title Suit No. 167 of 1975 in the Court of the Subordinate Judge, Cuttack for (i) dissolution of the partnership running in the name of "Suraj Talkies"; (ii) for rendition of accounts of the said business by defendants 1 and 2; and (iii) for an injunction restraining defendants 1 and 2 from managing the partnership business. The suit based on a deed of partnership was filed on 17-9-1975. Defendants Nos. 1, 2, 4 and 3 filed petitions under S. 34 of the Act on 18-9-1975, 25-9-1975, 24-10-1975 and 9-1-1976 respectively for staying further proceedings in the suit on the ground that the partnership deed contained an arbitration clause to the following effect:

"That in the event of any dispute between the parties aforesaid touching upon the business of the partnership firm, the same shall be referred to arbitration under the Indian Arbitration Act, 1940." These petitions of defendants 1 to 4 under S. 34 of the Act were registered as Misc. Case No. 21 of 1976 and on contest was rejected by the then Subordinate Judge, on 28-1-1976. But on appeal by the aforesaid defendants, the High Court in Misc. Appeal No. 19 of 1976 reversed the order of the Subordinate Judge and directed disposal of the matter afresh in accordance with law. After remand, the learned Subordinate Judge heard the parties and by his order dated 21-12-1976 allowed the applications under S. 34 of the Act. The operative portion of the said order reads as follows:

"In the result, the petitions filed by defendants 1 to 4 for staying the suit under S. 34 of the Arbitration Act and of the defendant No. 3 for referring the dispute to an Arbitrator to be appointed by the Court are allowed on contest. The suit is therefore stayed under S. 34 of the Arbitration Act. Misc. Case No. 21 of 1976 is allowed on contest. Put up on 8-1-1977 for nomination of an Arbitrator. Parties may come up with a common name for appointment of an Arbitrator in terms of cl. 22 of the Deed of Partnership". (The underlinings are mine) The learned Subordinate Judge thereafter called upon the parties to submit names for appointment of an Arbitrator, but there was no concurrence. So he appointed Shri S. K. Mohanty, a retired District and Sessions Judge and a practising Advocate on 28-1-1977 and issued a letter to him dated 2-2-1977 to submit his Award on or before 15-3-1977. The learned Arbitrator entered into the reference on 4-2-1977 and issued notices to the parties for appearance. On the next date, that is, 12-2-1977, the plaintiff asked for time to move the High Court against the order and defendants 5 and 6 (appellants in Misc. Appeal No. 64/79) did not appear. On 14-2-1977, the plaintiff filed M. A. No. 36 of 1977 challenging the order of the Subordinate Judge dated 21-12-1976 wherein he had stayed the suit under S. 34 of the Act and had directed for the nomination of an Arbitrator. It may be mentioned here that the appointment of Sri Mohanty as the sole Arbitrator by the Court prior to the filing of the appeal on 28-1-1977 was not challenged in this appeal nor at any time subsequently. Later, the plaintiff did not press the appeal.

In the meanwhile, defendants 1 and 2 filed Misc. Appeal No. 60 of 1977 in the High Court against an order of appointment dated 20-1-1977 of Shri R. K. Patnaik, Advocate as receiver to manage the cinema business during the pendency of the suit. While this Court dismissed the appeal by its order dated 31-11-1977 subject to some modification, it directed that the Arbitrator should submit his Award within two months thence. Appellants in Misc. Appeal No. 64 1979 (defendants 5 and 6) now make a grievance that though the time prescribed by this Court thus expired on 21-1-1978, yet the learned Arbitrator proceeded with the hearing of the matter without any formal extension order from this Court. Neither the parties had agreed before the Arbitrator for extension of time for giving the Award. It is urged on behalf of these two appellants

that they did not appear before the Arbitrator as the proceedings were without jurisdiction and had been rendered illegal in absence of an extension order from this Court. However, they admit that the learned Arbitrator had written some letters to the Subordinate Judge for extension of time who extended the same — vide his order dated 5-3-1978, 4-5-1978 and 25-7-1978. Thus, all these orders, according to these appellants, were passed "without any notice to or the knowledge of the parties" (See para 7 of Appeal memo). Ultimately, the learned Arbitrator submitted his Award on 27-9-1978. The plaintiff (appellant in Misc. Appeal No. 69/79) and defendants 5 and 6 (appellants 1 and 2 in Misc. Appeal No. 64/79) filed objections to the Award before the Subordinate Judge. However, no misc. case was registered on the objection and the learned Subordinate Judge proceeded to deliver the judgment in Title Suit No. 167 of 1975 making the Award submitted by the learned Arbitrator a Rule of the Court and dismissing the suit on contest against defendants 1 to 4 with costs and against the remaining defendants without costs.

3. Being aggrieved by that judgment and decree, defendants 5 and 6 have preferred Misc. Appeal No. 64 of 1979 under S. 39 of the Act and the plaintiff has preferred Misc. Appeal No. 69 of 1979 under the same provisions of the Act. Both the appeals were heard analogously and this common judgment will dispose of them both.

4. The grounds of attack in both the appeals are that —

(i) It is an invalid award as the reference by the learned Subordinate Judge to the Arbitrator was without jurisdiction in the absence of any petition therefor under Ss. 8 and 20 of the Act. The Court was merely disposing of the petitions under S. 34 of the Act which contemplates nothing more than staying of the legal proceedings. The reference therefore itself being void, it was urged, any amount of participation by the appellants in the proceedings before the Arbitrator will not cure the basic defect.

(ii) The Award having been made beyond the time granted by the Hon'ble High Court and Hon'ble High Court not having granted extension of time to the parties, under S. 28 (2) of the Act, the Award as passed is bad in law. This tantamounts to a legal misconduct on the part of the Arbitrator.

(iii) Dispute regarding dissolution of the partnership is not referable to arbitration; and the finding that it cannot be dissolved as per se illegal.

The merits of the above contention be now considered.

5. Ground No. (i): — Expatiating the point, it was submitted that the reference of the disputes arising out of Title Suit No. 167 of 1975 to an Arbitrator as made by the Subordinate Judge is wholly illegal and without jurisdiction and consequently the Award that followed being ab initio void is liable to be quashed. In that context, it was urged that while disposing of the applications under S. 34 of the Act, the learned Subordinate Judge had no jurisdiction to appoint an Arbitrator and to refer the dispute to him. He could only stay the suit and give opportunity to the parties to take recourse to arbitration. Great stress was laid on Ground No. 3 of the memorandum of appeal which says that —

".....in absence of an application under S. 20 of the Arbitration Act, or under any other provision thereof, the learned Subordinate Judge has no jurisdiction to make a reference to arbitration. It is submitted that no application was filed either under S. 8 or S. 20 or S. 21 of the Arbitration Act and the parties never agreed amicably to refer the disputes to the Arbitrator."

6. There is no escape from the conclusion that in fact the parties to the suit, including the three appellants (plaintiff and defendants 5 and 6) had participated in the proceedings before the Arbitrator on several dates without demur. The details thereof would be referred to at the relevant place. So Mr. Rath, the learned counsel for appellants in M. A. 64/79 (defendants 5 and 6) endeavoured to attack the very basis of the reference to the Arbitrator. His contention was that, this Court while disposing of the Misc. Appeal No. 19 of 1976 had remanded the matter to the Court below for disposal of the applications under S. 34 of the Act according to law. Thus, the matter before the learned Subordinate Judge was the petitions under S. 34 of the Act which contemplates nothing more than staying the proceedings and giving opportunity to the parties to take recourse to arbitration. His further contention was that there was no prayer from any side nor any petition for taking action under S. 8 or 20 or 21 of the Act; the parties had never agreed to amicably refer the

disputes to the Arbitrator and, therefore, the reference is a nullity having no existence in the eye of law. Consequently all that followed including the submission of the Award is vitiated for inherent lack of jurisdiction. In support of his stand, he cited several case laws such as AIR 1976 SC 1745 — Union of India v. Om Prakash; AIR 1962 SC 1810 — Khardah Co. Ltd. v. Raymon & Co. (India) Pvt. Ltd.; AIR 1963 SC 90 — Waverly Jute Mills Co. Ltd. v. Raymon & Co. (India) Pvt. Ltd.; AIR 1978 Cal 37 — Sunil Mukherjee v. Union of India and AIR 1963 Guj 141 — Bhailal Manilal v. Amratlal Lallubhai Shah.

7. Mr. Mohanty, the learned counsel for defendant-respondent No. 1 on the other hand was equally emphatic that the reference was not at all a nullity. His contention was that the trial Court while passing the order on 21-12-1976 only stayed the suit. It did not appoint an Arbitrator. It only gave opportunities to parties to come up with a common nomination in terms of the arbitration clause and the Act. On 12-1-1977 nomination was filed by one party but there was no concurrence to that. After the statutory period of 15 days, the Court made the appointment. Furthermore, while appointing the Arbitrator, the Court did not make any reference except stating that the disputes between the parties be adjudicated upon. It was the Arbitrator, who, after entering upon the reference and receiving the statements and documents from the parties, was indicted by the plaintiff about the scope of dispute and point of difference between the parties. Therefore, it is not correct on facts to suggest that the appointment of the Arbitrator and the reference are nullities. His further alternative argument that the appointment of and the reference to Shri S. K. Mohanty, Arbitrator was violative of the provisions of the Act, defendants Nos. 5 and 6 have never challenged the same at any stage earlier. On the other hand, defendant No. 6 on 26-11-1977 paid Rs. 40/- to the Arbitrator for sending notices to parties by registered post, took part in the arbitration proceedings, and filed his written statement. Similarly defendant No. 5 when noticed engaged his lawyer to appear and took part in the proceedings and at no point of time raised any objection to the appointment, continuance or jurisdiction of the Arbitrator when the proceeding was before him. Further they (defendants 5 and 6) have not even raised objection under S. 30 of the Act. Rather the plaintiff objected by filing an appeal and also required clarification. But later on kept quiet and co-operated in the proceedings before the Arbitrator. In this background, it was contended that by their conduct the plaintiff and defendants 5 and 6 held out representation which made defendant No. 1 and other believe that irregularity and/or illegality, if any, in the appointment of Arbitrator had been waived. His further contention was that after the stay of the suit, the parties could have agreed for appointment of a common Arbitrator. Instead of the same being suggested by the parties, the nomination was suggested by the Court and the parties have agreed. Therefore the conduct of the plaintiff and defendants Nos. 5 and 6 would either mean that they have waived their objection or have acquiesced in the proceedings estopping them from making the challenge now. Distinguishing the case laws cited on behalf of defendants 5 and 6, a series of decisions were cited main amongst which are AIR 1920 PC 123 — Donald Campbell & Co. v. Jeshraj Girdhari Lal; AIR 1976 SC 1745 ibid (at p. 1748) relied on by both the sides; AIR 1975 SC 230 — N. Chellappan v. Secretary, Kerala State Electricity Board; AIR 1954 Orissa 234 — V. Gurumurty Raju v. V. Narasimha Raju; AIR 1953 Cal 488 — India Hosiery Works v. Bharat Woollen Mills Ltd.; AIR 1958 Cal 415 — Union of India v. K. P. Mandal; AIR 1965 Cal 42 — New India Assurance Co. Ltd. v. Dalmia Iron & Steel Ltd.; AIR 1979 Delhi 97 — Chowdhury & Gulzar Singh v. Frick India Ltd. and (1972) Cut WR 951 — State of Orissa v. Bhagabat Prasad Bal.

8. To appreciate the rival contentions some relevant facts need be quoted. The order disposing of the application under S. 34 of the Act (the operative portion of the order which has been quoted above) says in unmistakable terms that —

"the petition filed by defendants 1 to 4 for staying the suit under S. 34 of the Act and of defendant No. 3 for referring the dispute to an Arbitrator to be appointed by the Court, are allowed on contest."

Defendant No. 3 in his petition dated 9-1-1976 had prayed thus:

"The petitioner in the aforesaid circumstances respectfully prays that your

Honour may be pleased to make an order under S. 34 of the Indian Arbitration Act, 1940 staying the proceedings in the aforesaid Title Suit No. 167 of 1975 to afford opportunity to the parties to get the disputes raised in the suit settled through arbitration as agreed to by them."

(Vide records in Misc. Case 21/76)

Defendant No. 1 in his earlier petition dated 19-9-1975 had prayed thus:

"This defendant accordingly prays that the Hon'ble Court may be pleased to stay the legal proceedings arising out of the above suit and direct the plaintiff to go before the domestic tribunal for settlement of disputes raised by him;"

Defendant No. 2 also had similarly prayed in his petition dated 25-9-1975 thus:

"This defendant accordingly prays that the Hon'ble Court may be pleased to stay the legal proceedings arising out of the above suit and direct the plaintiff to go before the domestic tribunal for settlement of disputes raised by him."

Defendant No. 4 in his petition dated 24-10-1975 had prayed thus:

"In the aforesaid facts and circumstances of the case the petitioner prays your Honour to examine the aforesaid matter and further prays that this Hon'ble Court may be pleased to order that the said suit shall be stayed and the matter may be referred to arbitration as provided under S. 34 of the Indian Arbitration Act."

Order No. 68 dated 10-1-1977 in Title Suit No. 167 of 1975 is thus:

".....Defendants 5 and 6 filed Hazira. Lawyer for the plaintiff stating that submitting the names of arbitrator be stayed on the grounds stated therein. Defendants 1, 2 and 3 pray separately for time for furnishing the name of the arbitrator. Defendant No. 4 also files a petition praying for time to furnish the name of arbitrator. In view of strong opposition for adjournment, time allowed till 12-1-1977 for nomination of an arbitrator. Parties failing to concur in the nomination. Court will appoint an arbitrator."

Order No. 70 dated 12-1-1977 was as follows:

"Defendants 5 and 6 file hazira. Lawyer for the plaintiff files a memo stating that the case may be stayed for a month on the grounds stated therein. Defendants 1 to 4 file a list of names of the Arbitrators, plaintiff objects and there is no concurrence in the nomination. Plaintiff filed a petition for time to obtain stay orders from the Hon'ble High Court. Time till 28-1-1977 for obtaining stay orders, failing which nomination of arbitrator will be made under S. 8 of the Arbitration Act."

On 28-1-1977 (Order No. 73) in T. S. No. 167/75, the following order was passed:—

"Plaintiff prays for time to obtain stay order or to furnish the names of Arbitrators. Sufficient time was granted and no valid ground exists for granting further adjournment. So time petition is rejected. Heard Advocates. Plaintiff does not concur in the nomination of arbitrators as per list furnished by defendants 1 to 4 and so none of them could be appointed as Arbitrator. Plaintiff also fails to obtain the concurrence of the defendants in his nomination if any. Parties are therefore not in concurrence in the nomination of Arbitrators. Therefore, in exercise of the powers conferred under S. 8 of Arbitration Act, I appoint Sri Sarat Kumar Mohanty (retired Dist. Judge) as arbitrator. So let a reference be made to the appointed Arbitrator for adjudicating the dispute between the parties.

x x x x"

9. Record shows that by a letter dated 2-2-1977, the matter in dispute was referred to the Arbitrator Shri Mohanty. The Arbitrator on 4-2-1977 entered upon the reference. After appearance of all the parties on 26-11-1977 the plaintiff explained the scope of arbitration.

10. It is otiose to go into a detailed discussion of all the case laws cited at the Bar. Suffice it to say that these citations lay down two clear propositions of law. The first one is that if the appointment of the arbitrator and/or reference to him is a nullity then participation of the parties does not cure the inherent defect. Further if the agreement itself that embodies the arbitration clause is void for some reason, viz., being against the provisions of any statute, against public policy or against public morals, then the whole agreement perishes and along with it the arbitration clause and therefore question of participation or non-participation, is immaterial. The second principle laid down as far back as in AIR 1920 PC 123 and consistently followed is that a defect in procedure as absence of notice under S. 9 (b) of the Act which would have been fatal to the authority of the persons appointed as

sole arbitrator can be waived by failure to object in time.

AIR 1976 SC 1745 is an authority coming under the former type that lays down the dictum that after appointment of Arbitrator under S. 8 (2) of the Act, the Court becomes functus officio and it has no further jurisdiction to refer the dispute to Arbitrator. Such reference made and awards passed is a nullity and therefore could be set aside under Section 30 (c) of the Act coming under the clause "otherwise invalid". The learned Advocate for respondent No. 1 also relied on this and referred to an observation where their Lordships while stating facts (in para 2) have observed:

"If the respondent's contention in these appeals is correct that after appointing an arbitrator under S. 8 (2) the Court ceases to have jurisdiction and cannot make an order of reference, the further directions given in the order of Feb. 13, 1950 were invalid. However, the question did not assume importance at that stage because both sides agreed to submit the disputes to Col. Ranbir Singh for arbitration."

The underlined portion is in line with the second category of cases mentioned above. In brief, the facts of this case are that seven cases were filed by the respondent and at first there was appointment of an arbitrator (Mr. R. Singh) not in the list on 13-2-1950 and a reference to him. Initially both the parties agreed and the above remark is made in that context. Later, after one year on 13-2-1951 another Judge to whom the cases had been transferred appointed another arbitrator (Brigadier H. L. Bhandari) and directed as follows:

"All these cases should be referred to him for arbitration. He must file his award within one month of this order."

The respondent-petitioner did not agree to this order and did not participate in the proceeding and challenged the order, but before it could be decided, the award was submitted.

Thus the facts and circumstances of that case are obviously different. Each case must be decided on its own facts and circumstances.

AIR 1962 SC 1810 — Khardah Co. Ltd. v. Raymon & Co. (India) Pvt. Ltd. lays down the principle that —

".....the arbitration clause cannot be enforced when the agreement of which it forms an integral part is held to be illegal. On principle it must be held when an agreement is invalid every part of it including the clause as to arbitration contained therein must also be invalid.

x x x x

The party applying under S. 33 is not estopped by its conduct in appearing before the arbitrators and in taking part in the proceedings before them from questioning the validity of the award. What confers jurisdiction on the arbitrators to hear and decide a dispute, is an arbitration agreement as defined in S. 2 (a), and where there is no such agreement, there is an initial want of jurisdiction which cannot be cured by acquiescence."

The case reported in AIR 1963 SC 90 — Waverly Jute Mills Co. Ltd. v. Raymon & Co. (India) Pvt. Ltd. is also an authority for the proposition that —

".....if a contract is illegal and void an arbitration clause which is one of the terms thereof, must also perish along with it and a dispute relating to the validity of a contract is in such cases for the Court and not for the Arbitrators to decide."

11. Some of the authorities coming under the second category besides. AIR 1920 PC 123 referred to above, may now be discussed. AIR 1975 SC 230 — N. Chellappan v. Secy., Kerala State Electricity Board lays down that on the arbitrators failing to make the award within the specified time, consent order directing the Umpire to act as sole arbitrator and party acquiescing in the proceeding before the Umpire is precluded from challenging the award for lack of jurisdiction. It further says —

"If the parties to the reference either agree beforehand to the method of appointment, or afterwards acquiesce in the appointment made, with full knowledge of all the circumstances, they will be precluded from objecting to such appointment as invalidating subsequent proceedings. Attending and taking part in the proceedings with full knowledge of the relevant facts will amount to such acquiescence." (See "Russel on Arbitration", 17th Edn., p. 215)".

In Chowdhri Murtaza Hossein v. Mst. Bibi Bechunnissa, (1876) 3 Ind App 209 (PC) at p. 220 the Privy Council said:

".....; that he allowed the arbitrators to deal with the case as it stood before them, taking his chance of the decision being more or less favourable to

himself; and that it is too late for him after the award has been made, and on the application to file the award, to insist on this objection to the filing of the award."

x x x x

As we said, the umpire could have entered upon the reference under R. 4 of the First Schedule when the arbitrators failed to make the award within the extended time. Neither the fact that the umpire wanted an order from the Court to enter upon the reference nor the fact that an application was made by the Board on 5-2-1972 to extend the time for the arbitrators to make the award would denude the umpire of his jurisdiction to enter upon the reference and pass an award under R. 4 of the First Schedule. Therefore, when the Board without demur participated in the proceedings before the umpire and took the chance of an award in its favour, it cannot turn round and say that the umpire had no inherent jurisdiction and therefore its participation in the proceedings before the umpire is of no avail. The fact that the umpire did not purport to act in the exercise of his jurisdiction under R. 4 of the First Schedule but under the order of the Court, would not make any difference when we are dealing with the question whether he had inherent jurisdiction.

x x x x

The High Court was, therefore, clearly wrong in thinking that acquiescence did not preclude the Board from challenging the jurisdiction of the umpire as sole arbitrator."

(1972) 1 Cut WR 951 lays down as follows:

"Parties submitting to the jurisdiction of the Arbitrators after accepting the position that the dispute is covered by the Arbitration clause, it is no longer open to either of the parties to resile from the arbitration agreement on the plea that the dispute does not come within the purview of the agreement clause.

It is not open to challenge the validity of the award on the ground that the Arbitrators had no jurisdiction to decide the dispute and pass the impugned award."

12. From the above it is clear that it is only inherent lack of jurisdiction or illegality of the contract embodying arbitration clause that could invalidate the award; and irregularities in procedure if acquiesced in without demur would preclude a party both from challenging the appointment of the arbitration and passing of the Award at a later stage when it finds that the award is not convenient for it. It is well settled law that each case is an authority for the facts stated therein. So we are here to see, which of the above two principles would apply to the facts of the present case. Here, admittedly in the agreement of partnership there is a clause for arbitration. It is not very specific. According to S. 3 of the Act, an arbitration agreement, unless a different intention is expressed therein, shall be deemed to include the provisions set out in the First Schedule in so far as they are applicable to the reference, and the First Schedule in R. 1 provides —

"Unless otherwise expressly provided, the reference shall be to a sole arbitrator."

When the plaintiff (appellant in M. A. 69/79) filed the suit, some of the defendants prayed before the Court to stay the proceedings under S. 34 of the Act and to refer the matter to an arbitrator as already quoted. So their prayer was firstly to stay the proceedings and secondly to refer the matter to arbitration. If the contention on behalf of the appellants be accepted, namely, that it was only a prayer for staying the proceedings, it would be both against the wishes of some of the defendants and the spirit of law. Merely staying the proceedings does not help any party, nor solves the problem. Besides, four of the defendants, at least, have prayed for referring the matter to an arbitrator. The only flaw picked up and dilated upon by the appellants, in both the appeals, is that S. 8 had not been mentioned in those petitions referred to above. The Court is to see to the pith and substance of the petition, intention of the party making the petition, the prayer sought for and not the section mentioned in the petition, nor the nomenclature given — which are unessential. From the petitions of the four defendants quoted above, it is clear that they wanted the matter to be referred to arbitration and they sought the assistance of the Court therefor. Accordingly the Court also passed the orders as would be evident from the portions of the order sheet already quoted. Under S. 8 of the Act, the statutory period for giving option to the parties is 15 days, but in this case, the Court has given longer period to suggest a common arbitrator. On 10-1-1977 it passed orders that

"Parties failing to concur in the nomination, Court will appoint one arbitrator." Yet, there was no concurrence. Is the Court then helpless and anxious parties remediless? Regard being had to the arbitration clause and the prayer of at least four of the defendants for referring the dispute to an arbitrator, the Court, in exercise of its powers under S. 8 of the Act did appoint a retired District and Sessions Judge as the Arbitrator for deciding the dispute. If any party was dissatisfied with the Court's nomination, it was open to that party to object. But the very fact that there was no objection means agreement. The Arbitrator gave notice. The record shows that on 12 occasions, namely, 17-2-1977, 15-11-1977, 26-11-1977, 12-12-1977, 18-12-1977, 10-1-1978, 15-1-1978, 22-1-1978, 3-4-1978, 11-4-1978, 24-4-1978 and 14-4-1978, notices had been given to the parties intimating them about the date of hearing. Out of those, the first two were under registered post and the rest under certificate of posting. There is no controversy that the parties did take part in the proceedings before the Arbitrator. The appointment of the Arbitrator was on 28-1-1977; letter was issued to him on 2-2-1977 and the award submitted on 27-9-1978.

13. It was submitted on behalf of defendants Nos. 5 and 6 that after 19-4-1978 they did not appear before the arbitrator. But I do not consider this statement to be correct, for, the proceedings before the Arbitrator dated 25-6-1978, 5-7-1978, 18-7-1978, 19-7-1978, 28-7-1978, 11-8-1978, 12-8-1978 and 13-8-1978 show that the parties were present. That apart, the appellants here, if they were dissatisfied in any way with the manner in which the proceedings were being conducted by the Arbitrator, it was open for them to challenge at the right time and not to wait till the award was submitted hoping that it might go in their favour. Accordingly they are precluded from challenging the proceedings at a belated stage. It may be recalled here that while the proceedings before the Arbitrator were continuing, on 14-2-1977 the plaintiff filed Misc. Appeal No. 36 of 1977 challenging the order of the Subordinate Judge dated 21-12-1976 (that is the order staying the suit and directing nomination of the Arbitrator) but later did not press the appeal and thereafter took part in the proceedings. Again on 3-2-1978 this plaintiff filed a copy of the petition to the Subordinate Judge for seeking clarification as to whether he shall take part in the proceedings. But the order sheet of the trial Court does not reflect any such action. It may also be mentioned here that on 8-1-1978, defendant No. 6 filed his written statement before the Arbitrator and the plaintiff and defendants Nos. 5 and 6, who now seem to make a common cause, took part in the proceedings before the Arbitrator.

14. The facts which cannot be cavilled at are that the partnership deed has a clause for arbitration; some of the parties barring the plaintiff, that is, appellant in M. A. No. 69/79, were anxious for decision of the dispute by arbitration; the Court wanted that they should agree to a common arbitrator; there was no concurrence; so the Court appointed one under S. 8; the parties accepted the nomination and participated in the proceedings without demur. It follows, therefore, that there was no inherent lack of jurisdiction on the part of the Court in appointing an arbitrator; nor the proceedings before the Arbitrator vitiated on that score. Procedural defects, if any, are deemed to have been waived by the parties by their conduct and cannot be raked up now. Further the parties having acquiesced and participated in the proceedings before the Arbitrator are also estopped from challenging the same. Accordingly this point is decided against the appellants.

15. Point No. (ii): — The grievance of the appellants here is that the High Court while disposing of the receiver matter (Misc. Appeal No. 60/77) had directed that the Arbitrator should submit his award within 2 months' time which expired on 21-1-1978 and therefore the proceedings before the Arbitrator thereafter, were without jurisdiction. The law is well settled that the Court having jurisdiction to entertain applications for filing of award has jurisdiction to grant extension of time under S. 28 of the Act (See AIR 1960 SC 629 — Champalal v. Mst. Samrathbai; AIR 1954 Orissa 29 — Narsing Das Hiralal Ltd. v. Bisandayal Satyanarain Firm; AIR 1968 Pat 150 (FB) Bokaro & Ramgur Ltd. v. Dr. Parsun Kumar Banerjee; AIR 1973 Ker 237 — State of Kerala v. K. P. Poulose). Therefore, the proper Court to grant time is the Subordinate Judge and not the High Court. The record shows that at least on 12 occasions, the parties

had been noticed about the proceedings before the Arbitrator either under certificate of posting or under registered cover as already pointed out, while deciding point No. (i). There is no complaint that the parties had no notice of the arbitration proceedings at the initial stages. Now a grievance is made that after the expiry of the time fixed by the High Court i. e. 21-1-1978, no further notice was given by the Arbitrator of the date, time and place of sitting. Record of the Arbitrator as already quoted shows, how long after that date, the plaintiff and defendants 5 and 6 have participated in the proceedings. It was argued on behalf of the appellants that they did not participate from 19-4-1978, but there is no basis for such a statement. Even otherwise, there is no justification for them to stand by till 27-9-1978 (when the Award was submitted) if really they had any grievance.

On the assumption that the Award should have been submitted by 21-1-1978 as fixed by the High Court, it was argued that the learned Arbitrator had illegally misconducted himself in not informing the parties about the extended time. Neither on facts nor in law this is sustainable. Besides, if the parties noticed misconduct on the part of the Arbitrator, proper action was under S. 11 (2) of the Act for his removal. That ground is not germane to challenge the Award under S. 39 of the Act. So this point is also decided against the appellants.

16. Point No. (iii): — Thus argument proceeded on the assumption that the Court has made a reference to the Arbitrator. The record does not support this stand. The order sheet shows that the trial Court had only stayed the suit and referred the dispute for adjudication to the Arbitrator. The entire matter was before the Arbitrator and no specific reference had been made to him. The question, therefore, that the Arbitrator had gone beyond the reference does not arise. It was contended on behalf of respondent No. 1 that assuming the Arbitrator travelled beyond the scope of any such reference, it was only because of the conduct of the plaintiff and defendant No. 6. The plaintiff, while explaining the scope of the dispute and defendant No. 6 in his written statement before the Arbitrator, Mr. Mohanty urged, widened the scope of arbitration, they allowed the Arbitrator to proceed and are squarely responsible for the field the arbitrator covered and should not be permitted to turn round and object to the same now. The parties having full knowledge of the circumstances in which the Arbitrator was proceeding and they having enough chance to stop it by raising objection thereto, either before the Arbitrator or before the trial Court, they by their conduct should be precluded from raising these points at this stage. It seems, there is enough force in this contention and so this point is also decided against the appellants.

17. Incidentally it was argued that dissolution of the partnership is a matter exclusively within the jurisdiction of the Court and a reference of the dispute to an arbitrator is bad in law. This point will not detain me much in view of the earlier decision of the High Court on the point. In M. A. No. 19 of 1976, it was contended before this Court that the suit being one under S. 44 of the Indian Partnership Act for dissolution of the partnership firm, the matter could not be referred to arbitration. This point was answered in the following manner:

"The second reason given by the learned Subordinate Judge is that the plaintiff respondent No. 1 having prayed for dissolution of the partnership firm under S. 44 of the Indian Partnership Act, the case has to be decided in the Court itself and not through arbitration. For this position, reliance is placed on a decision reported in (1972) 1 Cut WR 264 (Bankey Behari Lal v. Hirendralal Adhikari). In that decision, by referring to a paragraph at page 91 of the book "Russel on Arbitration" (17th Edition) R. N. M., J. observed thus:

x x x x"

He has invited my attention to that very particular passage in the book "Russel on Arbitration" which reads as follows:

"The Court has a discretion to refuse a stay. This discretion must be exercised upon the facts involved, but when a dissolution is claimed, the facts involved are very apt to be such as to call for refusal. This has led to the opinion of the Court in Joplin v. Postlethwaite (1889) 61 LT 629 (CA) that a question of dissolution was not a suitable one to be left to arbitrators to decide. Whilst this is not a proposition of law as the cases previously cited show, it may perhaps be regarded as a "proposition of good sense" and the principle is frequently persuasive."

That passage as is rightly contended by Mr. Mohanty does not show that in all

cases where dissolution of a firm is claimed by the plaintiff the matter should be left alone to the Court and should not be permited to be decided by a domestic tribunal under an arbitration clause."

Finally this Court in that appeal negatived the finding of the lower Court and held that the matter could be decided by an Arbitrator. This being a decision of this Court as between the same parties (M. A. 19/76), the appellants, having accepted it, cannot raise that point once again. The matter is concluded and cannot be re-agitated. So this point is also without any merit and hence decided against the appellants.

18. Before closing this judgment I may say that Mr. S. C. Mohapatra appearing on behalf of defendant No. 4 raised an objection that a joint appeal preferred by defendants Nos. 5 and 6 is unsustainable. In support of it he has drawn my attention to certain provisions of the General Rules and Circular Orders, Civil Vol. I and relied on (1975) 41 Cut LT 714 — Abdul Rahim v. State of Orissa and (1973) 39 Cut LT 330 — Dr. Mrs. Sarojini Pradhan v. Khirode Chandra Pradhan. His argument is that every party aggrieved by the award has an independent cause of action and therefore each one should prefer a separate appeal. That not having been done, the joint appeal by defendants 5 and 6 is invalid and they must be asked to confine it either in favour of defendant No. 5 or defendant No. 6. Shri Mohapatra also argued that if a selection is made now and the appeal is confined to one, in case the appeal is allowed, it would lead to inconsistency in the award in that it would be set aside in case of one appellant and confirmed in case of the other. Mr. Rath, the learned counsel for defendants 5 and 6 probably realising the technical defect, and the weighty authorities in its support, preferred that the appeal might be confined to defendant No. 6. In that context, Mr. Rath also argued that the learned Subordinate Judge has not registered the objections of different parties as independent miscellaneous cases as against which separate appeals could be filed. The learned Subordinate Judge disposed of the main suit and in that has considered the different objections. As such, there being one order defendants 5 and 6 could file one joint appeal. In view of the fact that on each of the three points raised on behalf of the appellants I have held against them, it would be academic to go into this question and hence need not be answered.

In the result, all the points raised on behalf of the appellants having been answered against them, both the appeals must fail and are hereby dismissed with costs to be borne by the plaintiff and defendants Nos. 5 and 6 equally. The interim orders passed during the pendency of the appeals stand vacated. Judgment and decree in Title Suit No. 167 of 1975 on the basis of the Award stand.

Appeals dismissed.

AIR 1979 ORISSA 205

R. N. MISRA AND
P. K. MOHANTI JJ.

Golak Chandra Rath, Appellant v. Krutibas Rath and another, Respondents.

First Appeal No. 50 of 1970, D/- 27-8-1979.*

(A) Hindu Adoptions and Maintenance Act (1956), S. 16 — Adoption — Document in support of adoption — Burden of proof on propounder of adoption — Nature of. (Evidence Act (1872), Ss. 101 to 104).

The statutory provision in S. 16 lays down a rule of presumption which requires that where there is a duly registered document in support of adoption, the Court shall presume that the adoption was in compliance with the provisions of the Act unless and until it is disproved. Consequently the propounder of the adoption has not to prove the same as in ordinary way where there is no document satisfying the requirements of S. 16. (Para 5)

(B) Hindu Adoptions and Maintenance Act (1956), Ss. 6 and 11 — Adoption by female — Validity of.

Section 6 makes provision that no adoption shall be valid unless it be made in accordance with the other conditions mentioned in the chapter and the conditions prescribed in S. 11 are included. Therefore, violation of condition No. (iv) of S. 11 which requires that there should be an age gap of 21 years between the adopter and adoptee in case the adopter is a female, would render the adoption invalid. (Para 6)

Cases Referred: Chronological Paras

AIR 1973 Orissa 3 5

*From decision of G. H. Panda, Sub. J, Dhenkanal, D/- 27-11-1965.

(1971) 1 Cut WR 784 5
(1971) 2 Cut WR 36 5
AIR 1965 SC 282 7
AIR 1959 SC 504 4

S. Mohanty and A. S. Naidu, for Appellant; R. K. Mohapatra, for Respondents.

R. N. MISRA, J.:—Plaintiff is in appeal challenging the dismissal of his suit for declaration of title and recovery of possession of 4.45 acres of land shown in 'B' schedule of the plaint or in the alternative for partition of the total area of 9.951 acres of land described in the 'A' schedule and allotment of half share therein to him.

2. One Sukadeva had two sons — Krutibas and Bhaskar. Suka's widow is the second defendant. Krutibas is defendant No. 1. Bhaskar died in 1951 leaving behind a widow Golap. Plaintiff laid claim in the suit on the basis of having been adopted by Golap on 18-12-1959. According to the plaintiff, defendant No. 1 was a political worker and taking advantage of his position wanted to deprive Golap of her title to the property. There was a proceeding under S. 145 of the Code of Criminal Procedure which terminated in favour of the defendant No. 1. Golap having died during that proceeding, plaintiff filed the suit on 27-2-1965 for the reliefs indicated above on the basis of adoption.

3. Separate written statements were filed by defendants 1 and 2. Adoption of plaintiff was denied by both and it was pleaded that Bhaskar having died in a state of jointness, defendant No. 1 became owner of the entire property upon Golap's death.

4. The main question that fell for consideration of the learned Subordinate Judge was adoption of the plaintiff. In support of the claim of adoption, plaintiff placed reliance on Ext. 15, the deed executed by Golap on 18/19-12-1959. A photograph was produced in support of the plea of giving and taking and other requisite ceremonies. Apart from these oral evidence was given in support of the factum of adoption. The learned Trial Judge took into consideration the provisions of S. 16 of the Hindu Adoptions and Maintenance Act but failed to appreciate its bearing on the litigation. He examined the evidence on the footing that the burden to prove an adoption lay on the propounder as indicated by the Supreme Court in the case of Kishori Lal v. Mt. Chaltibai, AIR 1959 SC 504 and held that adoption had not been established. Simultaneously he examined the contention advanced by the defendants that the adoption was invalid as there was not a gap of 21 clear years between the adoptive mother and the plaintiff and, therefore, he found against the plaintiff on the question of adoption and dismissed the suit.

5. Section 16 of the Adoption Act provides:—

"Whenever any document registered under any law for the time being in force is produced before any Court purporting to record an adoption made and is signed by the person giving and the person taking the child in adoption, the Court shall presume that the adoption has been made in compliance with the provisions of this Act unless and until it is disproved".

The statutory provision lays down a rule of presumption which requires that where there is a duly registered document of the nature indicated, the Court shall presume that the adoption was in compliance with the provisions of the Act unless and until it is disproved. It is unnecessary to deal with this aspect of the matter at length as Counsel for both sides agree that by a series of decisions of this Court, the effect of S. 16 of the Adoption Act has been set at rest. See, Shyama Sundar Padhi v. Dharanidhar Padhi (1971) 1 Cut WR 784; Manishi Krishna Murty v. Manishi Chinna Yerrayya (1971) 2 Cut WR 36 and Konchada Laxminarayan Subudhi v. Konchada Padmanav Subudhi, AIR 1973 Orissa 3. In view of the clear position indicated in these cases, Mr. Mohapatra for the respondents concedes that the learned Trial Judge fell into an error in saying that the burden lay on the plaintiff who was propounding adoption to prove the same as in an ordinary case where there is no document satisfying the requirements of S. 16 of the Adoption Act. It is conceded by the respondents that the burden lay on the defendants who were challenging the adoption to disprove it. But for such disproof, it was not necessary for the defendants to lead independent evidence on their side. It was open to them to demonstrate from the materials on the record that the adoption as claimed did not take place as a fact or that the adoption was otherwise invalid in law and, therefore, could not be accepted. The stand taken by Mr. Mohapatra is unexceptionable.

6. In the instant case, defendants have taken the stand that the age-gap between the plaintiff and his adoptive mother on the date of adoption was less than 21 years. S. 11 of the Adoption Act provides conditions to be complied with for valid adoptions. Clause (iv) thereof runs thus:—

"if the adoption is by a female and the person to be adopted is a male, the adoptive mother is at least twenyone years older than the person to be adopted."

Section 6 of the Adoption Act makes provision that no adoption shall be valid unless it be made in accordance with the other conditions mentioned in the chapter and the conditions prescribed in S. 11 are included. Therefore, violation of condition No. (iv) of S. 11 would render the adoption invalid.

7. In Ext. 15 the deed of adoption — the adoptive mother's age has been given as 27 and of the plaintiff — the alleged adopted son — as 3. The difference in the stated ages is 24 years. According to the defendants, plaintiff was born in April, 1954 and thus by the date of adoption, he was more than five years old. Plaintiff's date of birth has been proved from the entry in the School Admission Register. D. W. 2, the Head-Pandit of the Government U. P. School, where the plaintiff was admitted by his natural father on 15-4-1959 has been duly proved as Ext. G (sic). The natural father Jadunath signed in the register and his signature has also been proved. The attempt made by the plaintiff to prove that though he was 3 years old by then, his age had been enhanced to 5 has been rightly disbelieved by the learned Trial Judge. There was no rule, as pleaded by the plaintiff, that no one below the age of 16 would be allowed to take the matriculation examination and, therefore, there could be no motive in enhancing the age. In India, as judicial notice was taken by the Supreme Court in the case of Brij Mohan Singh v. Priya Brat Narain Sinha, AIR 1965 SC 282, often a false age is disclosed at the time of admission into the School by lowering it with a view to seeking public service in later life. The learned Trial Judge, in our opinion, rightly negatived the explanation offered from the plaintiff's side that his age had been enhanced by two years at the time of his taking admission into the school. Accepting the plaintiff's date of birth to be 15th April, 1954, he was 5 years and 8 months old by the time of adoption.

In order to find out the age of the adoptive mother by the time of the deed of adoption, the learned Subordinate Judge referred to horoscopes, one produced by plaintiff's side being Ext. 14 where the date of birth was disclosed as 13-7-1932 and the other produced by the defendants vide Ext. R where her date of birth was shown as 3-7-1938. On the basis of the evidence placed before the court, the trial court came to hold that Ext. R and not Ext. 14 was the genuine horoscope. P. W. 10 is the natural brother of Golap. He stated that the sister was three years younger to him. P. W. 10's age in 1963 has been disclosed as 34, but in the verification, it has been described as 30. P. W. 10 has stated his age to be 30 in the verification of the pauper application. Considering P. W. 10's age to be 30 in 1963, it must be held that he was born in 1933 and since Golap was 3 years younger to him, she could not have been born prior to 1936. An attempt has been made by the plaintiff and his witnesses to shift the age of Golap. In different documents age has been described differently and witnesses have also deposed differently in the court. P. W. 6, the lawyer, who drafted the deed of adoption (Ext. 15) has stated that he had in mind the provisions of the Adoption Act while drafting the document and as P. W. 7, the natural father of the plaintiff has admitted, there was discussion with P. W. 6 prior to adoption as to what should be the age of the adopted boy and of the adoptive mother. P. W. 8 has also stated that it had been discussed with the lawyer and ascertained that unless the age-gap was 21 years between the adopter and the adoptee there would be no valid adoption. There is force in the defence contention that the age disclosed in Ext. 15 was not with reference to actual age of the two but it had been so stated keeping in view the legal requirements in S. 11 of the Adoption Act. P. W. 8 is a co-villager and a distant relation of the parties. In his evidence-in-chief, he had stated that Golap was aged about 20 or 21 at the time of adoption. It is true that the witness has been declared hostile, but nothing has been brought out in cross-examination as to why he would depose falsely to support the defendant No. 1.

The conduct of the persons interested in the upholding of adoption in the matter of enhancing the age of the adoptive child (plaintiff) which has been proved from the materials already dealt with

lends support to the position that an attempt had been made to widen the gap of age between the adoptive mother and the adopted son with a view to satisfying the legal requirement and that again is a feature which probabilises the defence stand that Golap's age was also wrongly described. The conclusion of the learned Trial Judge that the legal requirement in S. 11 (iv) of the Adoption Act had not been satisfied, in our opinion, has been clearly proved and, therefore, the alleged adoption is invalid in law.

8. Plaintiff came with a positive case that adoption took place on 18-12-1959. As we have already found, plaintiff was admitted into the School on 15-4-1959. Thus, adoption was an event about 8 months after the admission of the plaintiff into the School. P. W. 7, the natural father, has categorically stated in his evidence in court that:—

"By the time of adoption, Golak (plaintiff) was not admitted into school. He was admitted into school 3 months thereafter. Somanath Ratha (D. W.) was the school teacher when the plaintiff was admitted. ....."

P. W. 10 also stated:—

"..... The plaintiff is now reading in Janguli. The plaintiff went to the school about 20 days after his adoption ceremony. ....."

From the depositions of these two witnesses, it is thus clear that there was actually no adoption on 18-12-1959 and an attempt was made to create the document and give oral evidence of a contemporaneous adoption. As a fact, it has, therefore, rightly been held by the learned Trial Judge that no adoption took place as alleged. The presumption arising under S. 16 of the Adoption Act has thus been disproved on the basis of the evidence. The claim of adoption stands negatived being not correct as a fact and also being invalid in law. Plaintiff's suit had been rightly dismissed by the trial court.

9. There is no merit in the appeal and the same is accordingly dismissed. There would be no order for costs in this Court.

P. K. MOHANTI, J.:— I agree.

Appeal dismissed.

END

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PATNA HIGH COURT

1979

CHIEF JUSTICE

The Hon'ble Mr. Justice Krishna Ballabh Narain Singh, M.A., B L.
(From 31-1-7 (Noon) to 20-9-79) Acting Governor. Then From 21-9-79 P. C. J.
The Hon'ble Mr. Justice Syed Sarwar Ali, M.A., B.L. (From 31-1-79 (Noon) to
20-9-1979) Acting Chief Justice.

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The Hon'ble Mr. Justice Shambhu Prasad Singh, M.A., B.L. (upto 8-1-1979.)
" " Syed Sarwar Ali, M A., B.L.
" " Shiveshwar Prasad Sinha, B.A., B.L.
" " Rameshwar Prasad Sinha, B.A., B.L.
" " Chandra Narain Tewary, B.A . B.L. (upto 31-7-1979 then from 11-12-79. Adh.
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" " Harilal Agarwal, B.A., (Hon's) B.L.
" " Lalit Mohan Sharma, B.A., B L.
" " Sushil Kumar Jha, M.A., B.L.
" " Nagendra Prasad Singh, B.A., (Hon's) B.L.
" " Muneshwari Sahay B.A., B.L. (upto 22-10-1978, then frem 20-2-79. Adh.
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" " Uday Sinha, M.A., B L.
" " Syed Ali Ahmad, B.Sc., B.L.
" " Birendra Prasad Sinha, M.A., B L.
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" " Brishketu Saran Sinha, B.A. LL.B.
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" " Gobind Mohon Misra, B.Sc., B L.
" " Prem Shankar Sahay, B.A., B L.
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" " Syed Samshul Hassan, B.A., B L.
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" " Satyeswar Roy B.A., B L.
" " Vishwanath Misra B.A., B L.
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" " Rajeshwar Prasad Mandal, M.A., B.L. (From 8-3-1979).

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" M. S. Ahuja. (Patna).

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288	1978	"	60
237	1977	"	171
393	"	"	90
452	1978	"	101
473	"	"	23
523	1977	NOC	180
622	"	Pat	127
659	"	"	258
694	1978	"	16
857	"	"	162
897	1977	"	154
921	1978	"	64
953	"	"	237
962	1978	NOC	87
1009	1977	"	248
1053	1978	"	151
1058	"	"	212
1062	"	"	82
1112	"	"	210
1141	"	"	172

1977 B B C J (SC)

BBCJ			AIR
258	1977	SC	2401
265	1978	"	55
270	1977	"	2304
274	"	"	2439
277	"	"	2255
282	"	"	2262
285	"	"	2270
288	"	"	2421
291	"	"	2257

1978 B B C J (SC)

BBCJ			AIR
1	1978	SC	12
9	1977	"	2425
13	1978	"	1
21	"	"	422
23	"	"	311
25	1977	"	2489
34	1978	"	275
37	"	"	335
43	"	"	429
49	"	"	849
53	"	"	1091
57	"	"	836
63	"	"	979
67	"	"	1091
73	"	"	1244
78	"	"	1239
84	"	"	1282
86	1978	SC	1351
97	"	"	1486
103	"	"	1492
110	1979	"	170

1977 B B C J (HC)

BBCJ			AIR
211	1978	Pat	5
307	"	"	60
455	"	NOC	150
662	"	Pat	101
731	"	"	117

1978 B B C J (HC)

BBCJ			AIR
1	1978	Pat	23
15	"	"	82
22	1977	NOC	346
34	1978	Pat	148
38	"	"	42
47	"	"	139
70	"	"	91
78	"	"	112
86	"	"	173
111	"	"	225
125	"	"	60
140	"	"	80
142	"	NOC	87
168	"	Pat	284
175	1977	"	258
187	1978	"	245
193	"	"	2
202	"	"	153
214	"	"	207
218	"	"	151
222	1977	"	295
242	1978	"	162
273	1979	"	25
316	1978	"	121
342	"	"	157
359	"	"	367
385	"	"	192
400	"	"	298
428	"	"	389
477	"	"	289
489	"	"	330
508	"	"	299
511	"	"	32
525	"	"	237
530	"	"	326
555	"	"	515
558	"	"	219
581	1979	NOC	76
597	1978	Pat	312
622	1979	"	5
625	1978	NOC	190
626	1980	Pat	41
654	1979	"	91
669	1978	"	256
677	1979	"	180
711	"	"	88
720	1978	"	322
736	1979	"	54
742	"	"	146
750	"	"	169

1979 B B C J (SC)

BBCJ			AIR
1	1979	SC	87
11	"	"	429
20	"	"	587
25	"	"	777
54	"	"	1705
56	"	"	1525
57	"	"	1339
61	"	"	1412
62	"	"	1250
69	"	"	1484
70	"	"	1393
89	"	"	1165
97	"	"	1583
100	"	"	1536
102(1)	"	"	1718
102(2)	"	"	1666
106	"	"	1745

1979 B B C J (HC)

BBCJ			AIR
1	1979	Pat	88
10	"	"	172
11	"	"	174
16	"	"	65
37	"	"	106
49	"	"	115
68	"	"	60
74	"	"	164
114	"	"	120
140	"	"	151
154	"	"	199
162	"	"	159
208	"	"	31
235	"	"	222
258	1980	"	22
259	1979	"	250
278	"	"	204
281	"	"	239
310	"	"	268
378	"	NOC	95
395	"	Pat	246
401	"	"	317
404	"	"	191
417	"	"	212
458	"	NOC	98
465	"	Pat	217
471	"	"	202
497	1980	"	24
521	1979	"	259
541	1980	"	38
559	1979	"	319
561	"	NOC	202
566	1980	Pat	18
571	1979	"	308
589	"	"	229
592	"	"	210
615	"	"	281
621	1978	NOC	303
677	1980	"	1
768	1979	Pat	88

1978 B L J

BLJ			AIR
1	1978	"	172
24	"	"	101
39	"	"	2
44	1977	SC	2304
49	1978	"	327
60	1977	"	2149
74	1978	"	411
77	1979	"	2018
91	1978	SC	126
96	1977	"	2265
98	1978	Pat	112
117	"	"	153
123	"	"	318
135	"	"	223
137	"	"	284
143	"	"	143
157	"	"	157
182	"	"	207
186	1978	SC	770
197	"	"	849
217	"	NOC	190
221	"	Pat	253
225	"	"	197
243	"	"	190
251	"	"	251
254	"	"	218
257	1977	"	230
260	1978	"	220
289	"	SC	979
294	"	"	886
317	"	Pat	292
325	"	NOC	310
326	"	Pat	144
330	"	"	250
334	"	"	256
337	1977	"	269
349	1979	NOC	29
353	1978	Pat	289
358	"	SC	845
363	"	"	1201
364	"	"	1277
390	1979	NOC	57
410	"	Pat	60
430	1978	"	225
445	"	"	212
459	"	"	267
498	"	NOC	299
511	"	"	301
528	1979	Pat	11
538	1978	NOC	300
573	"	Pat	298
591	1979	NOC	28
608	1978	SC	1428
636	1979	Pat	23
638	1978	"	315
629	1979	"	5
673	"	"	18
684	1978	"	326
700	"	"	256
702	"	"	351
706	1979	"	58
713	"	"	50
724	1978	"	330
728	1979	"	46
746	1978	NOC	298
764	1979	Pat	1
786	1978	NOC	302
793	"	"	304
796	1979	Pat	180
816	1978	"	285
819	1979	"	164
830	"	"	65

1979 B L J

BLJ			AIR
8	1979	Pat	178
22	"	"	179
47	"	"	120
57	"	"	146
67	"	"	169
78	"	SC	1
94	"	Pat	174
102	1979	Pat	175
111	"	"	159
125	"	"	115
136	1978	"	312
152	1979	"	73
158	"	"	83
165	"	"	88
206	"	"	172
210	1978	Pat	210
212	1979	NOC	95
214	"	Pat	103
256	"	SC	1177
271	"	"	1246
284	1979	Pat	285
309	1979	"	151
327	"	"	196
336	"	"	6
348	"	"	246
354	"	"	250
375	1980	NOC	38
383	1979	Pat	210
391	"	NOC	98
401	"	Pat	282
409	1980	"	22
427	1979	"	314
481	"	"	317
448	"	"	213
479	"	"	212
481	"	"	289
503	"	"	215
518	"	SC	1497
519	"	"	1412
528	"	Pat	231
532	1980	"	18
588	1979	"	319
544	"	NOC	187
552	"	Pat	229
575	1980	"	30
578	1979	NOC	188
583	"	SC	1510
584	"	NOC	202
597	1980	SC	104
611	1979	Pat	217
616	1980	NOC	82
623	1979	Pat	259

1976 B L J R

B R J R			AIR
567	1977	Pat	44
571	"	NOC	346
580	"	Pat	78
587	"	"	251
591	"	"	282
594	"	"	5
601	"	"	1
606	"	NOC	179
621	1976	Pat	352
624	1977	"	228
639	"	NOC	65
640	"	Pat	23
646	"	"	39
657	"	"	155
684	"	Notes	70
691	"	Pat	125
701	"	"	285

1977 B L J R

B L J R			AIR
113	1977	Pat	129
115	"	"	84
129	"	NOC	69
132	"	Pat	127
149	"	NOC	180

1977 B L J R

BLJR			AIR
152	1977	Pat	198
160	1976	"	5
175	1977	"	199
178	"	"	222
217	"	"	86
288	"	"	7
253	"	"	47
286	"	"	268
293	1978	"	235
298	"	"	287
308	1977	"	284
311	1978	"	112
380	"	"	245
378	1977	"	206
396	1978	"	86
437	"	"	197
448	"	"	16
487	"	NOC	26
506	"	Pat	162
530	1977	"	295
548	"	"	185
599	"	"	161

1978 B L J R

BLJR			AIR
1	1978	Pat	157
8	"	SC	1096
22	1977	"	2149
32	1978	Pat	172
54	"	SC	522
60	"	Pat	101
79	"	"	2
87	1977	"	166
93	"	"	282
105	1978	SC	982
110	"	"	1088
113	"	"	481
117	"	Pat	318
122	"	"	158
128	"	SC	849
142	"	"	475
143	"	"	770
144	"	"	988
153	"	Pat	258
177	"	"	213
179	"	"	42
189	1977	"	245
191	1978	SC	1021
212	1977	Pat	305
225	1978	SC	979
229	"	"	845
234	1977	Pat	272
244	1978	SC	886
259	"	Pat	91
27	"	"	148

1978 B L J R

BLJR			AIR
280	1978	SC	1277
286	"	Pat	258
293	1979	"	60
298	1978	"	225
313	"	"	2
320	"	"	153
325	"	"	151
328	"	SC	918
332	"	"	1351
337	1977	NOC	176
341	"	"	181
343	1978	SC	1393
349	"	"	1244
354	"	"	1239
362	"	"	117
377	"	"	293
392	1979	"	18
410	1978	NOC	300
414	1977	Pat	23
416	1978	"	315
420	"	"	285
430	1979	"	25
437	"	"	14
455	1978	"	326
468	1979	"	5
469	1978	"	322
497	"	"	389
521	"	"	267
542	"	SC	1351
554	"	NOC	297
558	1978	Pat	251
561	1979	"	31
568	1979	NOC	76
572	1978	SC	1201
578	1977	Pat	181
575	"	"	154
577	1978	"	218
581	1977	"	152
584	"	"	204
586	1978	SC	1447
595	"	"	1455
603	"	"	1436
620	"	Pat	190
626	"	"	289
639	1979	NOC	29
642	1978	"	301
652	"	"	302
666	"	Pat	256
668	"	NOC	310
669	"	Pat	351
671	"	"	330
675	"	NOC	299
687	"	Pat	334
727	1979	"	25
738	"	"	1
758	1978	"	312
768	1979	"	46
776	"	"	58

1978 B L J R

BLJR			AIR
782	1978	Pat	260
787	"	"	120
800	"	"	210
818	1979	NOC	28
820	"	Pat	11
825	"	"	54
830	"	"	60
835	"	"	50

1979 B L J R

BLJR			AIR
1	1979	SC	114
20	"	Pat	172
33	"	"	175
38	"	"	115
44	"	"	174
46	"	"	178
48	"	SC	472
63	"	Pat	120
77	"	"	182
81	"	"	91
101	"	"	169
120	"	SC	1246
130	"	NOC	95
138	"	Pat	103
142	"	"	202
178	"	"	146
185	"	"	151
194	"	"	199
225	"	"	124
235	"	"	159
241	"	"	88
257	"	SC	1682
268	"	Pat	85
288	"	"	222
300	"	"	78
306	"	"	98
348	"	"	204
355	"	"	229
361	"	NOC	98
366	"	Pat	317
376	1980	NOC	35
384	1978	Pat	250
407	"	"	212
417	"	"	284
424	"	"	196
439	1980	"	22
446	1979	"	314
465	1980	"	24
476	1979	"	191
482	"	"	246
502	"	NOC	186
509	"	Pat	218
512	"	"	319
513	"	"	282

1979 B L J R

BLJR			AIR
515	1979	NOC	187
532	"	Pat	289
562	"	NOC	202
580	"	Pat	282
686	1980	"	18
691	1979	"	308
699	"	"	222
711	"	"	259
729	1980	SC	269
731	"	Pat	20
742	1979	SC	1745

1977 Pat L J R

Pat	LJR		AIR
590	1977	SC	746
591	1978	"	30
593	1977	"	1496
603	1978	Pat	64
628	"	"	28

1978 Pat L J R

Pat	LJR		AIR
1	1977	SC	2286
12	"	"	2142
14	"	"	2018
18	"	Pat	84
32	1978	"	101
47	"	NOC	87
51	1976	SC	163
60	1977	"	2149
68	1976	"	66
72	"	"	1074
78	"	"	425
92	"	"	599
96	1978	Pat	172
120	"	"	16
130	1977	"	283
146	1978	"	117
151	1977	"	295
208	1978	"	186
218	1977	SC	2285
226	1978	Pat	82
232	"	"	91
240	1978	NOC	150
249	"	Pat	121
255	"	"	97
261	"	"	146
297	"	"	197
309	"	"	153
324	"	"	318
329	"	"	223
344	"	"	126
349	"	"	112

1978 Pat L J R

Pat	LJR		AIR
355	1978	SC	411
358	"	Pat	2
365	1977	SC	2304
367	1978	SC	327
378	"	Pat	190
390	"	"	241
398	"	NOC	190
401	"	Pat	212
408	"	"	225
416	"	"	192
422	"	"	218
430	"	"	237
436	"	"	245
446	"	"	267
470	1979	Pat	60
486	"	"	14
492	"	"	25
500	1978	"	298
519	"	"	389
544	"	"	330
566	"	"	312
600	1979	"	54
614	"	"	6
622	"	"	185
632	"	NOC	28
634	1978	Pat	256
642	1979	"	179
647	1978	"	334
654	1979	"	50

1979 Pat L J R

Pat	LJR		AIR
7	1979	Pat	1
40	"	"	164
49	"	"	65
60	"	"	180
82	"	"	169
86	"	"	46
99	"	"	78
161	"	"	250
185	"	"	254
193	"	"	199
232	"	"	124
247	"	"	259
258	"	"	266
324	"	"	246
357	1980	"	1
362	1979	"	222
380	"	"	103
389	1980	"	20
398	1979	NOC	186
410	"	SC	1369
419	"	"	1360
478	"	Pat	308
544	1980	"	18
551	1979	"	229

THE

All India Reporter

1979

Patna High Court

AIR 1979 PATNA 1

K. B. N. SINGH, C. J. AND
B. S. SINHA, J.

Daib Dayal Tewari and another, Petitioners v. Chairman, South Bihar Regional Transport Authority, Patna and another, Respondents.

Civil Writ Jurisdiction Case No. 1658 of 1977, D/- 18-5-1978.

(A) M. V. Act (4 of 1939), S. 62 (1) — Temporary permit — Grant of — Permanent need does not exclude temporary need.

The existence of temporary need under any of the four clauses of sub-sec. (1) of S. 62 is a condition precedent for the grant of a temporary permit. But existence of a permanent need does not exclude the existence of a temporary need. Both can co-exist. AIR 1961 Pat 227; (1971) 3 SCC 803 and AIR 1966 SC 156, Rel. on. (Para 6)

Anno: AIR Comm. M. V. Act, S. 62 N. 3.

(B) Motor Vehicles Act (4 of 1939), S. 62 — Temporary permit—Prohibition against grant of — Object is expeditious disposal — Reason for not granting temporary permit when application for permanent permit is pending.

The whole idea behind prohibition to grant a temporary permit for a route or an area in respect of which an application for grant of a permanent permit was pending was for expeditious disposal of the application for grant of the permanent permit, leaving no option for the authorities to delay it by taking subterfuge of grant of temporary permits. The condition precedent for grant of temporary permits for a maximum period of four months, being temporary need, which obviously must mean public interest, it could not have been the intention of the Legislature that even in cases where different routes have been notified, though they may be interlinked, no temporary permit could be granted in respect thereof. The fact that such a power could be misused by repeated grant of temporary permits will not entitle a court to put a construction obviously not intended by the Legislature. AIR 1961 SC 82, Expl. (Paras 9, 10)

(C) Motor Vehicles Act (4 of 1939), S. 62 — Temporary permit, grant of — Objectors need not be heard — Matters to be considered. AIR 1970 Cal 104, Dissented from.

Section 62 is a self-contained provision, dealing with the grant of temporary permits for limited periods in public interest. Public need and public interest being the basis of such a grant under conditions specified, calling for objections, which would delay the grant of temporary permits in cases of urgent and immediate needs, does not admit of extension of the principles of natural justice in cases of such a grant. The principles of natural justice cannot be extended to such cases where, in effect, their application would defeat the very object for which the particular provision has been made. AIR 1970 Cal 104, Diss., (1967) 2 SCWR 857, Ref.

But in spite of the fact that the principle of natural justice does not apply it is only just and proper that the objections, if any, that are filed with regard to the grant of temporary permits, should

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be considered while considering the applications for grant of temporary permits. That will help the authorities in coming to a correct decision about the genuineness of the public need. The authorities should also take into account as to whether the inclusion of a few miles in respect of a route for which an application for grant of a permanent permit is pending, is genuine one or is just to get over the bar of the first proviso to Section 62 of the Act. Where authorities are obliged to grant successive temporary permits to meet the public needs, in such a situation, it is also obligatory on their part to consider the question of issuing permanent permits in respect of such routes. (Para 10)

Anno: AIR Comm. M. V. Act, S. 62 N. 7.

Cases Referred: Chronological	Paras
(1971) 3 SCC 803	6
AIR 1970 Cal 104	10
(1967) 2 SCWR 857	10
AIR 1966 SC 156	6
AIR 1961 SC 82	9
AIR 1961 Pat 227	6

Basudeva Prasad, Amla Kant Choudhury and Chotey Lal Narain Singh, for Petitioners; H. K. Thakur, Standing Counsel No. 3 and R. S. Pradhan, Jr. Counsel, for the State; Sriram Chandra Pandey, for Respondent No. 2.

K. B. N. SINGH, C. J.:— The petitioners in this writ petition have prayed for quashing an order dated the 1st Sept. 1977 (Annexure 5), passed by respondent No. 1 granting temporary stage carriage permit for the route Sinhaghat-Arrah-Buxar-Itarhi-Dhansol to respondent No. 2 as also for cancelling the permit (Annexure 7) issued to the said respondent in pursuance of the order aforesaid.

2. The petitioners are bus owners carrying on business of transport by hire operating on permanent stage carriage permits on the route Berhampur-Buxar-Kochas. According to the petitioners, on the 15th Sept. 1976, respondent No. 2 filed an application in the prescribed form, for grant of temporary stage carriage permit for the route Sinhaghat-Dhansol via Arrah, Behea Chowk, Berhampur and Buxar, without, however, mentioning in column 4 of the application form, the purpose for which the temporary permit was required. Respondent No. 1, without prior notice to the existing operators on the route and thus depriving them of the opportunity of making representation against the prayer of respondent No. 2 for grant of temporary permit, by his order dated the 7th Oct. 1976 (Annexure 2) granted temporary permit to respondent No. 2. It may be mentioned here that Annexure 2 shows that one Shri Ramji Prasad Singh, M.L.A. had recommended for issue of permit in public interest which, according to the petitioners, disclosed merely public need of permanent character and not temporary need within the meaning of S. 62 (c) of the Motor Vehicles Act (hereinafter to be referred to as 'the Act'). According to the petitioners, even in face of the order (Annexure 2) respondent No. 2 failed to place the bus on the route within 24 hours which he did after more than six months which clearly indicates that there was no temporary need. Respondent No. 1, however, condoned this delay of respondent No. 2 and validated the temporary permit up to 2nd Sept. 1977. On the 25th Aug. 1977, respondent No. 2 filed another application (Annexure 3) for further grant of temporary permit on the route in question, without mentioning, this time also, in the application form, that there was temporary need.

Petitioner No. 1 and two other persons namely Sri Satrughan Singh and Shrimati Savitri Devi filed objection to the said application suo motu. The objection petition of petitioner No. 1 is Annexure 4 to the writ application, and it is stated therein, inter alia, that as applications for grant of permanent permit on the said route were pending, the application for grant of temporary permit should not be entertained and that there is no temporary need for which temporary permit is required.

3. A counter-affidavit has been filed on behalf of respondent No. 2, denying the assertions made by the petitioner, that there was no temporary need for a temporary stage carriage permit for the route in question.

4. Two supplementary affidavits have also been filed on behalf of the petitioners by which some more documents (Annexures '8 to 10') have been filed. In the second supplementary affidavit, the petitioners have also prayed for quashing a subsequent order dated the 31st Dec. 1977 (Annexure '10'), passed by respondent No. 1, granting a fresh temporary permit to respondent No. 2, for the said route for a period of four months with effect from the 3rd Jan., 1978, as also for cancelling the permit (Annexure '11'), issued thereunder.

5. Mr. Basudeva Prasad, learned counsel appearing on behalf of the petitioners, has submitted that neither in the first application for grant of temporary permit (Annexure '1'), nor in the second application for grant of the temporary permit for the second time (Annexure '3'), respondent No. 2 mentioned the temporary need. The successive orders granting temporary permits (Annexures '2' and '5', respectively) also do not show the existence of the temporary need, and, therefore, the grant on both the occasions of temporary permits, being contrary to S. 62 of the Act, are invalid.

6. Portions of S. 62 of the Act, relevant for the purpose of this application, may usefully be quoted:—

"(1) A Regional Transport Authority may, without following the procedure laid down in S. 57, grant permits, to be effective for a limited period not in any case to exceed four months, to authorise the use of a transport vehicle temporarily.

(a) for the conveyance of passengers on special occasions, such as to and from fairs and religious gatherings; or,

(b) for the purpose of seasonal business; or,

(c) to meet a particular temporary need; or,

(d) pending decision on an application for the renewal of a permit;

and may attach to any such permit any condition he thinks fit:

Provided that a temporary permit under this section shall, in no case, be granted in respect of any route or area specified in an application for the grant of a new permit under S. 46 or S. 54 during the pendency of the application:

Provided further, that a temporary permit under this section shall, in no case, be granted more than once in respect of any route or area specified in an application for renewal of a permit during the pendency of such application for renewal."

It is a settled law that the existence of temporary need under any of the four clauses of sub-sec. (1) of S. 62, is the condition precedent for the grant of a temporary permit, as laid down in B. K. Mukherjee v. Chairman East Bihar Regional Transport Authority (AIR 1961 Pat 227) and Andhra Pradesh State Road Transport Corporation v. K. Venkataramireddy (1971 (3) SCC 803). The order granting temporary permit on the first occasion, dated the 7th Oct. 1976 (Annexure '2'), in pursuance of which the temporary permit was actually granted on the 2nd May, 1977, after condoning the delay, having already expired, it is no longer necessary to quash that order. Besides that, the order makes a mention about a letter of Shree Ramji Singh, M.L.A., about the existence of a public need, which has been relied upon in the order (Annexure '2'). Mr. Basudeva Prasad has urged that the letter of Shree Ramji Singh was indicative of a permanent need and not of a temporary need. It is not necessary to go into this question at all, inasmuch as the existence of a permanent need does not exclude the existence of a temporary need. Both can co-exist, vide the decision of the Supreme Court in the case of Madhya Pradesh State Road Transport Corporation v. B. P. Upadhya (AIR 1966 SC 156). The permit granted in pursuance of the second order (Annexure '5') dated the 1st. Sep. 1977, has also spent its force. While the said permit was being granted, petitioner No. 1, as already stated, and some other operators, suo motu filed objections, which were considered. The said order, therefore, also does not call for any interference. Had it not been for the grant of a third temporary permit, (Annexure '11'), as per order dated the 31st Dec. 1977 (Annexure '10'), which was in force when the case was taken up for hearing, the writ application would have ordinarily been dismissed as having become infructuous, as contended by learned Counsel appearing on behalf of the Respondents. Besides that, Mr. Basudeva Prasad has raised a legal question which may have a bearing on grant of successive temporary permits, and has pressed for deciding that question.

7. Mr. Prasad has urged that in view of the first proviso to S. 62, as quoted above, no temporary permit could be granted for the route in question, when applications for grant of a permanent permit were pending consideration, and has relied on the objections filed by petitioner No. 1 on the 24th Dec. 1977 (Annexure '9') to the grant of the temporary permit for the third time, in support of his submission.

8. In Annexure '9', it has been stated that the whole route from Sinha Ghat to Itarhi has been divided into three sections and on all the sections permanent vacancies have been advertised in the Bihar Gazette and applications for regular permit on the route have been receiv-

ed and are pending consideration, which fact attracts the first proviso to S. 62 of the Act. The three sections, according to learned counsel, are (1) Sinha Ghat to Arrah (2) Arrah to Buxar and (3) Buxar to Itarhi. Learned counsel has further submitted that Dhansoi is only six miles from Itarhi, in respect of which temporary permits on the first and second occasions were granted, and Sisondhi is three miles from Dhansoi, and, in order to get over the bar of S. 62 of the Act, respondent No. 2, in his last application (Annexure '12'), applied for grant of a temporary permit for the route Sinha Ghat to Sisondhi. The primary question, therefore, for consideration is whether any application for permanent permit for 'the route' or 'area' in question was pending at the time the temporary permit was granted to respondent No. 2, even assuming that the addition of Dhansoi or Sisondhi in the application was a camouflage to get over the bar under S. 58, as that question will arise for consideration after the first point is established.

9. The expression 'area' has been defined as follows in Section 2 (1) of the Act:

"'Area', in relation to any provision of this Act, means such area as the State Government may, having regard to the requirements of that provision specify by notification in the official gazette."

Section 2 (28A) of the Act, defines 'route', as follows:—

"'Route' means a line of travel which specifies the highway which may be traversed by a motor vehicle between one terminus and another."

No notification relevant in this regard has been brought to our notice. Mr. Basudeva Prasad, relying on a decision of the Supreme Court in the case of J. Y. Konddala Rao v. Andhra Pradesh State Road Transport Corporation (AIR 1961 SC 82), has submitted that 'area' may include the three routes notified. The observations relied upon are as follows (at page 93):—

"There is no inherent inconsistency between an 'area' and a 'route'. The proposed route is also an area limited to the route proposed. The scheme may as well propose to operate a transport service in respect of a new route from point A to point B and that route would certainly be an area within the meaning of S. 68-C."

The observations of the Supreme Court, relied upon, were made for countering the argument that a scheme under Section 68-C of the Act could be made only in relation to a pre-existing route. In the light of the definition of 'route', as quoted above, admittedly, no application for grant of a permanent stage carriage permit from one terminus Sinha Ghat to the other terminus Itarhi or vice versa, was pending before the authorities. As already mentioned, three applications for the grant of permanent permits in respect of the aforesaid route, treating it as three distinct routes, were pending. Therefore, even if 'area' is treated as synonymous with 'route', it is of no assistance to Mr. Prasad. The whole idea behind prohibition to grant a temporary permit for a route or an area in respect of which an application for grant of a permanent permit was pending was for expeditious disposal of the application for grant of the permanent permit, leaving no option for the authorities to delay it by taking subterfuge of grant of temporary permits. The condition precedent for grant of temporary permits for a maximum period of four months, being temporary need, which obviously must mean public interest, it could not have been the intention of the Legislature that even in cases where different routes have been notified, though they may be interlinked, no temporary permit could be granted in respect thereof. The fact that such a power could be mis-used by repeated grant of temporary permits will not entitle us to put a construction obviously not intended by the Legislature. There being no existing application for the grant of a permanent permit for the route Sinha Ghat to Itarhi, the bar contained in the first proviso to S. 62 of the Act, in my considered opinion, is not attracted. It is, therefore, not necessary to consider the question, whether inclusion of a distance of 6 miles from Itarhi to Dhansoi and another distance of 3 miles from Dhansoi to Sisondha in the third temporary permit was genuinely or mala fide made.

10. Another contention raised by Mr. Basudeva Prasad is that while issuing a temporary permit, principles of natural justice demanded that the other operators working on the route should be noticed. He has relied on a single Judge decision of the Calcutta High Court in the case of Krishna Gopal Dutta v. Regional Transport Authority, Burdwan (AIR 1970 Cal 104) that although S. 57 has been excluded in case of grant of a temporary permit under S. 62, but not

S. 47 of the Act, and, therefore, calling for objections from the operators working on the route or part thereof was essential. The above decision overlooks the scheme of the Act from which it is manifest that if publication of the application under S. 57 is excluded, the application of the provisions of S. 47 of the Act are also automatically excluded. The following observations from the decision of the Supreme Court in the case of Jayaram Motor Service v. Rajaratnam, (1967) 2 SCWR 857, may usefully be quoted:

"The scheme of S. 47 is that when a person makes an application under Ss. 45 and 46 the authority first considers it under S. 47 (1) in the light of the matters set out therein and also the representations, if any, made by the persons mentioned therein. The authority then fixes under S. 47 (3), having regard to the matters mentioned in S. 47 (1), the number of stage carriages for which permits may be granted in the region or on any specified route within such region. Having fixed the limit, the authority publishes under S. 57 (3) the application with a notice of the date before which representations in connection therewith may be submitted and the date on which such application and representations would be considered."

It was also held therein—

"Therefore, S. 47 envisages two stages of the enquiry: (i) the fixing of the number of permits under S. 47 (3) and (ii) the consideration thereafter of the application for grant of a permit and the representations, if any, by the persons mentioned in S. 47 (1)."

The actual grant being made under Section 48 of the Act S. 62 is a self-contained provision, dealing with the grant of temporary permits for limited periods in public interest. Public need and public interest being the basis of such a grant under conditions specified, calling for objections, which would delay the grant of temporary permits, in cases of urgent and immediate needs, does not admit of extension of the principles of natural justice in cases of such a grant. The principles of natural justice cannot be extended to such cases where, in effect, their application would defeat the very object for which the particular provision has been made. The Calcutta decision (AIR 1970 Cal 104) (supra), with great respects to the learned Judge, does not seem to lay down the law correctly. The question, however, is academic, so far as the present petitioners are concerned, inasmuch as one of them filed objections, which were taken into consideration by the authority while granting the temporary permit. Both the petitioners are brothers and holders of a permanent stage carriage permit on a portion of the route in question. In spite of the fact that the principle of natural justice does not apply, it is only just and proper that the objections, if any, that are filed with regard to the grant of temporary permits, should be considered while considering the applications for grant of temporary permits. That will help the authorities in coming to a correct decision about the genuineness of the public need. The authorities should also take into account as to whether the inclusion of a few miles in respect of a route for which an application for grant of a permanent permit is pending, is genuine one or is just to get over the bar of the first proviso to S. 62 of the Act. Where authorities are obliged to grant successive temporary permits to meet the public needs, in such a situation, it is also obligatory on their part to consider the question of issuing permanent permits in respect of such routes.

11. In the result, there is no merit in this application and it is accordingly dismissed, but, in the circumstances of the case, I shall make no order as to costs.

B. S. SINHA, J.:— I agree.

Application dismissed.

AIR 1979 PATNA 5

LALIT MOHAN SHARMA AND BIRENDRA PRASAD SINHA, JJ.

Ramsunder Singh, Petitioner v. Most. Pana Kuer and others, Opposite Parties.

Civil Revn. No. 307 of 1974, D/- 5-1-1978.*

Civil P. C. (5 of 1908), S. 152 — Correcting clerical erorrs in judgment — Decree passed by trial Court and affirmed by Appellate Court — Only Appellate Court can correct errors therein. (1910) 37 Ind App 70 (PC) and AIR 1959 Pat 591, Rel. on. (Para 2)

Anno : AIR Comm. C. P. C. (9th Edn.) S. 152, N. 9.

*(Against order of Q. Hoda, Munsiff, Hajipur, D/- 15-1-1978).

GV/GV/C673/78/PNK

Cases Referred: Chronological **Paras**

AIR 1959 Pat 591 2

(1910) 37 Ind App 70 : ILR 32 All 295 (PC) 2

K. K. Ghose, for Petitioner; T. S. Tetarvai, for Opposite Parties.

ORDER :— The petitioner had filed a suit for specific performance of a contract of sale which was decreed in 1959. The defendant appealed and the suit was dismissed by the lower appellate Court. The petitioner thereafter filed second Appeal No. 924 of 1961 in this Court which was allowed on 14-11-67 by a Division Bench and the suit was decreed. The petitioner thereafter filed an application under Ss. 151, 152 & 153 of the Civil P. C. before the trial Court for correction of the decree. The court has rejected the application as not maintainable on the ground that the decree of the trial Court had merged in the decree passed in the second appeal by the High Court. The petitioner has challenged the order by the present civil revision application which has been referred by a learned single Judge to Division Bench.

2. The provisions of S. 152 of the Civil P. C. which is applicable in the present case, lay down that a clerical error in judgments, decrees or orders can be corrected by the Court. The question is as to which Court has the jurisdiction in a case where the suit travels up to the appellate stage. The power of correction has been vested in the Court where the mistake is committed. It, therefore, follows that if the decree, which is sought to be corrected, has been passed by the appellate Court, it is the appellate Court which has got the jurisdiction to set the mistake right. In Lala Brij Narain v. Kunwar Tejbal Bikram Bahadur ((1910) 37 Ind App 70) (PC) it was held that the trial Court has no jurisdiction to amend the decree which has been affirmed in appeal. The said decision was given in slightly different circumstances but the principle is applicable to the present case. In Mt. Kulwanti Devi v. Ajodhi Singh (AIR 1959 Pat 591) also it was observed that in cases where the decrees passed by the trial Court are affirmed by the appellate Court the power to make corrections in the decrees vests in the appellate Court. It must, therefore, be held that the view of the trial Court in the present case was correct and the petitioner should have filed an application for correction of the decree in this Court. The civil revision application is dismissed but without costs. It would be open to the petitioner to file a proper application for correction of the decree in this Court.

Revision dismissed.

AIR 1979 PATNA 6

LALIT MOHAN SHARMA AND S. ALI AHMAD, JJ.

Madhusudan Prasad Agarwal, Appellant v. Smt. Shusma Bala Dasi and another, Respondents.

A.F.A.D. No. 705 of 1975, D/- 28-3-1978.*

(A) T. P. Act (1882), S. 106 — Notice to quit by joint lessors — Notice signed by one lessor but mentioning "We give you notice, etc." — Notice held was on behalf of all lessors. (Para 6)

Anno: AIR Comm. T. P. Act (4th Edn.) S. 106 N. 34.

(B) T. P. Act (1882), S. 106 — "Expiring with the end of a month" — Lease expiring at midnight of last date of month — Notice asking vacating of premises on the morning of next date is not invalid. AIR 1952 Pat 69, Foll. (Para 6)

Anno: AIR Comm. T. P. Act (4th Edn.) S. 106 N. 40.

(C) Bihar Buildings (Lease, Rent and Eviction) Control Act (3 of 1947), S. 11 (1) (d) — Defaulter — Tenant depositing rent in Court is a defaulter — Withdrawal of rent from Court is not easy and its possibility is not valid defence.

When a tenant has deposited rent in Court the landlord cannot withdraw the amount at will. He has to file an application for permission to withdraw, the tenants will have to be noticed, their objections heard and then the court may or may not permit withdrawal. Such a course for realisation of rent is not contemplated by the Act and possibility of realisation of rent in the above manner cannot be a valid defence. (Para 7)

(D) Bihar Buildings (Lease, Rent and Eviction) Control Act (3 of 1947), Ss. 2 (h), 11 — Liability for rent of tenant holding over — Tenant continuing in occupation even after tenancy was terminated under S. 106 T. P. Act — Tenancy

*(From decision of Lakshman Jee Jha, 4th Addl. Sub-J., Muzaffarpur, D/- 27-8-1975.)

continues till tenant is evicted in execution of decree on grounds mentioned in S. 11 — Tenant is liable to pay rent till evicted. AIR 1965 SC 414; AIR 1972 SC 2526; AIR 1976 SC 2229, Distinguished. (Para 10)

(F) Bihar Buildings (Lease, Rent and Eviction) Control Act (3 of 1947), S. 11 —Default—Realisation of arrears of rent by landlord after service of notice under S. 106 T. P. Act — Realisation does not wash out default — Effect of notice does not lapse. 1977 BBCJ 678, Rel. on. (Para 11)

(F) Bihar Buildings (Lease, Rent and Eviction) Control Act (3 of 1947), S. 11 — Need of landlord — Suit for eviction as landlord needed premises for his own use — Crucial date to determine requirement is date of suit. (Para 12)

Cases Referred:	Chronological	Paras
1977 BBCJ 678		11
AIR 1976 SC 2229		9
AIR 1972 SC 2526		8
AIR 1965 SC 414		8
AIR 1952 Pat 69		6

S. C. Ghose, P. K. Joshi, R. C. Thakur and N. K. Agrawal, for Appellant; Balabhadra Prasad Singh, Bishwanath Agrawal and Om Prakash Ghose, for Respondents.

S. ALI AHMAD, J.:— After this appeal was heard, we were informed that similar questions are involved in Second Appeal No. 231 of 1975. Learned counsel appearing in this appeal and Second Appeal No. 231 of 1975, therefore, prayed that the judgment in this appeal may not be delivered before the hearing of Second Appeal No. 231 of 1975 was concluded. We, therefore, directed Second Appeal No. 231 of 1975 to be listed along with this appeal for hearing. Learned counsel appearing in both these two appeals addressed us on the points involved in the cases. Only one point is common to the two appeals. The facts are also entirely different. It is, therefore, desirable to give separate judgments in the two appeals.

2. According to the plaintiff-respondents, they purchased the house from the admitted last owner under a registered sale deed dated 14-5-1956 executed in their favour. At the time of sale, the defendant-appellant was occupying the suit premises as a tenant on a monthly rental of Rs. 25. The defendant-appellant in the demised room was carrying on business under the name and style of 'Rashtriya Pustak Bhandar'. The defendant did not pay a single paisa as rent after the purchase without recourse to the suit. The rent from Oct. 1964, till April 1967 had fallen due at the rate of Rs. 25 per month, totalling to Rs. 775. He was a defaulter under S. 11 (1) (d) of the Bihar Buildings (Lease, Rent and Eviction) Control Act, 1947 (hereinafter to be called the Act). By virtue of this default he rendered himself liable to be evicted under S. 11 (1) (d) of 'the Act'. It is further said that the plaintiffs also required the house for their own occupation and also for the extension of their business of sweetmeat. This requirement, according to them, was bona fide which entitled them to get a decree for eviction on that count also. The plaintiff-respondents claim that they requested the appellant to pay the arrears and vacate the premises but it did not bear any fruit. In the circumstance, they say that they were obliged to send a notice under S. 106 of the T. P. Act on 2-11-1964 to the defendant-appellant asking him to pay the arrears of rent and to give vacant possession on the 1st Dec. 1964. This notice was sent by registered post and was received by the defendant on the 14th Nov. 1964. It is said that in spite of this notice the defendant-appellant neither paid arrears of rent nor vacated the house. The plaintiffs, therefore, were obliged to file this suit for recovery of Rs. 775 being arrears of rent and for eviction of the defendant from the suit premises.

3. The defendant in his written statement did not deny the title of the plaintiffs. Their case, however, is that the plaintiffs never informed him about the purchase for some months and, therefore, he did not know that the rent had to be paid to the plaintiffs. The allegation that the defendant was in the habit of not paying rent without recourse to the suit was also denied. It has been said that in the year 1956 he sent Rs. 70 covering rent for two months by money order but the same was refused and the money order was returned. It is also said that on the assurance of the plaintiffs he paid Rs. 165-8-3 to the Electric Supply Company and also paid Rs. 34-7-9 on 1-2-1967 for restoration of electric connection. These two amounts, according to the defendant, are to be adjusted towards rent. Further according to the defendant's case the plaintiffs had earlier instituted Title Suit No. 228 of 1956 in the court of the Munsif on 21-12-1956 for eviction. This suit was decreed by

the trial court against which an appeal, being Title Appeal No. 171 of 1960 was preferred to the District Judge, Muzaffarpur. On the order of the appellate court, the defendant, it is said, deposited Rs. 1,500 towards rent in the appellate court. Ultimately the appeal was allowed and the case was remanded to the trial court for disposal in accordance with law. But the suit was withdrawn by the plaintiffs on 31-1-1966. It is also said that while Title Suit No. 228 of 1956 was pending, the plaintiffs instituted Money Suit No. 223 of 1964 for realisation of rent amounting to Rs. 900. The court in the money suit permitted withdrawal of Rs. 587.95 paise (after adjusting Rs. 312.05 paise spent by the defendant on behalf of the plaintiffs) out of Rs. 1,500 that was deposited in Title Suit No. 228 of 1956. The amount so directed was withdrawn by the plaintiffs leaving a balance of Rs. 912.05 paise which the plaintiff was at liberty to withdraw on account of rent. It is said that this sum of Rs. 912.05 paise is sufficient to satisfy the rent from Oct. 1964 to 15th October 1967. It is further said that the defendant has been remitting rent from Oct. 1967 onwards but the plaintiffs have all along been refusing to accept the same. On these facts, it is said that no arrears of rent is due to the plaintiffs from the defendant as claimed by the plaintiffs and that the plaintiffs have no personal necessity for the house as alleged and that the suit has been filed with a view to compel the defendant to increase the rent. With regard to the notice under S. 106 of the Transfer of Property Act, it is said that the same was never received by the defendant.

4. The trial court decreed the suit holding that the defendant was a monthly tenant and had not paid rent from Oct. 1964 to April 1967 (at the rate of Rs. 25 per month). With regard to the notice under S. 106 of the Transfer of Property Act, the trial court was of the opinion that the same was served on the defendant on 14-11-1967 on behalf of the two plaintiffs and that it was valid.

5. The defendant being aggrieved by the decree passed by the trial court preferred an appeal before the District Judge, Muzaffarpur. The appeal was heard and dismissed by the 4th Additional Subordinate Judge. The appellate court while dismissing the appeal affirmed the findings given by the trial court and also held that the plaintiffs needed the demised premises reasonably and in good faith for their own occupation. This second appeal was thereafter filed in this Court which has been referred to a Division Bench by a learned single Judge before whom the appeal was placed for hearing.

6. Mr. S. C. Ghose, learned counsel for the defendant-appellant first submitted that the notice under S. 106 of the T. P. Act was invalid and, as such, the suit was not maintainable. In that connection, he referred us to the notice itself which has been included in the supplementary paper book. The notice reads thus:—

"Dear Sir,

We beg to give you notice that you are in occupation of premises hereinafter described as tenant since our purchase of the house, you have not paid a single sheel towards rent except what you deposited in court in T. S. 228 of 1956.

That we want the portion of premises occupied by you for our personal necessities and owing to yourselves being defaulter we do not want to keep you as tenant any longer.

This is therefore to request you to quit and vacate the premises occupied by you and give vacant possession to us on the 1st Dec. 1964 and to pay up all arrears from Nov. 1961 to Oct. 1964 which is saved from limitation and in the event of your failure to do the same we will sue you in ejectment after the expiry of the period and for arrears and for damages and your tenancy is hereby terminated.

Yours faithfully.
Sushama Bala Dasi."

The first criticism is that although there are two plaintiffs, who have purchased the house and who have filed the present suit but the notice was sent only on behalf of Sushama Bala Dasi, plaintiff No. 1. The second criticism is that vacant possession of the premises has been asked to be given by this notice on the 1st Dec. 1964, which is in violation of the provision of S. 106 of the T. P. Act. Neither of the two criticisms is valid and sustainable. The contents of the notice clearly indicate that it is on behalf of more than one person as in all relevant places the word 'we' has been used. Had it been only on behalf of plaintiff No. 1 then instead of 'we' one will expect 'I'. Then again it is said in the notice that vacant possession be given to 'us'. Here also if the notice was given by only one person then instead of 'us' 'me' would have been used. The

fact that the notice was illegal as it was given by only one of the two plaintiffs has not been mentioned in the written statement and as such the plaintiff-respondents did not adduce any evidence to show as to in what circumstance the notice was signed only by plaintff No. 1. For these reasons in my view the notice cannot be said to be invalid on this count. Now so far the other criticism that the plaintiffs asked the defendant to give vacant possession of the premises on the 1st Dec. 1964, is concerned, I do not find anything wrong in that. The plaintiffs could not have asked the defendant to give vacant possession on 30th Nov. 1964, because before the midnight of the 30th Nov. 1964, the lease could not be terminated. The notice, in my view, on the facts of this case meant that vacant possession should be given to the plaintiffs immediately after the expiry of the 30th Nov. 1964. I am supported in (this) view by a Bench decision of this Court in Ram Palak Mahton v. Bilas Mahton (AIR 1952 Pat 69) where also the defendant was called on to vacate the premises on the 1st Jan. 1946. That notice was held by the Bench to be a valid notice. For these reasons, I do not find any fault with the notice on either of the two counts urged by learned counsel.

7. Learned counsel next urged that the finding to the effect that the appellant was a defaulter and had not paid rent for the month of Oct. 1964 to April 1967, is erroneous in law and as such it should be interfered with. According to him Rs. 912.05 paise was still in deposit which the plaintiffs were at liberty to withdraw on account of rent for the period in question. The fact that Rupees 912.05 paise lay in deposit in court is not disputed but it is significant to note that the plaintiffs could not withdraw the money on their will. If they wanted to withdraw they had to file applications praying for withdrawal of the amount. The defendant in the event of such an application being filed had to be noticed and objections invited and after hearing the parties the court either could have allowed or disallowed the prayer for withdrawal of the money. Such a course for realisation of rent is not contemplated by the Act and the possibility of realising the rent in the aforesaid manner cannot be, in my opinion, a valid defence. I am, therefore, unable to hold that the defendant was not in arrears of rent for the period beginning from Oct. 1964 to April, 1967. The findings of the two courts below which have not been assailed on any other ground are perfectly justified.

8. Mr. Ghose further urged that after the termination of the tenancy, i.e. with effect from 1st Dec. 1964, the defendant ceased to be a tenant and as such no rent was payable and since no rent was payable he could not be evicted from the suit premises on the ground that he was a defaulter within the meaning of S. 11 (1) (d) of the Act. To support his contention, learned counsel relied on the decisions in the case of Anand Nivas Private Ltd. v. Anandji Kalyanji's Pedhi (AIR 1965 SC 414) and in the case of J. C. Chatterjee v. Shri Sri Kishan Tandon (AIR 1972 SC 2526). In AIR 1965 SC 414 (supra), it has been held that:—

"A person remaining in occupation of the premises let to him after the determination or expiry of the period of the tenancy is commonly, though in law not accurately called a statutory tenant. Such a person is not a tenant at all; he has no estate or interest in the premises occupied by him. He has merely the protection of the statute in that he cannot be turned out so long as he pays the standard rent and permitted increases, if any, and performs the other conditions of the tenancy. His right to remain in possession after the determination of the contractual tenancy is personal, it is not capable of being transferred or assigned and devolves on his death only in the manner provided by the statute."

These observations by the learned Judges of the Supreme Court have been made in a different context altogether. The question for consideration in that case was as to whether the heirs of a statutory tenant have the right to sublet the premises which is a contractual tenant has? In that background, their Lordships observed that since a statutory tenant has no estate or interest in the premises occupied by him and that he cannot be turned out so long he pays the standard rent on his death his heirs cannot induct sub-tenant in the premises. In the case of AIR 1972 SC 2526 (supra) also the same view has been reiterated. Reliance has been placed on the observations made in this case to the following passage :—

"It was contended before us that since the rent was payable by the heirs and in fact it was paid during the pendency

of the proceedings, they were tenants within the definition. In our opinion, rent was not payable by the legal representatives and if the rent was paid by them during the course of the proceedings it was not because they were recognised as tenants by the landlord but because the amount was received by him without prejudice to his rights under orders of the court. Indeed if the original tenant had died before the contractual tenancy had been terminated then the heirs would have inherited the tenancy and in that sense the rent would have become payable by them. But that is not the position here."

This observation, in my opinion, does not help the appellant at all. Rather if at all, it goes against them. It is clear from the portions I have quoted above that if after the termination of tenancy the statutory tenant dies then no rent is payable by the heirs. But in case the tenant dies before the termination of tenancy then rent becomes payable by the heirs of the tenant even after the termination of tenancy. These two Supreme Court decisions, therefore, are of no assistance to the appellant.

9. 'Tenant' has been defined in Section 2 (h) of the Act which reads as follows:—

"Tenant" means any person by whom, or on whose account, rent is payable for a building and includes—

(i) a person continuing in possession after the termination of the tenancy in his favour; and,

(ii) a person who occupies a building as an employee of the landlord of such building either on payment of rent or otherwise."

According to S. 2 (h) (i) a person continuing in possession after the termination of tenancy in his favour is included in the definition of 'tenant'. The definition of 'tenant' in S. 2 (i) of the Madhya Pradesh Accommodation Control Act, 1961, is as follows:—

"A person by whom or on whose account or behalf the rent of any accommodation is, or, but for a contract express or implied, would be payable for any accommodation and includes any person occupying the accommodation as a sub-tenant and also any person continuing in possession after the termination of his tenancy whether before or after the commencement of this Act; but shall not include any person against whom any order or decree for eviction has been made."

According to this definition also any person continuing in possession after the termination of his tenancy is included in the definition of 'tenant'. In the case of Damadilal v. Parashram (AIR 1976 SC 2229) a question arose as to whether a tenant after termination of tenancy in his favour remains a contractual tenant and continues to hold an estate or is rendered to the category of a statutory tenant having no estate or property in the premises which he occupies. The learned Judges held that the definition makes a person continuing in possession after the determination of his tenancy a tenant unless a decree or order for eviction has been made against him, thus putting him on par with a person whose contractual tenancy still subsists. Their Lordships further held that the incidents of such tenancy and a contractual tenancy must therefore be the same unless any provision of the Act conveyed a contrary intention.

10. Now coming to the Bihar Buildings (Lease, Rent and Eviction) Control Act, 1947, I find that the position here is quite simple and plain. A suit for eviction of the tenant can be brought only after the tenancy is determined by a notice under S. 106 of the T. P. Act. If the argument of Mr. Ghose is acceptable then no rent is payable by the tenant. The Act, however, makes it clear that rent is payable even during the pendency of a suit for eviction which necessarily has to be paid after the tenancy is terminated. Sec. 11A of the Act is pointer in that direction. According to this section the landlord may make an application at any stage of the suit for an order on the tenant to deposit monthly rent and also the arrears of rent, if any. The court has been authorised under this section to pass an order directing the tenant-defendant to pay not only the arrears of rent but also current rent. If no rent was payable after the termination of tenancy then there could have been no provision in the Act enabling the landlord to file an application for deposit of current rent and authorising the court to pass an order for deposit of the current rent. For these reasons, in my view, the intention of the legislature is unambiguously clear that the tenancy continues even after it is determined by a notice under Sec. 106 of the T. P. Act till the tenant is evicted in execution of a decree passed on one or more of the grounds mentioned under S. 11 of the Act.

11. Mr. Ghose also urged that after the service of notice under S. 106 of the T. P. Act, the plaintiffs realised arrears of rent for the period beginning from Sept., 1961 to Sept., 1964 and by such realisation the notice under S. 106 of the Transfer of Property Act lapsed. He further urged that thereafter no notice terminating the tenancy under Sec. 106 of the Transfer of Property Act was served and as such the suit was not maintainable. This point also has no susbtance. It has been held in the case of Hardwari Lal v. Mst. Nandrani (1977 BBCJ 678) that the "defaulted amount being paid later will not make the case of no default or a case of no arrear but it has to be decided on the principle of waiver as to whether the plaintiff having accepted the rent later has waived his right to evict the defendant." Learned counsel did not contend that after serving notice under S. 106 of the Transfer of Property Act the plaintiffs had lost the right to realise the arrears of rent. If this right was not extinguished there was nothing wrong in filing the suit and realising the arrears of rent as has been held by N. P. Singh, J. that subsequent payment of the arrears will not make the case of "no arrear". I do not, therefore, find any thing to support the view that the notice lapsed or that by realising the arrears of rent the plaintiff waived his right to evict the defendant from the suit premises.

12. Learned counsel also submitted that since after the filing of this appeal in this Court certain new developments have taken place and that now the plaintiffs cannot be said to require the premises reasonably in good faith for their own occupation. The new developments, according to the appellant is that he has been able to take possession of another portion of the same building and that portion is sufficient to meet his requirement. I do not think now it is possible to hold that the respondents do not require the suit premises reasonably for their own occupation. The crucial date to determine the requirement is the date on which the suit is filed. However, be that as it may, since I have held above that the appellant is a defaulter within the meaning of S. 11 (1) (d) of the Act the question of personal necessity loses its significance as the suit has to be decreed on that ground alone.

12-A. For these reasons, I do not find any merit in the appeal which is dismissed with costs. Hearing fee Rupees 110/-.

LALIT MOHAN SHARMA, J.:— I agree.

Appeal dismissed.

AIR 1979 PATNA 11

MEDINI PRASAD SINGH, J.

Dwarka Rai and others, Appellants v. Babu Lakshmi Narain Singh and others, Respondents.

A. F. A. D. No. 321 of 1968, D/- 28-2-1978.*

Civil P. C. (1908), S. 2 (12) and O. 20, R. 12 — Mesne profits — Basis on which it should be determined.

The criterion for calculation of mesne profits is that mesne profits can only consist of what the person in wrongful possession of such property actually received or might with ordinary diligence have received therefrom. (Para 5)

The second principle is that in determining the question of mesne profits the Court should aim at doing justice between the parties having regard to all the circumstances of the case, the object being to see that the person wrongfully kept out of possession is put in the same position financially as if right had been done. AIR 1917 Pat 421; (1900) ILR 27 Cal 951 (PC), Rel. on. (Para 5)

The true test must be what the ordinary prudent agriculturist would have grown. (Para 5)

Anno: AIR Comm. C. P. C., 9th Edn., O. 20 R. 12 N. 5.

Cases Referred: Chronological	Paras
AIR 1954 Pat 447	5, 6
AIR 1935 PC 49	4
AIR 1930 PC 82 : 1930 All LJ 128	5
AIR 1917 Pat 421	4, 5
(1900) ILR 27 Cal 951 (PC)	5

Kaushal Kishore Singh, Parmanand Saran and Ashok Kumar Varma, for Appellants; Shyam Sundar Sinha 'Shyam' and Animesh Chandra Ghosh, for Respondents.

JUDGMENT:— This appeal by the defendants from a final decree of the Additional Subordinate Judge, Begusarai, of 9 March, 1968 is solely concerned with the question of ascertainment of mesne profits. The profits consist of the pro-

*(From decision of Jagnarain Pd., Addl. Sub-J., Begusarai, D/- 9-3-1968).

duce from 4 bighas 10 kathas of land. The point raised for determination in this appeal is as to the basis upon which mesne profits should be determined. The plaintiffs-respondents claimed mesne profits for 15 years from 1349 to 1363-Fs. claiming Bhadai and Rabbi crops. They claimed maize as Bhadai crops for the year 1353-Fs. and wheat, sugar-cane, Rahar, Mirchai, Andi and Alua as Rabbi crops for different years. Wheat was claimed only for three years, 1349, 1350 and 1353-Fs.; sugar-cane was claimed for five years, namely, 1351, 1352 and 1358 to 1360-Fs., Rahar for two years 1355 and 1357-Fs., Mirchai and Andi for 1361-Fs. and Alua for 2 years 1356 and 1363 Fs. The total amount claimed after deduction of the cost of cultivation was Rs. 77,054.25 Paise in respect of both the Bhadai and Rabbi crops.

2. The learned Munsif 1st, Begusarai rejected the claim of the plaintiffs for Bhadai (maize) crops. He also disallowed the claim for Mirchai, Andi and sugarcane. He, however, allowed wheat (i) for the years claimed (1349, 1350 & 1363 Fs.) and (ii) also for 10 years more for which there was no claim, This was given on the ground that the land was capable of producing wheat according to the report of the Pleader Commissioner. He rejected the case of the defendants to the effect that the land produced only Jaokerai every year. On appeal the learned Additional Subordinate Judge, Begusarai affirmed all the findings of the learned munsif and he proceeded on the following basis as stated by himself in para. 28 of his judgment:—

"It is now well-settled that mesne profits are allowed for the best crops grown in the year and in absence of that, the rightful owner is entitled to the best produce which a man in wrongful possession could have produced with due diligence as a prudent cultivator....."

3. The questions canvassed in this Court are as to whether mesne profits have been correctly determined (i) as to the defendants' liability from the date of dispossession (16-4-1941) till the date of the filing of the suit (17-3-1944), the same not having been mentioned in the preliminary decree for that period; (ii) as to the plaintiffs' right to obtain a decree for wheat for the period of 10 years for which no claim was made by them in the plaint or in evidence, (iii) as to the quantity of produce of Alua allowed by the courts to the full extent of the claim at the rate of 900 maunds per year ignoring the report of the pleader Commissioner who had allowed only 2/3rd of the claim, that is, at the rate of 600 maunds for each year; (iv) as to the grant of interest not mentioned in the preliminary decree, though claimed in the plaint; and lastly (v) as to the rate of produce and sale rate by ignoring the real evidence on record.

4. Mesne profits are defined in Section 2 (12) of the Civil P. C. as "those profits which the person in wrongful possession of such property actually received or might, with ordinary diligence, have received therefrom, together with interest of such profits, but shall not include profits due to improvements made by the person in wrongful possession."

It is quite clear that on the terms of this definition of mesne profits, the plaintiffs are entitled to (i) those profits which the person in wrongful possession of such property actually received or (ii) in absence of that which the person in wrongful possession might with ordinary diligence have received therefrom, together with interest thereon and in such cases, as held in Secretary of the State v. Saroj Kumar (AIR 1935 PC 49).

"..... What the plaintiffs have to show is that with reasonable diligence, more might have been realised than was actually realised in the way of profits..... As to what amounts to due diligence..... the person in wrongful possession is not liable for failure to realise the highest possible rates of rent and premium from the tenants. It is enough if taking account of both rent and premium, if any, a fair return has been realised from the land, and their Lordships will deal with the case on that basis in considering whether the plaintiffs have shown that there has been a want of reasonable diligence on the part of the defendant."

In that case the profits of land consisted of rent and Salami. The principles enunciated therein, however, will apply to the case of produce from agricultural land also. Reference may also be made to the case of E. Dalgleish v. Nandan Misser (AIR 1917 Pat 421). In that case the decree-holder had offered no evidence as to whether his cultivation of tobacco and chillies was more profitable to him or not. It was held that the learned Subordinate Judge was wrong in awarding a large sum on account of tobacco and chilli cultivation. In the present case the courts below have not determined the question as to whether the

plaintiffs showed want of reasonable diligence on the part of defendants in not growing wheat crops. They have held them liable simply because the land was capable of growing wheat crops. The approach, thus, was wrong. Learned counsel for the appellants submitted that the plaintiffs adduced positive evidence to the effect that the defendants had grown particular crops in particular years and did not give any evidence that the defendants as ordinary prudent agriculturist would have grown wheat in those years for which wheat was awarded to them. It was urged that the onus was on the plaintiffs to prove it and in absence of the same, the courts below should have awarded mesne profits on the basis of crops actually grown by the defendants as provided in the first part of the definition of "mesne profits". In my opinion, counsel is right on this point. I have already referred to the principles enunciated in Secretary of the State v. Saroj Kumar, AIR 1935 PC 49 (supra). According to that decision, it is for the plaintiffs to show that with reasonable diligence the person in wrongful possession would have cultivated more profitable crops. The two courts below have not discussed the evidence on record from this point of view. They simply accepted the report of the Pleader Commissioner to the effect that the land was capable of growing wheat. It is not clear from the judgment of any of the two courts below as to whether there is any oral evidence on the record even to show that the land was capable of growing wheat in each of the years for which no claim was made by the plaintiffs. In the circumstances the case will have to be sent back to the learned Additional Subordinate Judge for a fresh decision for ascertainment of mesne profits.

5. Learned counsel appearing for the plaintiff-respondents cited three decisions namely, E. Dalgleish v. Nandan Misser, AIR 1917 Pat 421; Harry Kempson Gray v. Bhagu Mian, AIR 1930 PC 82 : (1929-30) 34 Cal WN 257 : ILR 9 Pat 621 (PC) and Jagannath Prasad v. Badiul Mulk Khan, AIR 1954 Pat 447. In my opinion these cases do not help the plaintiff-respondents. According to all these cases, the criterion for calculation of mesne profits is that mesne profits can only consist of what the person in wrongful possession of such property actually received or might with ordinary diligence have received therefrom. In the Patna case (AIR 1917 Pat 421) it was further pointed out that there is a second principle for assessment of mesne profits. The second principle is that in determining the question of mesne profits the court should aim at doing justice between the parties having regard to all the circumstances of the case, the object being to see that the person wrongfully kept out of possession is put in the same position financially as if right had been done. This principle had been enunciated long ago by the Judicial Committee in Grish Chunder v. Shoshi (1900) ILR 27 Cal 951: 27 Ind App 110 (PC). While appreciating that the Code of 1882 introduced the words "interest on those profits" in the definition of mesne profits, it was observed in that case that, as mesne profits were in the nature of damages, the court might refuse interest in moulding a decree according to the justice of the case. It is clear from this case that there can be no rigid rule for determining the amount of mesne profits and the amount must be assessed in every case by a proper exercise of judicial discretion. It would depend upon the circumstances of each case, as for example, the Court can refuse interest in a particular case or it can give less than six per cent, per annum. The rate must depend upon a variety of circumstances. In the present case the court below has not kept in mind the second principle in calculating mesne porfits. In the Privy Council case (AIR 1930 PC 82) the appellants were owners of an Indigo factory and had utilised the lands in growing Indigo for the special purposes of the factory. It was contended on behalf of the appellant that the actual cultivation having been in Indigo, the Indigo profits only should have been allowed. The contention was repelled. It was observed that the growing of Indigo was for the special purposes of the appellants who were owners of the adjacent factory and that an ordinary farmer would have grown the other more profitable crops for which the land was admittedly adapted. Their Lordships said that in all such cases the true test must be what the ordinary prudent agriculturist would have grown. It is clear that the Privy Council case was decided upon its own facts and circumstances. In the present case the defendant-appellants did not cultivate the land for any special purposes. It is not suggested that they did not cultivate the lands in question as ordinary prudent farmers. This case,

therefore, is not of any assistance to the respondents.

6. Counsel for the respondents relied upon the case of Jagannath Prasad, AIR 1954 Pat 447 for the purpose of showing that the claim of the plaintiffs for mesne profits should not be treated as a decisive circumstance and that it was open to the courts to award more mesne profits than claimed by the plaintiffs. The following observation made in that case was relied upon (at p. 448):—

"It might well be that the plaintiff deliberately claimed mesne profits at a low rate for the purpose of avoiding payment of court-fee. The real test to be applied is what an ordinary prudent agriculturist would have grown on the land in dispute for the years....."

As already stated the principles for assessment of mesne profits laid down in this case cannot be disputed. The difficulty in the present case, however, is that the principles for assessment of mesne profits have not been correctly applied by the two courts below to the facts of the present case. On behalf of the appellants it was brought to the notice of this Court that the suit was valued by the plaintiffs at Rs. 970.50 p. only but the amount of mesne profits claimed was Rs. 77,054.25p. and that the courts below allowed mesne profits for Rs. 20,848/-. Counsel for the appellants also submitted that although the lower appellate court held in para. 30 of its judgment that the plaintiffs were not entitled to the amount of mesne profits from the date of dispossession up to the date of filing of the suit, it awarded mesne profits to the plaintiff-respondents for that period simply on the ground that no such objection was taken by the appellants before the Munsif or in the grounds of appeal. In the view which I have taken of the case it is not necessary to express any opinion on these matters because the case is being remanded and all these matters can be placed before the court below for consideration. On a consideration of the submissions raised on behalf of the parties, I am of opinion that the courts below have not correctly applied the principles in calculating mesne profits. However, I do not feel it necessary to set aside the judgment of the trial Court because the errors committed by it can be corrected by the court of appeal below.

7. In the result the judgment and decree passed by the learned Additional Subordinate Judge, Begusarai dated 9 March, 1968 are set aside, the appeal is allowed and the case is sent back to him for fresh decision in accordance with law and in the light of the observations made above. No costs.

Case remanded.

AIR 1979 PATNA 14

B. P. JHA AND NAGENDRA PRASAD SINGH, JJ.

M/s. Sass Construction & Power Company (P.) Ltd., Appellant v. Fertilizer Corporation of India Ltd., Respondent.

A.F.O.O. Nos. 58 and 72 of 1976, D/- 11-4-1978.*

Arbitration Act (10 of 1940), S. 34 — Application for stay — "Ready and willing" — Applicant must also make necessary averments in the application of his readiness and willingness.

Before filing an application under Section 34 the applicant must satisfy these conditions, namely, that (i) that he must file the application at any time before filing the written statement or taking any other steps in the proceedings, and (ii) that he was at the time when the proceeding commenced and is still ready and willing to do all things necessary for the proper conduct of the arbitration. The applicant is also required to make necessary averments that not only he is ready at present but he was also ready and willing to participate in the arbitration at the commencement of the proceeding. These facts must be supported by an affidavit. If there is no such averment nor there is any affidavit, the application under S. 34 must fail. (Para 9)

In the instant case the first condition was satisfied but not the second. There was also neither any averment nor any affidavit and hence the application was not maintainable. (Para 9)

Anno: AIR Manual (3rd Edn.), Arb. Act, S. 34, N. 9, 17.

Cases Referred: Chronological	Paras
AIR 1975 SC 469	4, 8
(1951) 2 KB 447 : (1951) 1 All ER	1021,
W. Bruce Ltd. v. J. Strong	8
(1882) WN 159, Weir v. Johnson	5

*(From order of G. N. Chandra, Sub-J., First Court, Dhanbad, D/- 12-12-1975.)

GV/GV/C661/78/MVJ

K. D. Chatterjee, Samir Kumar Ghosh and Laxmi Narain Das, for Appellant; Balabhadra Prasad Singh and Bindbashini Prasad Singh, for Respondent.

B. P. JHA, J.:— I shall dispose of these two appeals, namely, Miscellaneous Appeals Nos. 58 and 72 of 1976 by a common judgment as there is common point of law for decision. The parties in both the appeals are common. The plaintiff preferred these two appeals against the order dated 12-12-1975 passed in Money Suit No. 26 of 1974 and order dated 7-1-1976 pased in Money Suit No. 173 of 1974. Miscellaneous Appeal No. 58 of 1976 arises out of Money Suit No. 26 of 1974 and Miscellaneous Appeal No. 72 of 1976 arises out of Money Suit No. 173 of 1974. The points of law raised in both the orders are common.

2. The appellant in both the appeals filed the aforesaid money suits for realization of certain dues from the Fertilizer Corporation of India Ltd. (hereinafter referred to as 'the Corporation'). The plaintiff entered into agreements with the Corporation for executing certain works. In this connection the plaintiff executed two agreements with the Corporation. Clause 65 is the arbitration clause in both the agreements which runs as follows:—

"Settlements of disputes — except where otherwise provided in the contract, all questions and disputes relating to the meaning of the specifications, designs, drawings and instructions hereinbefore mentioned and as to the quality of workmanship, or materials used on the work, or as to any other question, claim, right, matter or thing whatsoever if any arising out of, or relating to the contract, designs, drawings, specifications, estimates, instructions, orders, or these conditions, or otherwise concerning the work of the execution, or failure to execute the same. Whether arising during the progress of the work or after the completion or abandonment thereof or otherwise shall within one month of the arising of such question or dispute, be referred to the Sole Arbitration of the General Manager of F.C.I. and if the General Manager is unable or unwilling to act, to the Sole Arbitration of some other person appointed by the G. M. willing to act as such Arbitrator. There will be no objection if the Arbitrator so appointed is an employee of F.C.I. and that he had to deal with the matters to which this agreement relates and that in the course of his duties as such he had expressed views on all or any of the matters in dispute or difference. The Award of the Arbitrator so appointed shall be final, conclusive and binding on all parties to this contract."

It is on the basis of this arbitration clause, the plaintiff sent two notices in respect of two agreements to the Corporation on 2-5-1973 for referring the dispute between the parties to the arbitrator in view of the arbitration cl. 65 of the agreement. The defendant Corporation instead of referring the matter to the arbitrator filed an application under S. 33 of the Arbitration Act, 1940 (Act X of 1940) (hereinafter referred to as 'the Act') before the Subordinate Judge, 1st Court, Dhanbad challenging the validity of the arbitration clause. The Corporation challenged the validity of the arbitration clause on the ground that the arbitration agreement had been determined by efflux of time. In view of this application under S. 33 of the Act, the the learned Subordinate Judge was pleased to pass an ad interim order of injunction on 10-9-1973 restraining the plaintiff from enforcing the arbitration clause and restrained the General Manager of the Corporation from proceeding with the arbitration. Under cl. 65 of the agreement the General Manager of the Corporation was the arbitrator. This order was passed in Miscellaneous Case Nos. 38 and 39 of 1973 on the basis of the petition filed by the defendant-Corporation. Thereafter the plaintiff filed two money suits for realisation of the money dues with the Corporation, that is, on 25-2-1974 Money Suit No. 25 of 1974 and on 30-9-1974 Money Suit No. 173 of 1974. During the pendency of the ad interim injunction orders, the defendant-Corporation filed two applications under S. 34 of the Act for stay of proceedings in two suits on 20-5-1975 (in Money Suit No. 26 of 1974) and on 27-5-1975 (in Money Suit No. 173 of 1974). On the basis of these two petitions, the court below stayed the proceeding in both the suits (Money Suits Nos. 26 and 173 of 1974). The plaintiff has preferred these two appeals under S. 39 (1) (v) of the Act against the order staying the proceedings in both the suits.

3. The short point for consideration in both the appeals is:

Whether the applicant has satisfied the court not only that he is but also that he was at the commencement of the

proceeding ready and willing to do every thing necessary for the proper conduct of the arbitration proceeding?

Before filing an application under S. 34 of the Act the applicant is required to satisfy two conditions, namely:

(i) that the application must be filed at any time before filing the written statement or taking any other steps in the proceedings, and,

(ii) that the applicant was at the commencement of the proceedings and still is ready and willing to do all things necessary for proper conduct of the arbitration.

In the present case the first condition has been satisfied. The defendant-Corporation moved applications under S. 34 of the Act in two suits before filing of the written statement or before taking any other steps in the proceedings. It is to be seen as to whether the Corporation has satisfied the next condition or not. On 2-5-1973 the plaintiff-appellant sent notices to the Corporation requesting it to send the matter to the arbitration in accordance with Cl. 65 of the agreement. Instead of referring the matter to the arbitrator, the Corporation moved applications under S. 33 of the Act and thereby challenged the validity of the existence of the arbitration agreement. To this effect the Corporation moved two separate applications in Miscellaneous Cases Nos. 38 and 39 of 1973 before the Subordinate Judge 1st Court, Dhanbad. In these two applications the court was pleased to pass ad interim injunction orders on 10-9-1973 whereby the plaintiff was restrained from referring the matter to the arbitration. It is also an admitted fact that while ad interim orders of injunction were in existence, the Corporation moved two separate applications under S. 34 of the Act in both the two Suits (Money Suits Nos. 26 and 173 of 1973) to stay the proceedings in these suits. In these two applications they relied on the arbitration cl. 65 of the agreement.

4. On these facts learned counsel for the appellant contends that as the Corporation was not willing to do all things necessary for proper conduct of the arbitration proceeding at the commencement of the proceedings both the suits and petitions under S. 34 of the Act are not maintainable. In my opinion there is sufficient force in this argument. When the two money suits were filed, that is, on 25-2-1974 and 30-9-1974, the respondent had already obtained ad interim orders of injunction in Miscellaneous Cases Nos. 38 and 39 of 1973. It is, therefore, clear that the Corporation was not ready and willing to do all things necessary for the proper conduct of the arbitration at the commencement of the proceedings in both the suits. Hence I hold that the Corporation failed to satisfy this condition and as such the petition for stay under S. 34 of the Act must fail on this ground alone.

5. In this connection learned counsel for the appellants relies on a decision of the Supreme Court in Food Corporation of India v. M/s. Thakur Shipping Co. (AIR 1975 SC 469). In that case, the Food Corporation of India requested M/s. Thakur Shipping Company to refer the dispute to the arbitrator in view of the arbitration clause. In spite of several letters Thakur Shipping Company refused to accede to the request of the Food Corporation of India. It is for this reason their Lordships held (at p. 471):

"Failing to act when a party is called upon to do so is a positive gesture signifying unwillingness or want of readiness to go to arbitration."

Relying on this decision I hold that the defendant Corporation took a positive stand that arbitration clause does not apply to the facts of the present two cases. Hence the defendant Corporation obtained ad interim orders of injunction restraining the plaintiff in both the suits from referring the matter to the arbitrator. In my opinion the defendant Corporation took a positive step signifying unwillingness or want of readiness to go to arbitration. Hence I hold that the defendant Corporation was not ready and willing to refer the matter to the arbitration at the commencement of the proceeding in both the suits. If it is so, the petitions filed by the defendant Corporation under S. 34 of the Act must fail on this ground. In this connection reference was made to another decision Weir v. Johnson [(1882) WN 159]. In that case it was held that if a party was not willing at the commencement of the proceeding to refer the matter to arbitration that party will not be entitled to move a petition for stay of the proceeding for referring the matter to the arbitration. In my opinion this decision fully applies to the facts of these cases.

6. There is another aspect of the matter and that is this: There are many infirmities in the petitions filed by the Corporation before the court below.

They filed two separate petitions in two different suits under S. 34 of the Act. They did not aver that they are still ready and willing to do all things necessary for proper conduct of the arbitration and they were also ready to do so at the commencement of the proceeding. There is no affidavit attached to any of the petitions filed under S. 34 of the Act. In this connection a reference was made to Halsbury's Laws of England, Vol. 2, P. 291, para. 564 in 4th Edition that he must also file an affidavit to this effect in support of his application for a stay. The applicant must state in his application that he is and he was at the time of commencement of the proceeding ready and willing to do everything necessary for the proper conduct of arbitration and there must be an affidavit to support this fact. In the present case neither there is any averment to this effect nor there is any affidavit filed by the applicant in both the suits. Hence both the petitions under S. 34 of the Act are not maintainable in view of these infirmities.

7. Learned counsel for the appellant also attacks the validity of the impugned orders on the ground that there is no specific finding that the Corporation was ready and willing to do everything necessary for the proper conduct of the arbitration at the commencement of the proceeding in both the suits. In the absence of this finding in both the orders the applications under S. 34 of the Act must fail.

8. Learned counsel for the Corporation (respondent) contends that merely because the Corporation filed petitions under S. 33 of the Act, it does not mean that the Corporation was not willing to participate in the arbitration proceeding. In other words he means to say that simply because the Corporation challenged the validity of the arbitration, it does not mean that Corporation was not willing at the commencement of the proceeding to do everything necessary for the proper conduct of the arbitration. Though the argument seems to be attractive, it is not possible to accept it in view of the decision of the Supreme Court in Food Corporation of India v. Thakur Shipping Co. (AIR 1975 SC 469) (supra). In this connection learned counsel for the respondent relies on a decision of King's Bench Division in W. Bruce Ltd. v. J. Strong [(1951) 2 KB 447]. In that case a time limit was fixed to refer the matter for arbitration. The point for consideration in that case was that if the time had elapsed for referring the matter to arbitration in view of the arbitration clause then could a party refer the matter to arbitration or not? In this connection Denning L. J. has held that in a case of hardship, the High Court has power to extend the time for arbitration in view of S. 27 of the Arbitration Act, 1950. In my opinion the facts of King's Bench case do not apply to the facts of the present case. In the present case when the plaintiff sent notices on 2-5-73 to the Corporation for referring the matter to the arbitration, the Corporation did not accede to his request. On the other hand, the Corporation filed applications under S. 33 of the Act and challenged the validity of the arbitration clause. In other words, the Corporation took the positive stand that the arbitration clause does not apply. Hence the Corporation filed two miscellaneous cases (Miscellaneous Cases Nos. 38 and 39 of 1973) before the Subordinate Judge, 1st Court, Dhanbad and obtained ad interim orders of injunction whereby the plaintiff was restrained from enforcing the arbitration clause. It is on these facts I hold that the defendant Corporation was unwilling to do all things necessary for the proper conduct of the arbitration at the commencement of the proceedings in both the suits. Hence I hold that the two petitions filed by the Corporation in both the suits (Money Suits Nos. 26 and 173 of 1974) are not maintainable because the Corporation did not satisfy the mandatory conditions laid down under the latter part of S. 34 of the Act.

9. The point of law may be summarised thus:

Before filing an application under Section 34 of the Act, the applicant must satisfy these conditions, namely, that (i) that the applicant must file the application at any time before filing the written statement or taking any other steps in the proceedings, and (ii) that the applicant was at the time when the proceeding was commenced and is still ready and willing to do all things necessary for the proper conduct of the arbitration. In the present case, the former condition was satisfied but the latter condition was not satisfied. On the facts of this case it is clear that the Corporation had filed applications under S. 34 of the Act and was not willing and ready to do all things necessary for the proper conduct of the arbitration at

the commencement of the proceeding. Hence its applications under S. 34 of the Act must fail on that ground. The applicant is also required to make necessary averments that not only he is ready at present but he was also ready and willing to participate in the arbitration at the commencement of the proceeding. These facts must be supported by an affidavit. If there is no such averment nor there is any affidavit, the application under S. 34 of the Act must fail. In the present case there was neither any averment nor there was any affidavit attached to the application.

10. In the result both the appeals are allowed and the impugned orders dated 12-12-1975 passed in Miscellaneous Appeal No. 58 of 1976 and dated 7-1-1976 passed in Miscellaneous Appeal No. 72 of 1976 are set aside. But in the circumstances in both the appeals the parties will bear their own costs.

NAGENDRA PRASAD SINGH, J.:— I agree.

Appeals allowed.

AIR 1979 PATNA 18

MADAN MOHAN PRASAD, J.

Union of India, Petitioner v. M/s. Harpal Dass Madhyani, Opposite Party.

Civil Revn. No. 480 of 1975, D/- 7-4-1978.*

(A) Civil P. C. (5 of 1908), S. 115 — Question of fact — Revisional Court would not interfere — Whether the dispute exists or not — A question of fact. AIR 1956 All 377 and AIR 1964 All 477, Rel. on. (Para 6)

Anno: AIR Comm. C.P.C. (9th Edn.), S. 115 N. 2, 13.

(B) Arbitration Act (10 of 1940), S. 8 — Refusal to act as arbitrator — Application under section to Court — Court has power to appoint arbitrator — Agreement providing sole arbitrator — Court cannot appoint more than one arbitrator. Case law discussed. (Para 12)

Anno: AIR Manual (3rd Edn.) Arbitration Act, S. 8 N. 8.

(C) Civil P. C. (5 of 1908), O. 1, Rr. 3 and 10 — Necessary parties — Suit against Railway — Union of India necessary party in the capacity of owner — Suit filed against Railway Administration and its General Manager — However revision filed by Union of India — Held Union of India considered the suit against itself. (Para 9)

Anno: AIR Comm. C.P.C. (9th Edn.), O. 1 R. 3 N. 2, 14-A; O. 1 R. 10 N. 10.

Cases Referred: Chronological	Paras
AIR 1978 NOC 301 : 1978 BLJR 642	9
AIR 1977 SC 1210	12
AIR 1964 All 477	6
AIR 1961 Pat 128	12
AIR 1961 Pat 228	12
AIR 1956 All 377	6, 12

P. K. Bose, for Petitioner; B. P. Rajgarhia and S. K. Sharan, for Opposite Party.

ORDER:— This application in revision is directed against an order by which the court below has appointed arbitrators under S. 8 of the Arbitration Act, 1940 (hereinafter to be referred to as 'the Act').

2. It appears that there was a contract between the petitioner and the opposite party by which the latter undertook to make some constructions. As a result, an agreement was entered into on the 22nd of March, 1972. Some further work was, however, found necessary to be done and the opposite party was asked to do that work as well. For such extra work he submitted a bill at the rate prescribed by the original agreement. After negotiation he reduced it by 2% and claimed a sum of Rupees 76,908.12, out of which the petitioner paid a sum of Rs. 26,596.49 paise, with the result that there remained due an amount of Rs. 50,311.63 paise. The petitioner refuted the claim on the ground that the opposite party was entitled to receive payment for the extra work at the rate prescribed in the subsequent agreement and not at the one prescribed by the original. It is said that according to the agreement a dispute or differences regarding the claim of the contractor is to be referred to arbitration. In view of the dispute aforesaid, therefore, the opposite party sent a notice dated the 12th of Oct. 1973 to the General Manager of the Railway, asking for nomination of arbitrators for deciding the dispute. There was no reply to this notice. Therefore, again on the 26th of April, 1974, the petitioner sent another notice through a lawyer. The petitioner, however, rejected the claim for arbitration on the ground that there was no dispute

*(Against decision of Jaleshwar Nath Dwivedi, Sub-J., Katihar, D/- 31-1-1975.)

at all. Hence the opposite party filed an application under S. 8 of the Act.

3. The petitioner, however, contended before the learned Subordinate Judge (1) that there was no dispute, (2) that the court had thus no jurisdiction to entertain the petition under S. 8 of the Act, (3) that the petition was barred by limitation and (4) that the Union of India not having been impleaded the petition was not maintainable. The learned Subordinate Judge held that the petition was maintainable, it was not barred by time and that a dispute existed which could be referred to arbitration, and accordingly he appointed two arbitrators directing them to submit their award within three months. Hence this application.

4. Counsel for the petitioner has virtually raised the same points as were raised before the court below. Further he has urged that the order of the learned Subodinate Judge appointing the arbitrators is wrong also on the ground that the claim being for an amount of Rs. 50,311.63 paise, only one arbitrator could be appointed.

5. The points thus which arise for consideration are (1) whether a dispute between the parties exists, (2) whether the application under S. 8 of the Act is barred by limitation, (3) whether the aforesaid petition is maintainable in the absence of Union of India being a party, and (4) whether the order of the court below appointing two arbitrators is correct.

6. It is not necessary to say much with regard to the first contention of learned counsel in order to reject it. Whether or not a dispute exists is a question of fact. On that question there is a finding of the court below. This court will not interfere with it in revision. In Sm. Balik Devi v. Kedar Nath Puri (AIR 1956 All 377) it was held that the question whether there is a dispute or not is a question of fact and it cannot be agitated in revision. This decision was relied on in a subsequent case of Union of India v. Gorakh Mohan Das (AIR 1964 All 477). Apart from that, it is so obvious that a dispute exists that it is impossible to accept the contention of learned counsel. The dispute between the parties obviously is whether the payment for the extra work done is to be made at the rate prescribed in the original agreement or the one in the subsequent agreement. The parties have joined issues in this respect. There is thus no scope for the argument made by the petitioner.

7. Turning now to the question whether the dispute could be referred to arbitration, cl. 63 (1) of 'General Conditions of Contract' in Regulation for Tenders & Contracts of North-East Frontier Railway, which admittedly governs the matter, provides as follows:—

"63 (1) In the event of any dispute or difference between the parties hereto as to the construction or operation of this contract, or the respective rights and of the parties on any matter in question, dispute or difference on any account, liabilities or as to the withholding by the Railway of any certificate to which the contractor may claim to be entitled to, or if the Railway fails to make a decision within a reasonable time, then and in any such case, but except in any of the 'excepted matters' referred to in clause 62 of these conditions the Contractor, after 90 days of his presenting his final claim on disputed matters may demand in writing that the dispute or difference be referred to arbitration. Such demand for arbitration shall specify the matters which are in question, dispute or difference and only such dispute or difference of which the demand has been made and no other, shall be referred to arbitration.

The reasonable time as the case may be demand (sic) in writing that such matter in question, dispute or difference be referred to arbitration. Such demand for arbitration shall be delivered to the Railway by the Contactor and shall specify the matters which are in question, dispute or difference and only such dispute or difference of which the demand has been made and no other shall be referred to arbitration."

Admittedly it is not one of the disputed matters referred to in cl. 62. Reading the aforesaid condition of contract, it is obvious that the dispute in the present case could be referred to arbitration. The contention that the petition is not maintainable, there being no dispute, must, therefore, be rejected.

8. The second point is with regard to limitation. Counsel for the petitioner urged that the notice was given to the General Manager in the present case after three months. Upon this argument it is difficult to find how the question of limitation arises. The argument is obviously misconceived because it appears from cl. 63 (1) itself that notice to refer

the dispute for arbitration has to be made 'after 90 days of his presenting his final claim on disputed matters.' To my regret, when this was pointed to Mr. Bose, he said that he had no option of giving up any point, however, useless it may be, if it had been taken in the court below. This contention has thus got to be rejected.

9. The next point raised is with regard to the non-impleading of the Union of India and consequently the petition being not maintainable on that account. There is no substance even in this contention. I had an occasion to consider a similar question in the case of the Chairman, Bihar State Electricity Board v. Hindu Agricultural Farm and Cold Storage (Civil Revision No. 460 of 1972, disposed of on the 6th of Feb. 1978).* There I held that the test to be applied in such cases is to find out whether the suit in substance is directed against a body or any individual and that if the suit be really intended against the body concerned, though some officer of that body has been impleaded as a party, it should be considered a case of mere description of parties which can be corrected under Order 1, Rule 10 of the Civil P. C. In this connection I held further that it would be relevant to consider also as to whether the party concerned considers the suit to be directed against itself or against any officer personally, and what was its conduct in the proceeding. In that case a suit had been instituted against the Chairman of the Bihar State Electricity Board. The contention was that the suit was against the Chairman and not against the Board. After going into the facts of that case, I had found that the dispute was intended to be against the Board, the Board had considered the case to be against itself and acted in that manner and, therefore, it amounted to a mere misdescription which could be corrected. There is no reason which has come to my mind since then to take a different view in the present case. In the instant case the application under S. 8 of the Act has been filed against the North Frontier Railway Administration and its General Manager.

The technical objection is that neither the General Manager nor the North Frontier Railway Administration should have been impleaded, but only the Union of India, which alone can sue and be sued, as the owner of the Railway concerned, should have been impleaded and which is a necessary party. That the Union of India is a necessary party is not disputed. Upon facts, however, I find, after reading the petition under S. 8 of the Act that the application is intended to refer a dispute between the Union of India as the owner of the Railway, and the opposite party. It appears that the Union of India also considered the suit to be directed against itself in spite of raising the objection that it had not been impleaded. The present application in revision itself has been filed by the Union of India. If it be taken that the petitioner was not a party to the application under S. 8 of the Act, it has no locus standi to file the present application. That apart, in the petition of revision itself it has been stated "that a rejoinder was filed by the petitioner (opposite party in the said miscellaneous case) and it was stated therein, amongst others, that the provision of S. 8 of the Act was not attracted in the case and the application was barred by limitation". It is obvious that according to the petitioner's own saying, it had filed the rejoinder in the court below. Further, it appears from the several petitions and rejoinders filed in the court below that although in the plaint the Union of India was not a party, the suit was described as between Bharat Sarkar and the opposite party. It appears that the show cause petition dated the 2nd of Dec. 1974 was filed by the General Manager. In the hazaris filed on behalf of the opposite party in the court below on 2-12-74, 4-1-75 and 16-1-75 the suit was described as between the present opposite party and 'Bharat Sarkar'. Similar was the description in hazaris filed by the present opposite party on 14-12-74 and 20-12-74. In the hazaris filed by the present petitioner on 21-12-74, 4-1-75 and 15-1-75 description of the suit was as between the present opposite party and the Union of India. On 12-2-75 a petition was filed on behalf of Bharat Sarkar. A list of documents was filed on behalf of Union of India on 18-2-75. These facts clearly bring out that the Union of India considered itself to be a party to the proceeding. It is too late in the day for it to say that the application under Section 8 of the Act should be thrown upon the ground that it has not been impleaded. It is thus obvious that in substance the application under S. 8 of the Act is

*Reported in 1978 BLJR 642 : AIR 1978 NOC 301

against the Union of India itself. It is thus only a case of misdescription and the misdescription can be removed by the court below under O. 1, R. 10 of the Civil P. C.

10. This remains to consider the question as to whether the court below could appoint two arbitrators in the present case. In this respect reliance has been placed by both the counsel for the parties on sub-cl. (3) of cl. 63 of the aforesaid conditions of contract, the relevant portion whereof reads as follows:—

"3. (a) Matters in question, dispute on difference to be arbitrated upon shall be referred for decision to:—

(i) A sole arbitrator who shall be the General Manager or a person nominated by him in that behalf in cases where the claim in question is below Rs. 3,00,000 and in cases where the issues involved are not of a complicated nature. The General Manager shall be the sole judge to decide whether or not the issues involved are of a complicated nature.

(ii) Two arbitrators, who shall be Gazetted Railway Officers of equal status to be appointed in the manner laid down in sub-cl. (3) (b) for all claims of Rupees 3,00,000 and above and for all claims irrespective of the amount or value of such claims if the issues involved are of a complicated nature. The General Manager shall be the sole judge to decide whether the issues are of a complicated nature or not. In the event of the two arbitrators being divided in their opinions the matter under dispute will be referred to an Umpire to be appointed in the manner laid down in sub-cl. (3) (b) for his decision.

(iii) The Arbitrator/Arbitrators/Umpire so appointed as the case may be shall give the award on all matters referred to arbitration indicating therein break-up of the sums awarded separately on each individual items of disputes."

It is obvious that where the claim in question is below Rs. 3,00,000, there has (blurred) arbitrator who shall be the General Manager. The appointment of two arbitrators upon the contract aforesaid could be made only for claims of Rs. 3,00,000 and above. In the present case the claim was only for Rs. 50,311 and odd. The court below has thus erred in appointing two arbitrators under the second sub-clause of cl. 3 (a).

11. That brings me to the question as to whether any sole arbitrator other than the General Manager could be appointed in the present case. As I have stated above, a notice was given to the General Manager to refer the matter to arbitration. In view of this notice it was for the General Manager to accept the claim and arbitrate into the matter or to nominate a person in that behalf. It is clear that the General Manager refused to do so. It would appear from the third sub-clause referred to above that the arbitrator so appointed is bound to give the award. It would thus be clear that in the present case the General Manager has refused to act as the arbitrator. The provision relevant to this matter is to be found in sub-cl. (3) (c) of Cl. 63 which reads as follows:—

"If the sole Arbitrator appointed under sub-cl. (a) (i) or one or both of the Arbitrators appointed under sub-clause (b) above resigns his appointment/resign their appointments or vacates his office/vacate their offices or is/are unable or unwilling to act for any period whatsoever or dies/die, the General Manager may appoint a new Arbitrator/Arbitrators to act in his/their place in accordance with the provisions of sub-cl. (a) (i) or sub-cl. (b) above as the case may be (blurred) Arbitrator/Arbitrators, as the case may be, shall be entitled to proceed on the reference from the stage at which it was left by the previous Arbitrator/Arbitrators."

It would thus appear that if the sole arbitrator is unwilling to act for any reason whatsoever, the General Manager may appoint a new arbitrator to act in his place. The question, however, arises if the General Manager does not appoint his nominee nor does he act himself, what is the remedy.

12. Let us, therefore, turn to Sec. 8 of the Act itself which provides as follows:—

"8. (1) In any of the following cases—

(a) where an arbitration agreement provides that the reference shall be to one or more arbitrators to be appointed by consent of the parties, and all the parties do not, after differences have arisen, concur in the appointment or appointments; or

(b) if any appointed arbitrator or umpire neglects or refuses to act, or is incapable of acting, or dies, and the arbitration agreement does not show that it was intended that the vacancy should not be supplied, and the parties or the arbitrators, as the case may be, do not supply the vacancy; or

(c) where the parties or the arbitrators are required to appoint an umpire and do not appoint him;

any party may serve the other parties or the arbitrators, as the case may be, with a written notice to concur in the appointment or appointments or in supplying the vacancy.

(2) If the appointment is not made within fifteen clear days after the service of the said notice, the court may, on the application of the party who gave the notice and after giving the other parties an opportunity of being heard, appoint an arbitrator or arbitrators or umpire, as the case may be, who shall have like power to act in the reference and to make an award as if he or they had been appointed by consent of all parties."

Reading Cl. (b) it is obvious that if any arbitrator neglects or refuses to act the aggrieved party may serve the arbitrator with a written notice and if the appointment is not made within 15 clear days after the service of the said notice, the court may appoint an arbitrator. There can be little doubt, therefore, that in the present case in view of the facts stated above, it was open to the court to appoint a sole arbitrator. In this connection I would refer to the case of Sm. Balika Devi v. Kedar Nath Puri (AIR 1956 All 377) (supra) which lays down the proposition that where one of the parties to the arbitration agreement refuses to concur in the appointment of an arbitrator under the arbitration clause, the other party has the right to move the court under S. 8 of the Act. In a decision of this Court in the case of Union of India v. D. P. Singh (AIR 1961 Pat 228) it was held by Raj Kishore Prasad, J. that an application under Section 8 (1) (a) of the Act is maintainable where the party having the sole power under the arbitration agreement to appoint the arbitrator fails to make the appointment when called upon to do so.

It was further held that there is no duty cast on the court to consult the defaulting party and give him the opportunity to make an oppointment before itself making the appointment, even where the defaulting party has the sole power under the arbitration clause to appoint the sole arbitrator and that the court has absolute discretion in the matter of appointment of an arbitrator after hearing the other party; counsel for the petitioner, however, drew my attention, to another decision of Untwalia, J. (as he then was) in the case of Ram Khelawan Mistry v. Rabindra Kumar Ghose, (AIR 1961 Pat 128) in support of the proposition that the court could not in the present case appoint an arbitrator. In that case the arbitration clause provided that the differences between the three parties to the agreement shall be referred to arbitration of three arbitrators, each of the partners nominating one arbitrator and on a difference arising between the parties two of them appointed two arbitrators, but the third one refused to nominate his own and carry out the terms of the arbitration clause. Thereupon the two partners had applied to the court to appoint an arbitrator in exercise of its powers under Ss. 8, 9 and 10 of the Act. It was held that the sections aforesaid were not applicable to the case as the contingency provided by each of the sections was not covered by the arbitration clause. It appears that in that case the court below had taken the view that S. 8 of the Act was not applicable but the court could appoint an arbitrator under S. 9. The learned Judge held that S. 9 applied to a case of reference where the arbitration clause provides a reference to two arbitrators and did not apply to the facts of that case. With regard to S. 8 the learned Judge said that the agreement must provide for reference "by consent of the parties" and the agreement clause in that case did not provide for that. As will appear, the decision in that case was given on the facts of that case itself. In the instant case before me the facts are entirely different. Apart from that, in the case of Union of India v. D. P. Singh (supra) also an agreement similar to the present one was construed and it was held that it was inherent in the agreement itself that the nomination of the arbitrator shall be deemed to have been made by the consent of both the parties. The learned Judge said that there may be express provision to such an effect but even in the absence of any express provision such a provision must be taken to be necessarily implied. I respectfully concur in this view. According to the agreement in the present case the sole arbitrator was to be the General Manager or his nominee. It must be taken to be implied that the General Manager or his nominee was to be the sole arbitrator in the present case with the consent of the parties. Therefore, the requirement of S. 8 of the Act with regard to arbitrators "to be appointed by

consent of the parties" is obviously fulfilled.

I may further refer to a decision of the Supreme Court in the case of Chander Bhan Harbhajan Lal v. State of Punjab (AIR 1977 SC 1210). In that case the agreement provided that in the matter in dispute the case shall be referred to a Settlement Committee for arbitration; on a dispute arising a committee was appointed but before the conclusion of its work it was abolished and a second committee was subsequently appointed and made an award. It was challenged and set aside and the second committee thus ceased to function. Thereafter the Government gave a notice under Section 8 (1) of the Act to concur in the appointment of a fresh committee to arbitrate. Ultimately it moved the court under S. 8 (2) of the Act. It was held that the committee having become incapable of acting it was within the competency of the court to appoint a new committee. The learned Judges further held that "equally untenable is the contention that S. 8 is not applicable to cases where the condition stipulates the appointment of a Settlement Committee by one of the parties. This submission was made relying on the wording of the section that any party may serve the other parties or the arbitrators, as the case may be, with a written notice to concur in the appointment or appointments or in supplying the vacancy. This part of the section no doubt contemplates two parties but the section cannot be read as not being applicable where the agreement provides for the nomination of the committee by one of the parties for the section itself says that the party may serve the other parties. 'May serve the other parties' will include not serving other parties in cases in which the service on the other party is not contemplated." This decision thus lends support to the principle that where one party is to be arbitrator and has become incapable of acting, which will also cover cases of refusal to act, the court has the authority to appoint an arbitrator under S. 8 of the Act. The subsidiary argument of Mr. P. K. Bose in this connection to effect that before appointing the arbitrators the court should have asked the General Manager to act as the arbitrator or to appoint his nominee, is untenable.

13. No other point was raised during the arguments of Mr. P. K. Bose. The opposite party was heard in reply. Thereafter Mr. Bose finished his argument in reply. Arguments were thus concluded. The counsel for the parties then wanted to find out any relevant decision and for that the case was adjourned. When it was placed again, Mr. Bose suddenly wanted to raise a new point, namely, that on the facts of the present case and in view of the agreement, the application should have been filed under S. 20 of the Act for filing the agreement and appointment of arbitrator and for reference to such arbitrator. It appears that the point was not raised in the trial court nor was it raised in the petition and the opposite party naturally urged that the point ought not to be allowed at this stage to be raised. In such circumstances, it would be unfair to the opposite party to allow the petitioner to raise a new point, not raised earlier, which depends upon the interpretation of the agreement and other facts. I, therefore, refused Mr. Bose permission to raise any new point long after arguments were concluded.

14. In the result, the order appointing two arbitrators, in the circumstances of the case, has to be set aside and the case is remitted to the court below to appoint only one arbitrator who will act in the reference.

Order accordingly.

AIR 1979 PATNA 23

LALIT MOHAN SHARMA AND S. ALI AHMED, JJ.

Shankar Bhai Dada Bhai Patel, Petitioner v. The State of Bihar and others, Respondents.

Civil Writ Jur. Case No. 764 of 1976, D/- 25-1-1978.

Bihar Agricultural Produce Markets Act (16 of 1960), S. 27 — "Worth" — Word means market value including excise duty paid. (Words & Phrases — "Worth").

There being no indication in the Act limiting the meaning of the word "worth" occurring in S. 27 enabling levy of market fee on agricultural produce bought or sold in the market area, the expression would only mean 'market value' in the sense that it includes the entire amount paid or incurred for procuring the commodity. Therefore, "worth" of agricultural produce must be held to in-

clude excise duty paid thereon. (1895) 1 Ch 53, (1824) 107 ER 825 and AIR 1959 Pat 389, Rel. on. (Paras 3 and 4)

Cases Referred : Chronological Paras

AIR 1959 Pat 389 4

(1895) 1 Ch 53 : 71 LT 679, MacILquham v. Taylor 3

(1824) 107 ER 825 : 3 B & C 516, King v. Hull Dock Co. 3

Kailash Roy and Binod Kumar Roy, for Petitioner; Rambalak Mahto Govt. Pleader No. 4 with Harendra Pd. J. C., for Respondents.

ORDER:— The petitioner, by this application under Arts. 226 and 227 of the Constitution of India has challenged the demand for market fee as contained in Annexure 1 to the writ application, payable under the Bihar Agricultural Produce Markets Act, 1960 (hereinafter to be called as the Act) on tobacco, after including in its value the amount of excise duty paid on the commodity.

2. The market fee is payable under sub-sec. (1) of S. 27 which is in the following terms:

"27. Power to levy fees (1) The market committee shall levy and collect market fees on the argicultural produce bought or sold in the market area, at the rate of rupee one per Rs. 100/- worth of agricultural produce.

Explanation— All notified agricultural produce leaving a market area, shall unless the contrary is proved, be presumed to have been bought or sold in such area.

Provided that, when any agricultural produce brought in any market area for the purpose of processing or export is not processed or exported therefrom as the case may be, or any such produce processed in the market area is not exported therefrom within twenty one days from the date of its arrival therein, it shall, until the contrary is proved, be presumed to have been bought or sold in the market area, and shall be liable for the levy of fees under this section as if, it had been so bought or sold."

3. Mr. Kailash Roy appearing for the petitioner has contended that the term "worth" in the section does not mean the price or the market value of the commodity and does not include the excise duty paid thereupon. He has referred to the Dictionary edited by Sir James Murray for the meaning of the word. The term conveys different shades of meaning in accordance with the context in which it is used. When used in connection with say the forensic skill of a person it may refer to the quality of the person or the degree of his skill but when used with reference to commercial transactions it must be understood to refer to the market value, that is the price for which the particular commodity is sold. In the cited dictionary also, the first meaning given to the word is "pecuniary value" the "price". The other meanings mentioned in the Dictionary are clearly not applicable in the present context. As it appears from a reference to the section quoted above, fee has to be paid on the agricultural produce bought or sold in the market and therefore the aforesaid ordinary meaning has to be given to the word "worth". In MacILquham v. Taylor (1895) 1 Ch 53 the expression "£ 1000 worth of shares" had to be construed. The defendant in the case had covenanted, by a deed to pay a sum of £ 1000 or transfer to the plaintiff £ 1000 worth of fully paid company shares. The value of the shares had considerably diminished when the dispute arose and the court of appeal held that the expression "£ 1000 worth of shares" meant shares of that value in the market and since the shares transferred had no market value the defendant was asked to pay the amount in cash. In the King v. The Hull Dock Co., (1824) 107 ER 825 a similar interpretation was given. We therefore, overrule the objection raised on behalf of the petitioner and hold that the word "worth" in S. 27 of the Act means the market value of the commodity in question.

4. The next point which has been canvassed is that the excise duty paid on the commodity is not included in its value. Ordinarily the market value of an article must include the entire amount which has been paid or incurred in procuring the same and unless there is a provision in the statute to limit this meaning, it cannot be restricted. The learned counsel for the petitioner has not been able to give any reason for limiting the meaning of the word in the present case. He has, however, referred to rule 82 (viii) as an illustration that actual market price is not always taken the basis of the levy. This provision does not to our mind, advance the petitioner's argument. The sub-rule governs the cases of fictional sales in a market and by providing for calculation of the worth of a commodity brought for the purpose

of processing or export on the basis of the average market rate of the relevant day, it supports rather than negatives our view. Mr. Government pleader also relied upon the case of Dayabhai Gokul Bhai v. The State of Bihar (AIR 1959 Pat 389) for the proposition that excise duty must be deemed to be included in the price. In the present case the question is confined to the value of tobacco on which excise duty has already been paid and it is not necessary to consider or decide the question with reference to tobacco on which excise duty has to be paid in future. The market fee has to be paid on the transactions of sale and purchase in the market area and the amount for which the transaction takes place is always ascertainable and therefore there is no difficulty in interpreting the meaning of the section so far this aspect is concerned. Accordingly, we hold that the fee is payable on the entire amount paid as the price of the commodity in question including the excise duty which has already been paid.

5. For the reasons stated above the application is dismissed but there will be no order as to costs.

Petition dismissed.

AIR 1979 PATNA 25

D. P. SINHA AND CHAUDHARY SIA SARAN SINHA, JJ.

State of Bihar and others, Appellants v. M/s. Prasad Constructions, Respondents.

A. F. O. O. No. 138 of 1976, D/- 3-3-1978.*

(A) Arbitration Act (10 of 1940), Ss. 13, 29 — Power to award interest — All disputes including claim for interest referred to arbitrator — Arbitrator has power to grant pendente lite interest. (Para 15)

Anno: AIR Manual (3rd Edn.) Arbitration Act, S. 13 N. 5, S. 29 N. 2.

(B) Arbitration Act (10 of 1940), Sections 17, 38 — Costs of arbitration — Decree in terms of award granting costs of proceeding — Appeal under S. 39 (1) (vi) against Court's order refusing to set aside award — No separate appeal against decree relating to costs — Question of modification of decree relating to costs does not arise. (Paras 17, 18)

Anno: AIR Manual (3rd Edn.) Arbitration Act, S. 17 N. 1, S. 38 N. 2.

Cases Referred: Chronological	Paras
AIR 1972 SC 1507	14
AIR 1967 SC 1030	12, 13, 14
AIR 1967 SC 1032	13, 14
AIR 1961 SC 908	12
AIR 1960 SC 307	12
AIR 1955 SC 468	12, 13
AIR 1951 Pat 201	12
AIR 1946 Pat 70	16
AIR 1921 Pat 161 : 6 Pat LJ 287	16

K. D. Chatterji, Advocate General and Mahendra Nath Verma, Jr. Counsel to Advocate General, for Appellants; Anjani Kumar Saran and G. B. Sahay, for Respondents.

D. P. SINHA, J.:— This is an appeal under S. 39 (1) (vi) of the Arbitration Act, 1940 (hereinafter referred to as 'the Act'). The plaintiff-respondent, a registered partnership firm engaged in carrying on various kinds of business including contract business, entered into a contract with appellant No. 1, namely, the State of Bihar in the Public Works Department (hereinafter referred to as 'the Department') on 6-5-1967 for construction of an R. C. C. high level bridge at village Gaurichak. One of the terms of the agreement was that all disputes and differences arising between the department and the contractor would be referred for decision to a sole arbitrator to be chosen with common consent of the parties. The work was taken up by the plaintiff. There was delay in the completion of the work and each party held the other responsible for the delay and ultimately the Department rescinded the contract and the claim of the plaintiff would not be settled. Thereupon the plaintiff filed an application under S. 20 of the Act in the court of the Second Subordinate Judge, Patna (vide Title Suit No. 70 of 1972) stating the circumstances and his claim against the appellants and prayed that notices be issued to the appellants requiring them to file the agreement in the court and in case they failed to do so the certified copy of the agreement produced by the plaintiff be deemed to have been filed and refer the dispute between the parties detailed in Sch. 1 read with Sch. II of the application to an arbitrator who should submit his award within the time which the court may fix. The total amount claimed on account of various items detailed

*(From order of Nand Kishore Pd. Bhagat, Sub. J, 2nd Court, Patna, D/- 27-2-1976).

in Sch. II of the application was laid at Rs. 2,74,301.73 after a set off of the amounts received by the plaintiff from the Department. To this he had added a sum of Rs. 6,585.48 on account of interest calculated at 12 per cent per annum from 31-1-1970 to 31-1-1972. The application under S. 20 of the Act was filed on 15-2-1972.

2. After hearing the parties the learned Subordinate Judge, by his order dated 20-11-1973, overruled the objections filed on behalf of the appellants and directed that the agreement be filed and in the absence of a consensus between the parties as to who should be appointed arbitrator, he appointed Shri Shiva Chandra Prasad, a retired High Court Judge, to be the arbitrator and, accordingly, a reference was made to him.

3. The arbitrator gave his award on 20-5-1975. He held that the rescission of the contract by the appellants was invalid and while he disallowed the claim for interest, he awarded a sum of Rs. 2 lacs only as a consolidated sum in respect of all the other items of the claim in Sch. II except item No. 5 thereof which he disallowed as not having been pressed. He also allowed interest pendente lite at 6 per cent per annum.

4. The award was filed in court. The appellants filed objection under S. 30 of the Act for setting aside the award. The plaintiff filed a petition contending that the grounds of objection raised by the appellants were frivolous and untenable and that the same be rejected. It further prayed that since the award was silent with regard to the costs, the court should in exercise of its powers under S. 29 of the Act allow costs to the plaintiff.

5. The matter was heard by the learned Subordinate Judge and he came to the conclusion that the award was all right and, accordingly, affirmed it and made it a rule of the court and also allowed future interest at 6 per cent per annum till realisation (vide order dated 27-2-1976).

6. It appears that after the composite order dated 27-2-1976 (i) affirming the award and making it a rule of the court and (ii) the grant of future interest by the court, a decree was prepared in which the pendente lite interest was calculated at Rs. 48,000/- and Rs. 10,060 was entered as cost to be paid by the appellants. The decree is dated 27-2-1976 though it appears to have been signed on 6-3-1976.

7. This appeal under S. 39 (1) (vi) was filed by the appellants on 21-6-1976. The grounds taken in the memorandum of appeal are substantially these. That the order of the court affirming the award and making it a rule of the court was bad in law and in fact, that the court should have held that the arbitrator had misconducted the proceedings and should have set aside the award after holding that the reasons given by the Arbitrator for the rescission of the contract were illegal, and, further that the arbitrator had misconducted himself in awarding a lump sum amount of Rs. 2 lacs as consolidated sum in respect of all the items without any basis; that the award had been improperly procured; that the arbitration proceedings were invalid as the arbitrator had taken a long time in hearing and submission of the award. It was further stated that the order of the court below was bad in law and facts.

8. I have set forth the grounds taken in the memorandum of appeal in extenso for the reason that none of those specific grounds was raised or pressed at the time of hearing of this appeal. The learned advocate-general who appeared on behalf of the appellants, however, raised two new grounds. First, that the arbitrator had no power to grant pendente lite interest and to that extent the award was liable to be modified. In the alternative, the learned Advocate General argued that if it be held that the arbitrator did have the power to grant pendente lite interest then the period of pendency of the proceedings for which he had granted interest in this case would be the period between 20-11-1973 when the reference was made and 20-5-1975 on which date the award was given and not for any other period. The second ground taken by the learned Advocate General was that the decree passed by the court on the basis of its composite order dated 27-2-1976 should be modified in so far as it allowed costs and a sum of Rs. 48,000/- by way of pendente lite interest calculated from the date of the filing of the application under S. 20 of the Act to the date of the decree of the court because by the said composite order the court had not allowed, on its own, costs or any pendente lite interest and it had only affirmed the award which had given pendente lite interest at 6 per cent per annum which meant that he had allow-

ed pendente lite interest only for the pendency of the arbitration proceedings before him.

9. On the other hand, Mr. A. K. Saran learned counsel appearing on behalf of the respondent submitted that the appellants should not be allowed to raise the question of validity of the grant of pendente lite interest by the arbitrator as this point had not been taken either in the grounds of objection under S. 30 of the Act or in the memorandum of appeal. He contended that once all the disputes between the parties are referred to an arbitrator the arbitrator will decide the dispute and he may grant according to law the same relief as the civil court may grant if the claim is laid in a suit before it. As to the contention that the court had wrongly allowed costs in the decree, Mr. Saran contended that since no appeal had been preferred against the decree, the objection should not be allowed to be raised.

10. I shall state and consider the contentions raised by Mr. Saran with regard to the submissions made by the learned Advocate-General in respect to the decree later on.

11. I shall first consider the contention that the arbitrator had no power to grant pendente lite interest. It is true that this point had not been taken either in the objection petition under S. 30 or in the memorandum of appeal under Section 39 (1) (vi) of the Act but since this was a question of law and no fresh investigation of facts was necessary for deciding the point and in the grounds taken in the memorandum of appeal it had been stated that the award was invalid also on grounds other than those specified in the memorandum of appeal, we allowed the Adv.-Genl. to raise the point and the point was argued at length by either side and each side cited reported decisions of the Supreme Court and of some of the High Courts in support of their respective contentions.

12. The sheet-anchor of the contention of the learned Advocate-General that the arbitrator did not have the power to grant interest pendente lite was the decision of the Supreme Court in the case of Thawardas Pherumal v. Union of India (AIR 1955 SC 468). Reliance was placed on the following observations of Bose, J. (at p. 478):

"It was suggested that at least interest from the date of 'suit' could be awarded on the analogy of S. 34 of the Civil P. C., 1908. But S. 34 does not apply because an arbitrator is not a 'court' within the meaning of the Code nor does the Code apply to arbitrators, and, but for S. 34 even a court would not have the power to give interest after the suit. This was, therefore, also rightly struck out from the award."

The observations divorced from their context lend colour to the argument that the arbitrator had no power to award pendente lite interest but in the later cases the Supreme Court pointed out that the said observations in Thawar Das's case (AIR 1955 SC 468) were not intended to lay down such a broad and unqualified proposition. In this behalf the decision in the case of Firm Madan Lal Roshan Lal Mahajan v. Hukumchand Mills Ltd. (AIR 1967 SC 1030) may be noticed. In this case it has been clearly pointed out that the above observations of Bose J. in Thawar Das's case were not intended to lay down such broad and unqualified proposition as had been pointed out in Nachiappa Chattiar v. Subramaniam Chettiar (AIR 1960 SC 307 at p. 390), Satinder Singh v. Umrao Singh (AIR 1961 SC 908 at p. 916) and Union of India v. Premchand Satram Das (AIR 1951 Pat 201 at pp. 204 and 205). Bachawat J. who spoke for the Supreme Court in Firm Madanlal Roshanlal Mahajan's case (supra) had distinguished Thawar Das's case (supra) in the following words :—

"The arbitrator awarded interest on unliquidated damages for a period before the reference to arbitration and also for a period subsequent to the reference. The High Court set aside the award regarding interest on the ground that the claim for interest was not referred to arbitration and the arbirator had no jurisdiction to entertain the claim. In this court, counsel for the claimant contended that the arbitrator had statutory power under the Interest Act of 1889 to award the interest and, in any event, he had power to award interest during the pendency of the arbitration proceedings u/s. 34 of the Civil P. C., 1908. Bose J. rejected this contention. It will be noticed that the judgment of this Court in Thawar Das's case, 1955-2 SCR 48 : (AIR 1955 SC 468), is silent on the question whether the arbitrator can award interest during the pendency of arbitration proceedings if the claim regarding interest is referred to arbitration. In the present case, all the disputes in the suit were referred to the arbitrator for his

decision. One of the disputes in the suit was whether the respondent was entitled to pendente lite interest. The arbitrator could decide the dispute and he could award pendente lite interest just as a court could do so under S. 34 of the Civil P. C. Though, in terms, S. 34 of the Civil P. C. does not apply to arbitrations, it was an implied term of the reference in the suit that the arbitrator would decide the dispute according to law and would give such relief with regard to pendente lite interest as the court could give if it decided the dispute. This power of the arbitrator was not fettered either by the arbitration agreement or by the Arbitration Act, 1940. The contention that in an arbitration in a suit the arbitrator had no power to award pendente lite interest must be rejected.

13. Thawar Das's case (supra) was again considered by the Supreme Court together with a large number of other cases including some English cases. In AIR 1967 SC 1032 one of the questions which had arisen for decision was whether the arbitrator had the power to award interest subsequent to passing of the award. The observations of Bose, J. were put forth in support of the contention that interest could not be awarded by the arbitrator after the date of the award. It was again pointed out that the said observations were not intended to lay down such a broad and unqualified proposition; it was pointed out that Thawar Das's case did not deal with the question whether the arbitrator could award interest subsequent to the passing of the award if the claim regarding interest was referred to arbitration. The principles decided in Firm Madanlal Roshanlal Mahajan's case (AIR 1967 SC 1030) were reiterated in the following words at p. 1035:

"In the present case, all the disputes in the suit, including the question of interest, were referred to the arbitrator for his decision. In our opinion, the arbitrator had jurisdiction, in the present case, to grant interest on the amount of the award from the date of the award till the date of the decree granted by Mallick, J. The reason is that it is an implied term of the reference that the arbitrator will decide the dispute according to existing law and give such relief with regard to interest as a court could give if it decided the dispute. Though, in terms S. 34 of the Civil P. C. does not apply to arbitration proceedings, the principle of that section will be applied by the arbitrator for awarding interest in cases where a court of law in a suit having jurisdiction of the subject-matter covered by S. 34 could grant a decree for interest."

14. The next case to which reference may be made is that of the State of Madhya Pradesh v. Saith Skelton (P) Ltd., (AIR 1972 SC 1507). In that case the arbitrator had made the interest payable from the date on which the final inspection of the work had taken place and when the amounts became payable to the respondent. The main contention of the appellant was that S. 34 of the Civil P. C. would not apply to the proceedings before the arbitrator as he is not a "court". It was pointed out that in AIR 1967 SC 1032, the Supreme Court had recognised the power of an arbitrator to award interest on the amount of the award from the date of the award till the date of the decree and that from the decision in AIR 1967 SC 1030 it was clear that if all the disputes are referred for arbitration, the arbitrator has power to award interest pendente lite i.e. during the pendency of the arbitration proceedings. It was further pointed out that the question ultimately will be whether the dispute referred to the arbitrator included the claim for interest from any particular period or whether the party is entitled by contract or usage or by a provision of law for interest from a particular date.

15. In view of the above decisions of the Supreme Court it is established that if all the disputes between the parties are referred for arbitration, the arbitrator may give all those reliefs which a court of law could give in a suit instituted before it. It has already been stated that in this case all the disputes between the parties including the claim for interest had been referred to the arbitrator. As such, the arbitrator had the power to grant pendente lite interest to the respondent and there can be no doubt about it.

16. The question which next arises for consideration is as to what was the period which may be said to be covered by the expression "pendente lite" used by the arbitrator. Mr. Saran contended that it covered the entire period from the date of the filing of the application by the respondent under S. 20 of the Act to the date of the passing of the de-

cree by the court below. On the other hand, learned Advocate-General contended that by 'pendente lite' the arbitrator meant the period during which the arbitration proceedings remained pending before him i.e., the period between 20-11-1973 when the reference was made and 20-5-1975 when the award was given. The contention of the learned Advocate-General must be accepted as the only reasonable interpretation of the words 'pendente lite' in this case. It is quite obvious that the arbitrator was not thinking of any other proceedings except the proceedings before him while awarding pendente lite interest. Mr. Saran argued that an application under S. 20 is registered as a 'suit' in view of the provisions of S. 20 (2) of the Act and that it remains pending till the court passes a final order on the award after it is filed in court and, therefore, the award given by the arbitrator with regard to pendente lite interest covered the entire period from 15-2-1972 on which date the application under S. 20 of the Act was filed by the respondent to 20-5-1975 when the award was given. In support of this contention he cited the decision in the case of Nagar Chand Goenka v. Surendra Nath Sarcar (AIR 1946 Pat 70). It has already been pointed out that the arbitrator never intended to award interest pendente lite except for the period of pendency of the arbitration proceedings before him. Moreover, Nagarchand Goenka's case is not a decision laying down the proposition that a 'suit' within the meaning of subsec. (2) of S. 20 of the Act was to be treated as a 'suit' for all purposes. What has been held in that case was that in a proceeding under the Act, the court has got power to appoint a receiver when an application under S. 20 (1) has been made even though no notices have been served on the parties as required under S. 20 (3) and the proceedings have not become arbitration proceedings. On the other hand, in the case of Satish Chandra Bose v. Paliram Agarwala (6 Pat LJ 287) : (AIR 1921 Pat 161) it has been held that :

"Although an application to file in court an agreement to refer to arbitration under para 17 (1) of the second Sch. of the Civil P. C., 1908, must under the provisions of Cl (2) of that para, be numbered and registered as a suit, it is not in fact a suit within the meaning of the Code."

It would appear that the provisions of Cl. (2) para. 17 of the second schedule of the Code of Civil P. C., 1908 was in pari materia with the provisions of subsec. (2) of S. 20 of the Act. Thus in any view of the matter the contention of Mr. Saran is not acceptable and it is rejected. It may be mentioned that the court had merely affirmed the award and had not, on its own, granted any pendente lite interest with regard to the period of pendency of the proceeding before it. As such, no amount by way of pendente lite interest can be realised from the respondent except for the period 20-11-1973 to 22-5-1975.

17. I shall now take up consideration of the second contention raised by the learned Advocate-General that the decree passed by the court on the basis of its composite order dated 27-2-1976 should be modified in so far as it allowed costs against the appellants inasmuch as in the composite order no order for costs had been made and the decree was not in conformity with the judgment in so far as it allowed costs to the respondent. Mr. Saran, on the other hand, contended that since no appeal against the decree had been preferred by the appellant, there could be no question of modifying the decree. The learned Advocate-General tried to meet this argument by contending that it was not necessary to file a separate appeal against the decree and the matter being connected with the award relief could be given to the plaintiff by this court by striking off the cost from the decree although no separate appeal had been preferred against the decree. This contention has no force. The present appeal under S. 39 (1) (vi) of the Act is against the order of the court below refusing to set aside the award. By the composite order the court has rejected the objection of the appellant under Sec. 30 and affirmed the award. By the decree the court has awarded costs against the appellant on its own as the arbitrator had not allowed any costs to the appellant. In the circumstances a separate appeal against that part of the decree by which costs had been allowed should have been preferred but the same was not done. During the course of discussion the learned Advocate-General submitted that in view of the objection raised by Mr. Saran with regard to the absence of an appeal against the decree relating to costs, he proposed to file a petition for

treating this appeal which is one under S. 39 of the Act as an appeal against the decree also and to apply for condonation of the delay in making this prayer on the ground that in the Act the legal position with regard to the filing of a separate appeal against the decree was in a state of confusion and therefore, no appeal could be filed within time. He was granted a short adjournment for the same and he filed petition incorporating the said prayers. The prayer for condonation was objected to by Mr. Saran as according to him there was no question of any confusion as the law was quite clear and a separate appeal against the decree in so far as it allowed costs was obviously and necessarily required to be filed, if the appellant wanted to challenge that part of the decree.

18. The contention of Mr. Saran is well founded. In this behalf the provisions of S. 17 as also that of Sec. 41 of the Act may be noticed. Sec. 17 lays down as follows :—

"17. Where the court sees no cause to remit the award or any of the matters referred to arbitration for reconsideration or to set aside the award, the court shall, after the time for making an application to set aside the award has expired, or such application having been made, after refusing it, proceed to pronounce judgment according to the award, and upon the judgment so pronounced, a decree shall follow, and no appeal shall lie from such decree except on the ground that it is in excess of, or not otherwise in accordance with the award."

If the appeal preferred under Sec. 39 of the Act is allowed then to that extent the decree pronounced under Section 17 shall automatically stand modified and no separate appeal would be required to be filed for such modification. But where the court on its own grants by the decree some relief, for example, costs of proceeding in exercise of its powers under S. 38 (3) of the Act a separate appeal will have to be filed against that part of the court's decree which has allowed costs quite obviously because an appeal under Section 39 cannot possibly in view of its provisions, include an appeal against the decree awarding costs. In the circumstances it is difficult to accept the argument of the learned Advocate-General that there was confusion with regard to the law as to whether or not a separate appeal was required to be filed against that part of the decree and that had misled the appellants into not filing a separate appeal. I am, therefore, not prepared to accept the prayers which have been made in the appellants' petition dated 17-1-1978 and to condone the delay.

19. Another objection had been raised by Mr. Saran to the acceptance of the prayer. It was to the effect that the petition filed on behalf of the appellant for treating the appeal under Section 39 as an appeal against the decree also was liable to be rejected as it was not accompanied by a certified copy of the decree as required by O. XLI, R. 1 of the Civil P. C. To this the Advocate-General replied that since the original decree was already there before this court in the lower court record the requirement with regard to the filing of a certified copy of the decree should be dispensed with. I do not think it necessary to go into that question in view of the fact that no sufficient ground has been made out for condoning the delay in making the prayer. As earlier stated the judgment was pronounced on 27-2-1976, the decree was signed on 5-3-1976 and it appears to have been subsequently modified by an order dated 27-6-1976 whereas a separate appeal has been attempted to be filed on 17-1-1978. In these circumstances the prayers made by the appellants in their petition dated 17-1-1978 are rejected.

20. A number of other decisions, not referred to above, had also been cited by the learned counsel for the parties but it is not necessary to refer to them as they do not appear to be quite pertinent to the points raised in this appeal.

21. In view of the findings recorded above, the appeal is dismissed but in the particular circumstances of this case there will be no order for costs of this appeal.

CH. SIYA SARAN SINHA, J.:— I agree.

Appeal dismissed.

AIR 1979 PATNA 31

(RANCHI BENCH)

HARI LAL AGRAWAL AND SAYESHWAR ROY, JJ.

The Ranchi Khunti Central Co-operative Bank Ltd., Ranchi, Petitioner v. Prem Prakash Bagroy and others, Opposite Parties.

Civil Revn. No. 111 of 1977 (R), D/- 28-7-1978.*

(A) Civil P. C. (5 of 1908), S. 73 — Application for rateable distribution of assets — Dismissal for default — Fresh application by claimant is maintainable till he is entitled to claim rateable distribution in terms of S. 73. AIR 1970 Pat 237 (FB), Rel. on. (Para 9)

Anno: AIR Comm. C.P.C. (9th Edn.), S. 73 N. 2.

(B) Civil P. C. (5 of 1908), S. 73 — Application for rateable distribution of assets realised by the particular court — Pendency of execution case of the applicant in that court is necessary precondition.

One of the essential conditions to enable the claimant to get rateable distribution is that he must have applied for execution to the court by which the assets are held. The scheme of S. 73 will not apply to the cases where the assets are held by a Civil Court and execution proceeding by the applicant under the section is pending before the revenue or any other authority. (Case law discussed). (Paras 12, 13)

Anno: AIR Comm. C.P.C. (9th Edn.), S. 73 N. 8, 3.

Cases Referred: Chronological Paras

AIR 1970 Pat 237 : 1969 BLJR 774 (FB) 9
1964 BLJR 387 13
AIR 1960 Pat 574 13
AIR 1955 Cal 573 13
AIR 1945 PC 60 13
AIR 1938 Sind 157 13
AIR 1935 Bom 176 13
AIR 1921 All 142 (2) 12

Debi Prasad, A. Sahay and Miss Indrani Chowdhary, for Petitioner; Shambhu Prasad, P. C. Roy and Suresh Prasad, for Opposite Parties.

HARI LAL AGRAWAL, J.:— This application under S. 115 of the Civil P. C. has been filed by the petitioner, whose claim for rateable distribution of the assets of the judgment-debtor (opposite party No. 3) has been rejected.

2. In order to appreciate the question, the relevant facts have got to be stated and they are these. The opposite first party instituted a suit against the opposite party No. 3, namely the Ranchi Central Consumers Co-operative Stores Limited, Ranchi for its eviction on account of arrears of rent and also for a decree for Rs. 60,000 on account of the arrears. The suit was decreed by the Subordinate Judge, Ranchi, and the opposite first party put the said decree in execution in Ex. Case No. 1 of 1975. In course of the said execution proceeding, the opposite first party attached two trucks of opposite party No. 3, the judgment-debtor, on 11-2-1975.

3. The opposite party No. 3 had taken a loan of Rs. 7,44,403.73 P. from the petitioner and on failure, on the part of the opposite party No. 3 to make the payment, the petitioner took steps for realisation of its dues under the provision of the B. & O. Co-operative Societies Act and accordingly an award under Section 48 of the Co-operative Societies Act was passed for a sum of rupees eight lacs, twenty thousands and odd in favour of the petitioner. The petitioner then executed the said award in the court of the District Co-operative Officer he being the Certified Officer and the case was registered as Certificate Case No. 377 of 1974. According to the petitioner's case, it had also attached the trucks in question on 22-1-1975 and, accordingly, on the attachment of the trucks in the execution proceeding of the opposite first party, it filed a claim case under O. 21, R. 58 of the Civil P. C. on 12-2-1975 in the execution case. The executing court allowed the claim case, but this Court in Civil Revision No. 93 of 1976 (R), filed by the opposite first party, set aside the said order.

4. Thereafter, the trucks in question were sold in court sale on 15-11-1976 for a sum of Rs. 48,000 and the auction-purchaser deposited the amount in court.

5. The petitioner then made an application in the execution case on 26-2-1977, claiming rateable distribution under Section 73 of the Civil P. C. This application was dismissed for default on 22-3-1977. The petitioner filed successively two similar applications thereafter, which also were similarly dismissed and thereafter on 4-4-1977, the fourth application was filed. This application has been dis-

*(From order of M. K. Verma, Spl. Sub-J., Ranchi, D/- 12-4-1977.)

missed by the learned Special Subordinate Judge by the impugned order on various grounds, namely, (i) that successive applications for rateable distribution were not maintainable. (ii) The assets having already been realised by the Court on 7-12-1976, the application filed by the petitioner, subsequent thereto, would not be entertained. (iii) The attachment of the trucks in question by the petitioner was illegal, inasmuch as, the details of the properties attached were not stated in the warrant of attachment, and therefore, no right flowed on account of the purported attachment of the trucks in question in favour of the petitioner.

6. The petitioner has accordingly come to this Court. We have seen that the award in favour of the petitioner was passed under Section 48 of the Co-operative Societies Act. Section 51 of this Act provides that an order passed under S. 48 shall, in addition to any other method of enforcement provided under this Act, on application be enforced as follows:

"(a) When passed by the Registrar, a liquidator or by an arbitrator or arbitrators, by any Civil Court having local jurisdiction in the same manner as a decree of such Court:

(b) When passed by the District Judge, in the same manner as a decree of the District Judge made in any suit pending before him."

7. According to S. 52 of the Act, any sum payable by any person or by any registered society

xx xx xx

"(e) in accordance with an order, decision or award passed or made under S. 48, shall be recoverable, as a public demand in any area, in which the Bihar and Orissa Public Demands Recovery Act, 1914 (B. & O. Act 4 of 1914), is in force or as an arrear of land revenue throughout the whole of the State and the Registrar or other person authorised by him in this behalf, shall be deemed to be the person to whom such public demand is due or to whom such arrear of land revenue is payable."

8. From the perusal of the above provisions of the Co-operative Societies Act it becomes clear that the award passed in favour of the petitioner would have been enforced by it, either as specified by S. 51 of the Act by a Civil Court, having the local jurisdiction in the matter or as provided under S. 52 of the Act, as a public demand under the provisions of the Bihar and Orissa Public Demands Recovery Act. Had the petitioner taken recourse to the enforcement of the award through the Civil Courts, then by virtue of cl. (a) of S. 51 of the Act, it could have been enforced in the same manner as the decree of a Civil Court, but it has not done so. Question then arises as to whether the petitioner, executing the award through the processes of the Certificate Court, can be allowed to claim rateable distribution in the assets held by the Civil Courts in execution of the decree of the opposite first party.

9. The learned Subordinate Judge has rejected the claim of the petitioner, as already stated above, on three grounds. The first ground, that successive applications were not competent, does not appear to me of any substance. The applications which were dismissed merely for default did not create, in my view, any impediment in the way of a claimant to make a fresh application, until he is not late, i.e. till he is otherwise entitled to and can claim rateable distribution in terms of S. 73 of the Code. Although, no direct authority was cited, reference can be made to the Full Bench case of Sarjug Singh v. Basisth Singh, 1969 BLJR 774: (AIR 1970 Pat 237). The question that arose in that case was as to whether a second application under S. 47 of the Civil P. C. by a judgment-debtor, an earlier application having been dismissed for default, would be maintainable and it was held that the dismissal of the earlier application did not bring about any bar on the principle of res judicata or the like. In my view the principle of the above case will apply with full force to an application under S. 73 of the Code also.

10. The second ground regarding the validity or invalidity of the attachment by the petitioner is also of no consequence, inasmuch as, if the petitioner is found otherwise entitled to get the advantage of rateable distribution, he would still get it.

11. Now remains the main and primary question for consideration, namely the third question. The learned Advocate, although conceded that his application filed in the Court, claiming rateable distribution, was subsequent to the receipt of the assets, the petitioner was still entitled to claim rateable distribution because the petitioner had already put his award in execution before the

receipt of the assets by the court, which by itself was sufficient to entitle the petitioner to participate in the distribution of the assets in question and it was not necessary to make a separate application in the executing court.

12. There is a lurking fallacy in the argument of the learned counsel, inasmuch as, the execution proceeding of the petitioner was not pending in the court i.e. a Civil Court, but was pending before the revenue authorities. One of the essential conditions to enable the claimant to get rateable distribution is that he must have applied for execution to the court by which the assets are held. The scheme of this section, in my view, will not apply to such cases, where the assets are held by a Civil Court and another proceeding is pending before the revenue authorities. Although, I could not find any direct authority in support of this proposition, some support can be derived to this view from the case of Roshan Lal v. Mashkur Ali Khan, AIR 1921 All 142 (2). It was observed in this case that the principles of S. 73 of the Code would have no application, where the matters are pending in courts totally different and entirely independent of each other.

13. The learned single Judge of the Sind Judicial Commissioner's Court in the case of Khudabadi Amil Co-operative Credit Bank Ltd., Hyderabad, Sind, v. Hyderabad Amil Co-operative Urban Bank Ltd., Hyderabad, Sind (AIR 1938 Sind 157), where an award was being executed under S. 59 (1) (b) of the Bombay Co-operative Societies Act (7 of 1925) as arrears of the land revenue observed that the principles of S. 73 of the Code could not be applied to such a case.

The learned counsel, however, placed reliance upon the following decisions:

(i) Dhirendra Rao Krishnarao Gunzikar v. Virbhadrappa G. Hosmani (AIR 1935 Bom 176).

(ii) Lyallpur Bank Ltd. v. Ramji Das (AIR 1945 PC 60).

(iii) Sm. Rajlakshmi Dassi v. Bonamali Sen (AIR 1955 Cal 573).

(iv) Bhola Sahu v. Chameli Devi (AIR 1960 Pat 574) and,

(v) Gobardhan Das v. Harinagar Co-operative Society (1964 BLJR 387).

In none of these cases, the situation was like that as in the present case, namely, one execution case was pending in the Civil Court and another before the Revenue or any other authority. Therefore, none of the cases cited on behalf of the petitioner are of any assistance to him.

In the Bombay case it was observed that "the true construction of S. 73 of the Code is that an application need only have been made to the Court which granted the decree before the receipt of the assets and need not be made to the Court which holds such assets.

The learned counsel had however placed strong reliance on the Privy Council case, but there also the person who was held entitled to the claim of rateable distribution was one, who although had obtained an order in his favour under S. 186 (1) of the Companies Act, 1913 had resorted to enforce that order in the District Court, which was holding the assets.

In the Calcutta case, it was decided that S. 73 of the Code does not require that an application for rateable distribution as distinct from an application for execution should be filed before the assets are received and that if more than one application for execution happen to be pending, it becomes the duty of the Court to make an order for rateable distribution.

In the Bhola Sahu's case, this court on review of various authorities observed that ordinarily Section 73 requires that the decree-holder claiming rateable distribution should have applied for execution to the Court by which the assets were held, S. 63 of the Code recognised an exception and laid down when and to what extent this rule may be departed from.

In the last case (Gobardhan Das v. Harinagar Co-operative Society) again both the execution cases were pending in the Court of the Munsif.

14. From the above discussions, I do not feel any doubt in my mind to come to the conclusion that the petitioner, whose execution proceeding was pending in the revenue court at the relevant time and not before the court which was holding the assets in question or for that matter in any court inferior or superior to that court, the equitable principles contained in S. 73 of the Civil P. C. cannot be applied in this case. The application, therefore, has no substance and is accordingly dismissed but in the circumstances of the case, however, I shall make no order as to cost.

SATYESHWAR ROY, J.:— I agree.

Petition dismissed.

AIR 1979 PATNA 34

(RANCHI BENCH)

GOBIND MOHAN MISRA, J.

Dhirendranath Chandra, Petitioner v. Apurba Krishna Chandra and others, Opposite Parties.

Civil Revn. No. 93 of 1977 (R), D/- 1-8-1978.*

Civil P. C. (5 of 1908), O. 14, R. 2 — Trying any point as preliminary issue — Discretionary — Not mandatory.

A plain reading of R. 2 will show that ordinarily even if the case may be disposed of on a preliminary issue, the Court is bound to pronounce judgment on all issues. This ordinary rule is subject to only one exception which has been provided in sub-rule (2) according to which if the case or any part thereof may be disposed of on issue of law only and if that issue of law relates to the jurisdiction of the Court or a bar to the suit created by any law for the time being in force the Court may try such issue first. It is, therefore, clear that a departure from the ordinary rule provided in sub-r. (1) of R. 2 can be made by the Court only in the circumstances mentioned in sub-r. (2) and even in these circumstances the Court has only a discretion that it may try an issue of law relating to the points mentioned in Cls. (a) and (b) of sub-r. (2) as a preliminary issue before framing other issues. There is, however, nothing in sub-rule (2) which makes it obligatory for the Court to try such an issue first in all cases. If, therefore, the Court is of opinion that in any particular case it will be more expedient to try all the issues together and therefore, if it refuses to try and decide any issue of law even on the points referred to in Cls. (a) and (b) of sub-r. (2) as a preliminary issue before taking up other issues, it commits no error touching jurisdiction. (Para 6)

Where the trial Court disallowed the request of the petitioner to try the issue namely whether the suit was barred under S. 66 (1) of Civil P. C. as preliminary issue there was no error touching jurisdiction on the part of trial Court as that was a discretionary matter. (Para 6)

Anno : AIR Comm. Civil P. C. (9th Edn.) O. 14, R. 2, N. 3.

*(Against order of K. P. Sinha, Sub. J. 2nd Court, Dhanbad, D/- 21-4-1977).

JV/JV/E444/78/PNK/LGC

N. K. Prasad, R. K. Marathia and V. S. Prasad, for Petitioner; S. K. Muzumdar and A. N. Deo, for Opposite Parties.

ORDER :— This revision application is directed against the order dated 21-4-1977 passed by the Subordinate Judge, 2nd Court, Dhanbad, in Title Suit No. 32 of 1975 refusing the prayer of the petitioner to decide the preliminary issue that the suit was barred under the provisions of S. 66 (1) of the Civil P. C. (hereinafter referred to as "the Code").

2. It is not disputed that opposite party Nos. 1 to 4 and the petitioner are full brothers, being the sons of late Sushil Kumar Chandra whose father was Indra Narain Chandra. It is also not disputed that Sushil Kumar Chandra died during the lifetime of his father, Indranarain Chandra. Opposite party Nos. 1 to 4 instituted Title Suit No. 32 of 1975 for partition of their 4/5th share in the property mentioned in Sch. A to the plaint. The remaining 1/5th share, according to the opposite party-plaintiffs, belonging to defendant-petitioner. It is also not disputed that the suit property had been purchased at a Court sale in the name of the petitioner (defendant No. 1). It was the further case of the plaintiffs-opposite party that the suit property had been purchased by Indra Narain Chandra, the grandfather of the petitioner in the name of the petitioner (defendant No. 1) since he was at that time the only other adult male member in the family. It was also asserted by the plaintiffs opposite party that the suit property was joint family property and after the death of Indra Narain Chandra in 1931 has been all along in possession of the five brothers, namely, the plaintiffs (opposite party Nos. 1 to 4) and petitioner-defendant No. 1.

3. In his written statement, the defendant-petitioner denied the aforesaid allegations and resisted the claim of the plaintiffs, amongst other grounds, on the ground that they were not entitled to maintain the suit in view of the provisions of S. 66 (1) of the Code. One of the issues framed in the suit was whether the suit was barred under the provisions of S. 66 (1) of the Code. The petitioner-defendant No. 1 by an application dated 21-4-1977 prayed for determination of the above issue as a preliminary issue in the suit. The prayer of the petitioner-defendant No. 1 was disallowed by the learned Subordinate

Judge by the impugned order. Defendant No. 1-petitioner has, therefore, come up in revision before this Court.

4. Learned counsel for the petitioner has contended that the suit property was admittedly purchased in a court sale in the name of the defendant (petitioner) alone and it was he, who, held the sale certificate granted by the Court in respect of the suit property. Obviously, therefore, defendant No. 1 alone was the certified purchaser within the meaning of S. 66 (1) of the Code and the plaintiffs-opposite party could not, therefore, lay any claim to the property on the ground that the purchase had been made by Indra Narain Chandra through whom the plaintiffs' claim. According to the learned counsel for the petitioner such a claim of the plaintiffs-opposite party was barred under the specific provisions of S. 66 (1) of the Code. In the circumstances, according to the learned counsel for the petitioner, the Court below ought to have decided preliminarily whether the suit was barred under the provisions of S. 66 (1) of the Code in accordance with the provisions of sub-rule (2) of R. 2 of O. XIV of the Code.

5. Mr. S. K. Mazumdar, learned counsel appearing on behalf of the opposite party has, on the other hand, contended that the impugned order does not require any interference firstly because the provisions of sub-rule (2) of R. 2 of the O. XIV of the Code are not mandatory and secondly according to the facts averred in the plaint, the plaintiffs-opposite parties had laid claim to the suit property not merely on the ground that the property had been purchased on behalf of the certified purchaser, defendant No. 1 as also on behalf of the other grandsons of Indra Narain Chandra. The plaintiffs' claim was mainly based on the allegation that the acquisition of the property was on behalf of the joint family and even after the death of the purchaser Indra Narain Chandra, the property was all along in joint possession of the petitioner-defendant No. 1 and the plaintiffs-opposite parties since 1941 i.e. more than 12 years before the institution of the suit. In the circumstances, according to the learned counsel, the plaintiffs' claim was not one which was envisaged by the provisions of S.66 (1) of the Code and as such the provisions of sub-rule (2) of R. 2 of O. XIV of the Code will not be applicable to such case.

6. It may be stated at the outset that it is not necessary nor desirable to express my opinion on the question whether or not the suit out of which this application arises will be barred under the provisions of S. 66 (1) of the Code. It appears from the impugned order that such a plea has been taken in the written statement of the defendant-petitioner. If such a point has been raised it will have to be decided by the trial court along with other issues that might arise on the pleadings of the parties. But the question that has to be answered in the present case is whether in refusing to decide this point as a preliminary issue before trying and deciding other issues the learned trying Judge has committed an error to justify interference by this Court in exercise of powers of revision. For examining this aspect of the matter it will be necessary to read the provisions of R. 2 of O. XIV of the Code which runs as follows:—

"2 (1) Notwithstanding that a case may be disposed of on a preliminary issue the Court shall, subject to the provisions of sub-rule (2), pronounce judgment on all issues.

(2) Where issues both on law and facts arise in the same suit, and the court is of opinion that the case or any part thereof may be disposed of on an issue of law only; it may try that issue first if that issue relates to:

(a) the jurisdiction of the Court, or

(b) a bar to the suit created by any law for the time being in force;

and for that purpose may, if it thinks fit, postpone the settlement of the other issues until after that issue has been determined, and may deal with the suit in accordance with the decision on that issue."

A plain reading of R. 2 will show that ordinarily even if the case may be disposed of on a preliminary issue, the Court is bound to pronounce judgment on all issues. This ordinary rule is subject to only one exception which has been provided in sub-rule (2) according to which if the case or any part thereof may be disposed of on issue of law only and if that issue of law relates to the jurisdiction of the Court or a bar to the suit created by any law for the time being in force the court may try such issue first. It is, therefore, clear that a departure from the ordinary rule provided in sub-rule (1) of R. 2 can be made by the Court only in the circumstances

mentioned in sub-rule (2) and even in these circumstances the Court has only a discretion that it may try an issue of law relating to the points mentioned in clauses (a) and (b) of sub-rule (2) as a preliminary issue before framing other issues. There is, however, nothing in sub-rule (2) which in my opinion makes it obligatory for the Court to try such an issue first in all cases. If, therefore, the Court is of opinion that in any particular case it will be more expedient to try all the issues together and therefore, if it refuses to try and decide any issue of law even on the points referred to in cls. (a) and (b) of sub-rule (2) as a preliminary issue before taking up other issues. I do not think it has committed an error touching jurisdiction. In the impugned order the court below is of opinion that it is more expedient to try the issue regarding bar under Section 66 (1) of the Code along with other issues and the suit is also likely to be disposed of within a short period. It appears from the facts placed before me at the time of argument that for deciding either the point whether the suit is barred under S. 66 (1) of the Code or the point whether the plaintiffs are entitled to claim partition as prayed more or less the very same facts and circumstances have to be considered according to the averments in the pleadings and it may be more convenient to decide both these points together. At any rate, however, I am not satisfied that in refusing to decide the issue regarding bar under S. 66 (1) of the Code as a preliminary issue the Court below has committed any error of jurisdiction which may justify interference of this Court in exercise of its revisional jurisdiction. The application is, therefore, dismissed but in the circumstances, there will be no order as to costs.

Petition dismissed.

AIR 1979 PATNA 36

(RANCHI BENCH)

HARI LAL AGRAWAL, J.

Anand Mohan Boral, Petitioner v. Bilas Bihari Lal, Opposite Party.

Civil Revn. Nos. 200 and 202 of 1976 (R), D/- 28-7-1978.*

*(Against order of B. N. Tiwary, Dist. J., Palamau, D/- 10-7-1976.)

JV/JV/E438/78/MNT/DVT

(A) Civil P. Code (5 of 1908), S. 11 — Res judicata — Same proceeding — Decision of trial court — Does not operate as res judicata in appeal.

The principle that res judicata applies to two stages in the same litigation would apply between the two stages in the same litigation to this extent that the same court whether the trial Court or a higher court having at an earlier stage decided a matter in any way would not allow the parties to reagitate the matter again at a subsequent stage of the same proceeding. However, where the preliminary issue of maintainability of eviction proceeding was decided by trial court against defendant, the said issue could be raised in appeal against eviction order. Although an appeal may be said to be in continuation of the suit, certainly it is a proceeding different from the suit. AIR 1977 Pat 110; AIR 1960 SC 941, Rel. on. (Paras 7, 8)

Anno: AIR Comm. Civil P. Code (1908) (9th Edn.), S. 11 N. 2.

(B) Civil P. Code (5 of 1908), S. 11 — Res judicata — Revision petition against decision on preliminary point — Revision dismissed or withdrawn — No decision on merit — Does not operate as res judicata in appeal on merits from decision of trial Court. AIR 1961 SC 1457, Rel. on. (Para 9)

Anno: AIR Comm. Civil P. C. (1908) (9th Edn.), S. 11 N. 104.

Cases Referred: Chronological Paras

AIR 1977 Pat 110: 1977 BBCJ (HC) 253 7

1975 BBCJ 750 (Pat) 6

AIR 1961 SC 1457 9

AIR 1960 SC 941 7

A. K. Chatterjee, for Petitioner; Debi Prasad, A. Sahay and Miss Indrani Chaudhary, for Opposite Party.

ORDER:— Both these Civil Revision Applications, which have been heard together and involve identical questions, are being disposed of herewith.

2. The relevant facts, briefly stated, are that the petitioner has got a building consisting of various shop rooms on Hospital Rd. in the town of Daltonganj. Two contiguous shop rooms of the above building were let out to the opposite party under two separate leases, each for a fixed period of 11 months beginning from the 1st July 1969 to 31st May, 1970, on certain rents. Some time after the expiry of the period of the aforesaid leases, the petitioner filed two applications in the court of the Munsif, Dal-

tonganj under Section 12 (3) of the Bihar Buildings (Lease, Rent and Eviction) Control Act, 1947, for eviction of the opposite party from each of the two shop rooms. A claim for damages was also made, but we are not concerned with the same in these applications.

3. The opposite party filed objections and one of the points raised by him in both the cases was that the application was not maintainable, inasmuch as, in this case recourse to the provisions of Section 12, sub-secs. (1) and (2) of the Act was not resorted to. Objections on various other grounds were also taken, but they are beside the point.

4. The opposite party then prayed in the trial court to decide the question of maintainability of the applications filed by the petitioner as a preliminary point and the learned Munsif by his orders dated 6-2-1973 held that the applications were maintainable. Against the orders of the Munsif aforesaid, the opposite party came to this Court and filed two Civil Revisions, one of them was 'dismissed' in limine. The other application, however, was permitted to be 'withdrawn'. Both the cases were thereafter fully heard by the trial court and the learned Munsif allowed the same and passed decrees for eviction of the opposite party from the premises in question, besides allowing the claim for damages in part.

5. The opposite party then filed appeals in the court of the learned District Judge, Palamau at Daltonganj. The learned District Judge heard both the appeals analogously and by the impugned judgment allowed both the appeals. The learned District Judge held that the applications filed by the petitioner under Section 12 (3) of the Act were not maintainable, inasmuch as, the tenant had not taken recourse to the provisions of sub-sections (1) and (2) of Section 12 of the Act, as already indicated earlier. Reliance has been placed by the learned District Judge on a Bench decision of this Court in the case of Narayan Prasad Tulsian v. Shital Prasad Saha (1975 BBCJ 750) (Pat), in support of his view. The petitioner (landlord) has accordingly filed the present applications under S. 115 of the Civil Procedure Code against the said judgment.

6. I have heard learned counsel for both the parties and find that the view taken by the Court of appeal below is amply borne out by the above Bench decision, where it has been firmly held that in absence of an action taken under Section 12 (1) of the Act, the landlord cannot take recourse to Section 12 (3) of the Act. It is not necessary to notice the reasonings of the judgment, nor its correctness was challenged before me by the learned counsel for the petitioner.

7. The learned counsel for the petitioner, however, contended that the preliminary point, having been decided by the trial court by its order dated 6-2-1973, it could not be raised by the opposite party at the succeeding stage of the same proceeding. He further contended that the said order could not be challenged more so as the civil revision applications filed by the opposite party in this Court were dismissed/withdrawn. In other words, it is contended that the order dated 6-2-1973 would operate as res judicata against the opposite party, and therefore, the court of appeal below could not interfere with the same. In support of his proposition, learned counsel placed reliance upon my own decision in the case of Dinbandhu Ghosh v. Tasawar Hussain, 1977 BBCJ (HC) 253: (AIR 1977 Pat 110). In that case, relying upon the decision of the Supreme Court in the case of Satyadhayan Ghosal v. Smt. Deorajin Devi (AIR 1960 SC 941) I had held that "the principle of res judicata applies to the two stages in the same litigation". The argument of res judicata, advanced in this case, however, is entirely erroneous, in asmuch as, what was decided in the earlier case, was that this principle would apply between the two stages in the same litigation to this extent that the same Court, whether the trial court or a higher court, having at an earlier stage decided a matter in any way would not allow the parties to reagitate the matter again at a subsequent stage of the same proceeding.

8. In the cases on hand, however, this argument is entirely misconceived as the order dated 6-2-1973 deciding the question of maintainability as a preliminary point, was not reagitated in the same proceeding i.e. in the proceeding pending in the Court of the Munsif. Had it been done so the argument and the decision would have application, but certainly the opposite party had got every right to agitate the correctness of any decision of a subordinate court in an appeal. Although an appeal may be said to be in continuation of the suit,

certainly it is a proceeding different from the suit. The argument is entirely misconceived.

9. The objections on the second ground i.e. on account of the dismissal or withdrawal of the civil revision applications by the opposite party, against the order dated 6-2-1973 of the court below is also erroneous. It is well recognized that the principle of res judicata or for that matter, even constructive res judicata applies only when the matter is heard and finally decided by a competent court. That being essential to the rule, where there has been no adjudication of the matter, obviously there will be no application of the principle of res judicata. It was observed by the Supreme Court in the case of Daryao v. State of U. P. (AIR 1961 SC 1457) that if a petition is dismissed as withdrawn, it cannot be a bar to the subsequent petition, because in such a case there has been no decision on the merits by the Court. A person, when he makes an application under Section 115 of the Code, he evokes a discretionary power of this Court. The Court may refuse to adjudicate upon a matter in its discretion. The order of dismissal or withdrawal passed by this Court against the order of the Munsif did not, in any way, clothe them with any higher authority.

10. I, therefore, do not find any merit in these applications, which are accordingly dismissed. In the circumstances, however, I shall make no order as to cost.

Revision dismissed.

AIR 1979 PATNA 38

(RANCHI BENCH)

HARI LAL AGRAWAL, J.

S. M. Thakkar, Petitioner v. M/s. A. K. Hazra & Sons and others, Opposite Parties.

Civil Revn. No. 1220 of 1972, D/- 21-9-1978.*

Civil P. C. (5 of 1908), S. 73 — Rateable distribution of assets — Attachment before judgment confers no right on decree-holder who obtained the attachment — Decree-holder must apply for execution before receipt of assets by the Court.

The distinction between the "assets held by the Court" and "receipt of the assets by the Court" must be well understood. A Court may hold the assets in many ways, although the same may not have been actually received by it. If by an order of attachment certain amount lying with any person is attached either before the judgment or in course of execution, the assets will be simply deemed to be held by the Court. It will be deemed to have been received only when in pursuance of some further order of the Court or otherwise, the attached property is actually received by the Court. An attachment before judgment confers no right on the party who obtained the attachment. The actual benefit which he gets by such attachment is that when he applies subsequently for execution, he need not reattach the property and that any private dealing of the property in question after the date of attachment will not be binding. But simply because a decree-holder has obtained an attachment before judgment of his debtor's property, he will not thereby become entitled to get rateable distribution under S. 73, unless like other decree-holders, he applies for execution after getting the decree, and his execution application is made before the receipt of the assets by the Court in execution. (Paras 8, 10)

Anno: AIR Comm. C.P.C. (9th Edn.), S. 73 N. 11.

P. K. Sinha and D. K. Sarkar, for Petitioner; N. N. Roy and Miss Jaya Roy, for Opposite Party No. 6.

ORDER:— The question that arises for consideration in this civil revision application is as to whether the opposite party No. 6, Madanlal Agarwala, was entitled to get rateable distribution along with the petitioner in certain money.

2. The relevant facts, briefly stated, are as follows: The petitioner filed Money Suit No. 119 of 1969 against opposite party Nos. 1 to 5 in the Court of the Subordinate Judge at Jamshedpur for a decree for Rs. 46,000. Against the same judgment-debtors (opposite party Nos. 1 to 5), Execution Case No. 67 of 1971 was levied by one Banwarilal Agarwala for realisation of certain money in the Court of the same Subordinate Judge. After fully satisfying the decree of Banwarilal Agarwala, a sum of Rs. 18,000 was found in excess and was separately

*(Against order of R. B. Prasad, Sub. J. Jamshedpur, D/- 29-7-1972.)

deposited by a chalan in the said Execution Case No. 67 of 1971.

3. The petitioner had attached before judgment the said sum of Rs. 18,000. The suit of the petitioner was decreed on 13-12-1971 and then he put the decree in execution in Execution Case No. 146 of 1971 on 20-12-1971. The decree being for more than the sum of Rs. 18,000 which was attached before the judgment, the petitioner, besides praying for payment of the said sum of Rs. 18,000, also prayed for attachment of certain other bills of the judgment-debtors. I am not, however, concerned with the details of those bills. It is not clear as to what orders were passed in the execution case of the petitioner in regard to his prayer with respect to the said sum of Rs. 18,000, but it appears that the amount in question was brought to the Execution Case of the petitioner from the case in which it was earlier deposited.

4. Opposite Party No. 6 had filed Money Suit No. 43 of 1970 in the same court of the Subordinate Judge for realisation of certain money against the same judgment-debtors and had also got the aforesaid sum of Rs. 18,000 attached before judgment. The aforesaid suit of opposite party No. 6 was also decreed on 19-6-1972 and on the same day he levied execution, his Execution Case being No. 54 of 1972, and also made a prayer that the sum of Rs. 18,000 lying in deposit may be rateably distributed as excess amount in Execution Case No. 67 of 1971, which was attached before judgment in Money Suit No. 43 of 1970. On this prayer, the learned Subordinate Judge by his order D/- 22-6-1972, after dispensing with the requirement of O. 21, R. 22 of the Civil P. C. directed for attachment of the said money lying in deposit in Execution Case No. 67 of 1971. Accordingly, a prohibitory order under O. 21, R. 53 of the Civil P. C. was issued from the Court of the Subordinate Judge to the 'Judge Incharge of Accounts, Jamshedpur' requesting him to "hold the said money subject to the further orders of this Court."

5. It has been seen that the amount in question was the result of the surplus which was found after satisfying the decree in Execution Case No. 67 of 1971 of the same Court levied by Banwarilal Agarwala, and inasmuch as the amount was surplus, it seems to have been put under the charge of the Judge Incharge of Accounts. The amount, however, must be deemed to be held by the Court below.

6. The records of Execution Case No. 146 of 1971 have not been received from the Court below, but the learned counsel for the petitioner has produced the entire order sheet at the time of hearing of this application, and from the said order sheet I find that the petitioner had again taken steps for attachment of the said amount of Rs. 18,000 in his execution proceeding, although that amount was also got attached by him before the judgment passed in his suit.

7. Be that as it may, the learned Subordinate Judge has allowed the claim of opposite party No. 6 solely on the ground that "he had obtained an attachment before judgment during the money suit itself....."

8. It was contended by the learned Advocate appearing on behalf of the petitioner before me that the learned Subordinate Judge has committed an apparent error of jurisdiction in allowing the claim of rateable distribution of opposite party No. 6 merely on the ground that he had attached the amount in question before the judgment in his Money Suit No. 43 of 1970. The contention advanced, as it is, must be accepted as correct, inasmuch as an attachment before judgment confers no right on the party who obtained the attachment. The actual benefit which he gets by such attachment is that when he applies subsequently for execution, he need not reattach the property and that any private dealing of the property in question after the date of attachment will not be binding. But simply because a decree-holder has obtained an attachment before judgment of his debtor's property, he will not thereby become entitled to get rateable distribution under S. 73 of the Civil P. C. unless, like other decree-holders, he applies for execution after getting the decree. It has to be seen as to whether the claim of rateable distribution of opposite party No. 6 on the facts and circumstances of this case can well be upheld under the provisions of S. 73 of the Code.

9. The essential conditions to enable a decree-holder to claim rateable distribution of the assets of the judgment-debtor under S. 73 of the Civil P. C. are as follows:—

(1) The assets must be held by the Court.

(2) The decrees obtained by the decree-holder and the attaching creditor must be decrees for the payment of money.

(3) Such decrees should have been obtained against the same judgment-debtor.

(4) The claimant for rateable distribution must have applied for execution to the Court by which the assets are held, and

(5) Such application should have been made before the receipt of assets by the Court.

It is not disputed that all the first four conditions are fulfilled in this case. The sum of Rs. 18,000 was being held by the executing Court, the decrees are for payment of money and have been obtained against the same judgment-debtors and that applications for execution of the decrees have been made to the same Court which is holding the assets, namely, the Court below.

10. Still, in order to qualify for rateable distribution, Opposite Party No. 6 had to satisfy the fifth and the last condition also, namely, that his execution application in this case should have been made before the receipt of the assets by the Court. The distinction between the "assets held by the Court" and "receipt of the assets by the Court" must be well understood. A Court may hold the assets in many ways, although the same may not have been actually received by it. I would better illustrate it, in order to bring home the distinction. If by an order of attachment certain amount lying with any person is attached either before the judgment or in course of execution, the assets will be simply deemed to be held by the Court. It will be deemed to have been received only when in pursuance of some further order of the Court or otherwise, the attached property is actually received by the Court.

The execution case of the petitioner was filed on 20-12-1971, his decree being for more than Rs. 46,000. In his execution application, he also made a prayer for realisation of his decretal dues, inter alia, by payment of the said sum of Rs. 18,000 deposited in Execution Case No. 67 of 1971. Nothing has been shown that before the execution petition of Opposite Party No. 6 was filed i.e. on 19-6-1972, the sum of Rs. 18,000 which was deposited under Chalan No. 234 dated 19-11-1971 and was put under the charge of the Judge Incharge of Accounts, was received by the Executing Court; rather, as already shown earlier, the learned Subordinate Judge issued a prohibitory order in the execution case of opposite party No. 6 under the provision of O. 21, R. 52 of the Civil P. C. In order that S. 73 of the Code may apply, it is necessary that the assets should have reached the hands of the Court in execution, i.e. on the execution side. The assets in question (Rs. 18,000) was, therefore, not received nor will be deemed to have been received by the Court merely on the filing of the execution petition by the petitioner, for the fact that it was already attached earlier.

11. In my opinion, the Opposite Party No. 6 is entitled to rateable distribution. I would, therefore, uphold the order of the learned Subordinate Judge, but for the reasons entirely different than his.

12. In the result, the application fails and is dismissed; but in the circumstances of the case, there shall be no order as to costs.

Revision dismissed.

AIR 1979 PATNA 40

(RANCHI BENCH)

LALIT MOHAN SHARMA AND MANORANJAN PRASAD, JJ.

Mukteshwar Singh, Appellant v. The State of Bihar, Respondent.

A.F.O.D. No. 559 of 1969, D/- 13-7-1978.*

(A) Sale of Goods Act (3 of 1930), S. 20 — Auction sale of forest coupe for exploitation — When becomes effective — Agreement signed by purchaser and Divisional Forest Officer on date of auction and forwarded to Conservator for execution — Purchaser permitted to carry on his operation in coupe in anticipation of approval of Conservator — Sale held was complete on date of auction — Fact that Conservator signed it on subsequent date was of no consequence. AIR 1966 SC 58, Foll. (Para 17)

Anno: AIR Manual (3rd Edn.) Sale of Goods Act (1930), S. 20 N. 1.

*(Against judgment and decree passed by Satyendra Mohan Prasad, Addl. Sub. J. Chaibasa, D/- 30-8-1969).

JV/KV/E445/78/GDR

(B) Contract Act (9 of 1872), S. 28 Exception I — Saving of contract to refer to arbitration dispute that may arise — Auction sale of forest coupe — Agreement between purchaser and Divisional Forest Officer — Agreement embodying a clause to the effect that in the event of dispute decision of Conservator of Forest shall be final and binding on parties — Held that agreement was not void and a suit by contractor for damages was not maintainable — Fact that decision of Conservator was not made rule of Court was of no consequence. AIR 1970 SC 833 and AIR 1973 Pat 405, Rel. on. (Arbitration Act (1940), S. 17.)

(Paras 23, 24 and 27)

Anno: AIR Manual (3rd Edn.) Contract Act (1872), S. 28 N. 5; Arbitration Act (1940), S. 17 N. 1.

Cases Referred: Chronological	Paras
AIR 1973 Pat 405: 1973 BBCJ 85	27
AIR 1970 SC 833	27
AIR 1966 SC 58	17

N. N. Roy and Miss Jaya Roy, for Appellant; Ram Nandan Sahai Sinha and S. L. Jha, Jr. Counsel to Govt. Pleader, for Respondent.

MANORANJAN PRASAD, J.:— This is a first appeal by tre plaintiff against the judgment and decree dated 30-8-1969, passed by the Additional Subordinate Judge, Chaibassa, in Title Suit No. 3/1 of 1968.

2. The plaintiff, who is a timber merchant, being the highest bidder at a public auction held on 8-8-1966 at the office of the Divisional Forest Officer, Chaibasa, in pursuance of a notice published in the Bihar Gazette dated 13-7-1966 (Ext. 6), had purchased forest coupe No. 29 at Noamundi for its exploitation in the year 1966-67, at Rupees 32,005, and, in pursuance thereof, an agreement dated 8-8-1966 (Ext. 5) was also signed on the same date by him and the Divisional Forest Officer which was thereafter forwarded by the Divisional Forest Officer for its execution by the Chief Conservator of Forest who is the officer authorised to sign and execute agreements above Rs. 20,000 and below Rs. 50,000 on behalf of the State Government.

3. The area of the coupe, as mentioned in schedule 'A' of the agreement as also in the map, schedule 'C', forming part of it, was 17.4015 hectares equivalent to 43 acres. The working period for exploitation of the coupe was between 16-10-1966 and 30-6-1967. Under the terms of the agreement the plaintiff was required to pay the aforesaid bid amount of Rs. 32,005 in the following four instalments:—

1. Rs. 9,605 on or before signing the agreement.
2. Rs. 8,000 on or before 25-1-1967.
3. Rs. 8,000 on or before 15-3-1967.
4. Rs. 6,400 on or before 15-6-1967.

4. The plaintiff paid the first instalment of Rs. 9,605 on 21-11-1966 and the second instalment of Rs. 8,000 in two instalments on 6-1-1967 and 6-3-1967 and he paid only Rs. 5,468 towards part payment of the third instalment on 17-5-1967 but did not pay the remaining part of the third instalment nor did he pay any amount of the fourth instalment.

5. According to the plaintiff, he was supplied with a copy of the agreement, after its execution by the Chief Conservator of Forest, in November, 1967, whereas, according to the defendant, after its receipt from the Conservator of Forest on 21-6-1967, it was sent to the plaintiff by the Divisional Forest Officer along with his letter dated 14-7-1967 (Ext. A).

6. According to the plaintiff, though he was supplied with a copy of the agreement, after its execution by the Chief Conservator of Forest, in the month of November, 1967 i.e., much after the period of exploitation expired on 30-6-1967, he had been permitted, by the Divisional Forest Officer and his subordinate staff to carry on the operation in the coupe in question during the agreed period of exploitation i.e. between 16-10-1966 and 30-6-1967. But when he had started his operations in the said coupe, the subordinate officials of the Forest Department started unduly interfering with his work over a portion of an area measuring 12 acres lying between coupe Nos. 29 and 30 in spite of the fact that this area was not only advertised for sale as a part of coupe No. 29 but had also been delineated in the map which formed part of the agreement. Owing to this undue and illegal interference, the plaintiff had to bring the matter to the notice of the Divisional Forest Officer, Chaibasa, by his letter dated 18-12-1966 on which the Divisional Forest Officer had personally visited the coupe in question, and, after being thoroughly satisfied by spot enquiry and actual measurement about correctness and genuineness of the plaintiff's claim, had submitted a report to the Conser-

vator of Forest, Ranchi, completely supporting the stand taken by the plaintiff. The plaintiff also understands that the said Officer had also recommended that the plaintiff should be permitted to work and exploit this area of 12 acres. In spite of the aforesaid unambiguous recommendation of the Divisional Forest Officer, the plaintiff was not only not permitted to carry on his work in the aforesaid area of 12 acres but was also prevented from removing the materials, some of which had already been felled by him and some of which were still standing on another area of 6 acres. The plaintiff had personally discussed the matter with the Conservator of Forest and also with the Chief Conservator of Forest and although they had been assuring the plaintiff all the times that the matter would be looked into and the date of expiration of the period of exploitation mentioned in the agreement would be extended, nothing finally turned out and when the time mentioned in the agreement was about to run out, the plaintiff was compelled to issue a notice under S. 80 of the Civil P. C.

7. According to the plaintiff, the value of the timber standing on the said 12 acres of land over which he had been illegally debarred from cutting and removing the materials is Rs. 15,000 and the value of the timber standing on the other 6 acres of land over which also he had been illegally debarred from cutting and removing the materials is Rs. 7,000 total Rs. 22,000, and, therefore, the plaintiff, after deducting the sum of Rs. 8,932 being the amount due from him on account of the remaining unpaid part of the third instalment and whole of unpaid fourth instalment, had claimed Rs. 13,068 on account of loss suffered by him by way of damages as per accounts given in the schedule of the plaint.

8. The defendant, the State of Bihar, had filed a written statement. The case of the defendant was that the coupe No. 29 as demarcated on the spot physically was only 31 acres and not 43 acres and the aforesaid 12 acres as claimed by the plaintiff was outside coupe No. 29 and it was wrongly shown as 43 acres in Schedule A of the agreement as also in the map, Sch. C, attached to the agreement due to the mistake committed by the staff of the Forest Department against whom necessary action had been taken.

9. The defendant admitted that the concerned Divisional Forest Officer had made spot inquiry and had sent recommendation to the Conservator for rebate in favour of the contractor but, according to the defendant, he never recommended that the plaintiff should be permitted to work and exploit the area of 12 acres in question.

10. The further case of the defendant was that the plaintiff had failed to pay part of the third instalment and had not paid any part of the fourth instalment, and hence, as per term of the agreement, the Divisional Forest Officer, by his letter dated 10-5-1967 (Ext. A/3) had informed the Range Officer that the plaintiff had paid only Rs. 5,468 towards the third instalment of Rs. 8,000 and hence he should be asked to deposit the balance amount of the third instalment and in the meantime he should not be allowed to remove more than half of the materials from Section 3 of coupe No. 29. The Divisional Forest Officer also by his letter dated 10-5-1967 (Ext. A/2) asked the plaintiff that he should deposit arrear part of the third instalment and the fourth instalment in full soon and that the question of allowing him rebate was under the consideration of the Chief Conservator of Forests. Thereafter also by letters dated 17-5-1977 and 22-5-77 the plaintiff was directed to deposit the arrear, but when, in spite of the final notice, the plaintiff did not pay the balance due, the Divisional Forest Officer in his letter dated 19-6-1976 (Ext. A/1), with a copy to the plaintiff, wrote to the Conservator of Forest, for termination of the agreement.

11. According to the defendant, the plaintiff had worked in 26 acres and removed materials therefrom, but, as he did not deposit the third instalment in full and the entire fourth instalment, he was not allowed to work in the remaining 5 acres of section 3 of coupe No. 29 and the plaintiff did not work whatsoever in the disputed area of 12 acres.

12. The further case of the defendant was that the Chief Conservator of Forest rejected the plaintiff's representation for allowing him to work in 5 acres of section 3 of coupe No. 29 and to give him possession of the disputed 12 acres, and this fact was intimated by the Conservator of Forest by his letter dated 18-12-1967 (Ext. A/6) to the Divi-

sional Forest Officer in which he also directed the Divisional Forest Officer to sell the said 5 acres of coupe No. 29 as left materials and to make a new coupe of the disputed 12 acres and auction the same. The plaintiff was also duly informed by the Divisional Forest Officer in his letter dated 30-12-1967 (Ext. A/5) that his representation in respect of coupe No. 29 had been rejected.

13. The defendant also contended that the plaintiff did not suffer a loss of Rs. 13,068 or any amount whatsoever as claimed by him and he is not entitled to any decree for damages.

14. The defendant had also taken a plea that the plaintiff's suit was barred under Clause 19 of the agreement which stated that the parties to the agreement had mutually agreed that in the event of any dispute or question arising whether during the continuance or after the termination of the agreement with regard to the terms or the construction or meaning of the agreement or as to the performance of any act required to be done under the agreement or as to any other matter or thing in connection with the agreement, the decision of the Conservator of Forest upon the matter of such dispute or question shall be final and binding on the parties. According to the defendant, in this case, as already mentioned above, the decision of the Conservator of Forest was against the plaintiff whose representation in this regard was rejected, and hence the plaintiff's suit was liable to be dismissed on this score alone.

15. The learned Additional Subordinate Judge has held that as per terms of the agreement dated 8-8-1966 (Ext. 5 and Ext. D) entered into between the parties, 43 acres of forest land was auction-sold for the purpose of exploitation of the forest produce; but, according to the admitted case of the parties, the plaintiff was not allowed by the defendant to work in 12 acres of land. He has further held that for the non-payment of a part of the third instalment and full of the fourth instalment, the plaintiff was not allowed to work in a further area of 5 acres. He has, thus, held that the plaintiff had worked only in 26 acres and removed materials therefrom, and that the plaintiff was not allowed to work in 12 acres, besides 5 acres, total 17 acres, and, thus, he has accepted the plaintiff's case that he was given lesser area than what he was entitled to and he was not permitted to carry on work in and was prevented from removing materials from the entire area of 43 acres mentioned in the deed of agreement. He has, however, further held that the defendant was justified in not allowing the plaintiff to remove forest produce from 5 acres as he had failed to deposit a part of the third instalment and whole of the fourth instalment. As regards 12 acres of land, he has held that the defendant had given assurance to the plaintiff that he would be allowed rebate in respect of that area after he deposited the balance of the third instalment and the entire fourth instalment within time; but since the plaintiff himself had not done his part of his job by depositing these instalments, the plaintiff cannot have any justification for claiming any amount against the Government. He has next held that under Clause 12 of the agreement also the plaintiff is not entitled to claim refund of any sums payable or paid by him under the agreement on the ground that the area differs in any way from that laid down in the map in Schedule C thereto or in the sale notice. He has also held that under arbitration Cl. 19 of the agreement also the plaintiff's suit was not maintainable. He has further held that the plaintiff had led no evidence as to why and how Rs. 22,000 had been claimed as damages. In view of these findings, the learned Additional Subordinate Judge has held that the plaintiff was not entitled to any relief and, consequently, he had dismissed the plaintiff's suit.

16. Against the said judgment and decree of the learned Additional Subordinate Judge, the plaintiff has preferred the present appeal.

17. Before entering into the merits of the appeal, I would like to dispose of a preliminary point which incidentally arises on the pleadings of the parties but which was not canvassed in the trial court and was only feebly referred to in his argument by Mr. N. N. Roy, the learned counsel appearing for the appellant. The admitted case of the parties is that the plaintiff being the higest bidder at an auction held on 8-8-1966, in pursuance of a notice published in the Bihar Gazette dated 13-7-1966 (Ext. 6), had purchased coupe No. 29 for Rupees 32,005, and an agreement (Ext. 5) was also signed by the plaintiff and the Divisional Forest Officer, and thereafter it was forwarded by the Divisional Forest Officer to the Chief Conservator of

Forest for execution as it is only the Chief Conservator of Forest who is authorised to execute agreements for more than Rs. 20,000 and below Rs. 50,000 on behalf of the State Government. The plaintiff had in this connection mentioned in paragraph 4 of the plaint that he was supplied with a copy of the agreement, after the signature of the Chief Conservator of Forest, in November, 1967, i.e. long after the expiry of the period of exploitation of the forest produce mentioned in the agreement which was from 16-10-1966 to 30-6-1967. On the other hand, the defendant had stated in paragraph 9 of the written statement that a copy of the agreement was sent to the plaintiff with letter No. 1930 dated 14-7-1967 (Ext. A) of the Divisional Forest Officer after its receipt on 21-6-1967 from the Conservator of Forest. Subsequent signing and execution of the agreement by the Chief Conservator of Forest at a late stage will, however, make no difference in this case as the sale of coupe No. 29 to the plaintiff was finalised on 8-8-1966 when the bid was knocked down in favour of the plaintiff in pursuance whereof the deed of agreement was also signed by the plaintiff and the Divisional Forest Officer, which was, however, subject to the approval of the Chief Conservator of Forest, and the fact that the Chief Conservator of Forest signed it on a subsequent date did not make the sale effective from the date of his signature. The signature of the Chief Conservator of Forest simply completed the execution of the deed of contract and related back its execution to the date on which the sale took place and the contractor and the Divisional Forest Officer had signed the document. This view finds support from the decision of the Supreme Court in the case of Badri Prasad v. State of Madhya Pradesh, (AIR 1966 SC 58). Morever, this point is only academical as it is the admitted case of the parties that the contract was taken as completed on the date of auction sale on 8-8-1966 and the plaintiff was permitted to carry on his operation in the coupe in anticipation of the formal execution of the agreement by the Chief Conservator of Forest and the plaintiff actually carried on such operation.

18. In this case it is undisputed that though in Sch. A of the agreement as also the map, Sch. C, forming part of the agreement, the area of coupe No. 29 was mentioned as 43 acres, the plaintiff was not allowed to work in 12 acres by the defendant. In this connection the contention of the defendant is that the said area of 43 acres had been wrongly shown therein due to mistake in preparing the map by the staff of the Forest Department against whom necessary action had been taken as the area of Coupe No. 29 auction-sold to the plaintiff was only 31 acres at the spot and was demarcated as such and the plaintiff knew before the sale and also after the sale about it when he and his agent were shown the boundary and limits of coupe No. 29 whereafter the plaintiff had given a boundary declaration certificate dated 22-11-1966 to that effect. The defendant relied in this regard on the declaration certificate dated 22-11-1966 (Ext. C) given by the plaintiff to the effect that he and his authorised agent had been shown the boundary and limits of coupe No. 29 by Forester and the area shown to him and to his authorised agent on the ground, agrees with that delineated on the map attached to Sch. 'C' of the agreement and that he and his authorised agent had counted the trees in the above lot and had found that those marked trees agree with the list attached to Sch. 'BB' of the agreement.

19. According to the plaintiff, he was also not allowed to work in another 6 acres which was admittedly auction-sold to him. According to the defendant, however, the plaintiff was not allowed to work in only 5 acres out of the area auction-sold to him. The learned Additional Subordinate Judge has accepted the defendant's version that the plaintiff was not allowed to work only in 5 acres and he has rejected the plaintiff's version that he was not allowed to work in 6 acres, on the ground that the plaintiff had not got that area measured, and I see no reason to differ from the said finding of the learned Additional Subordinate Judge. According to the defendant, the plaintiff was not allowed to work in the said area of 5 acres, because he had not paid part of the third instalment and whole of the fourth instalment. The plaintiff had admittedly paid only Rs. 5468/- on 17-4-1967 towards the third instalment of Rs. 8000/- although this third instalment had become due on 15-3-1967 and he had not paid the remaining Rs. 2532/- of the third instalment and whole of the fourth instalment of Rs. 6,400/-. Thus, the plaintiff had not paid Rs. 8,932/- towards

the bid amount of Rs. 32,005/-. Ext. A/2 is a letter dated 10-5-1967 from the Divisional Forest Officer to the plaintiff demanding from him the remaining amount of the third instalment and the whole of the fourth instalment and informing him that after the receipt of the order of the Chief Conservator of Forest he will be given rebate. Ext. A/3 is another letter dated 10-5-1967 of the Divisional Forest Officer to the Range Officer informing him that the plaintiff had deposited only Rs. 5,468/- towards the third instalment and hence from section No. 3 of coupe No. 29 he should not be allowed to take out more than half of the forest produce, and the plaintiff should be asked to deposit the balance of the third instalment. Ext. A/1 is another letter dated 19-6-1967 written by the Divisional Forest Officer to the Conservator of Forest intimating him that the plaintiff had not deposited the balance of the third instalment and whole of fourth instalment within the stipulated period in spite of reminders and recommending that, in the circumstance, the agreement with the plaintiff in respect of the coupe No. 29 should be cancelled and the coupe should be resold by fresh auction. Ext. A/6 is a letter from the Conservator of Forest to the Divisional Forest Officer intimating him that though he had recommended for allowing the plaintiff to work in the remaining 5 acres and for giving him the remaining 12 acres, the Chief Conservator of Forest was not agreeable to it and hence the forest produce of the said 5 acres should be sold away as left materials and the 12 acres which was a part of coupe No. 29 should be made a new lot and sold away, and the representation of the plaintiff should be treated as rejected. Ext. A/5 is a letter D/-30-12-1967 from the Divisional Forest Officer to the plaintiff informing him that his representation had been rejected.

20. Clause 12 of the agreement stated that the purchaser shall not be entitled to claim any reduction or refund of the sums payable or paid by him under the agreement on the ground that the area differs in any way from that laid down in the map in Sch. 'C' thereto or in the sale notice. After having entered into such an agreement, the plaintiff cannot subsequently complain that the area actually given to him at the spot was less by 12 acres than what had been mentioned in the map, Schedule 'C' of the agreement.

21. Clause 15 of the agreement further laid down that in case of the failure of the purchaser to pay any of the instalments on or before the stipulated dates, it shall further be lawful for the Conservator of Forest, at his discretion and without prejudice to any penalties already imposed under the terms of the agreement, to suspend temporarily all operations in the said lot for one month or until the adjustment of the failure or breach by the purchaser whichever is earlier and if the failure or breach by the purchaser is not adjusted within one month of the suspension of his work then the State Govt. shall have full power to suspend all operations in the lot for such time as the Government may consider necessary, pending adjustment of the failure or breach and/or determination of the agreement. The said Cl. 15 further laid down that under the same condition as aforesaid it shall further be lawful for the Government/ Conservator of Forest, at any time by notice in writing to the purchaser under the hand of the Forest Officer to determine the agreement and thereupon the purchaser shall forfeit his security deposit and all his rights under the agreement and all forest produce whether exploited or not and all material converted therefrom whether partially exploited or not which is still within the said lot shall become the property of the Government. Therefore, when the plaintiff did not pay the balance of the third instalment and whole of the fourth instalment within the stipulated periods, the defendant was fully justified in terms of the agreement in not allowing the plaintiff to work in 5 acres out of the area auction-sold to him.

22. Moreover, Cl. 19 of the agreement reads as follows :—

"19. Lastly, it is mutually agreed between the parties hereto that in the event of any dispute or question arising whether during the continuance or after the termination hereof with regard to the terms of these presents or the construction or meaning hereof or of any part or provision hereof or as to the performance of any act hereby required to be done or as to any other matter or thing in connection herewith, the decision of the Conservator of Forest, Bihar upon the matter of such dispute or question shall be final and binding on the parties hereto."

23. Section 28 of the Indian Contract Act which declares agreement in restraint of legal proceeding void, provides the following exception to the said section in respect of arbitration agreement:

"Exception 1— This section shall not render illegal a contract by which two or more persons agree that any dispute which may arise between them in respect of any subject or class of subjects shall be referred to arbitration, and that only the amount awarded in such arbitration shall be recoverable in respect of the dispute so referred."

24. As already mentioned above, the plaintiff had also made representation regarding his claim to the Conservator of Forest and according to the plaintiff's own case in the plaint, he had also personally discussed the matter with the Conservator of Forest and also with the Chief Conservator of Forest, but the representation of the plaintiff to allow him to work in the remaining 5 acres of coupe No. 29 and also to give him possession of the disputed 12 acres was rejected by the Chief Conservator of Forest which fact was intimated by the Conservator of Forest in his letter dated 18-12-1967 (Ext. A/6) addressed to the Divisional Forest Officer, and this fact was also intimated to the plaintiff by the Divisional Forest Officer in his letter dated 30-12-1967 (Ext. A/5).

25. For the aforesaid reasons, I do not see any reason to interfere with the judgment and decree passed by the learned Additional Subordinate Judge, which are hereby confirmed, and the appeal is dismissed with costs.

LALIT MOHAN SHARMA, J.:— 26. I agree that the appeal should be dismissed with costs.

27. The Cl. 19 of the agreement, quoted in para. 22 of the judgment of my learned brother clearly leads to the conclusion that the present suit is not maintainable. The plea was pointedly raised in the written statement and a specific issue was framed. Although the Court has not considered the point at length, but the question has been answered to in the judgment against the plaintiff. The fact that the matter was considered and was decided against the plaintiff by the Conservator is proved by the documentary evidence including Exts. 1 (a), A (5) and A (6). In para. 8 of his evidence, the plaintiff (P. W. 2) also accepted the fact. I am fully conscious of the fact that the decision of the Conservator was not made rule of the Court, but, for the reason, it is not possible to hold that the suit is maintainable. The decision in Satish Kumar v. Surinder Kumar (AIR 1970 SC 833) and that of the High Court in Gouri Shankar Prasad Sinha v. State of Bihar (1973 BBCJ 85) : (AIR 1973 Pat 405) which has followed the Supreme Court decision, fully cover the present appeal and it must be held that the suit is not maintainable.

28. Before concluding, I would like to mention that although the point was very faintly stated on behalf of the State and was not supported by exhibits or the decisions mentioned by me above, it cannot be said that the plaintiff has been, for that reason, prejudiced. When Mr. N. N. Roy, appearing for the plaintiff-appellant rose for his final reply, the question was put to him by the Bench with specific reference to the provisions of S. 28 of the Indian Contract Act by my learned brother and to the exhibits by me. It was also indicated to Mr. Roy that the question of maintainability of the suit on account of Cl. 19 of the agreement appeared to be a formidable one against him and we, in our judgment, would not be confined merely to the perfunctory argument addressed on behalf of the State. Mr. Roy was invited to make full arguments on the question.

Appeal dismissed.

AIR 1979 PATNA 46

S. K. JHA, J.

Mahabir Singh and others, Appellants v. Rameshwar Singh and others, Respondents.

A. F. A. D. No. 122 of 1977, D/- 27-6-1978.*

(A) Trusts Act (2 of 1882), S. 90 — Scope — Relief to mortgagor — Fraud or collusion on the part of mortgagee ought to be proved.

In order to hold the mortgagor entitled to any relief by virtue of the provision of S. 90 of the Act it is essential to find out as to whether the mortgagee has himself brought about the sale with an ulterior motive to gain advantage of the fiduciary relation that he enjoys.

*(Against decision of S.M.I.F. Alam 1st Addl. Sub. J., Gaya, D/- 15-1-1977).

Even if he himself is not the auction purchaser, yet if there be cogent evidence on the record to establish that he has been instrumental in some way or the other by having the property auction-sold through some agency in his collusion and ultimately gains an advantage by holding over the property in question he may be subject to the provision of S. 90. But in such cases there must be clear and unequivocal proof of his collusion. Fraud and collusion can never be presumed. Case law discussed. (Para 6)

Anno: AIR Manual (3rd Edn.) Trusts Act, S. 90 Notes 1 and 3.

(B) Bihar Tenancy Act (8 of 1885), Ss. 161 (a) and 167 — Encumbrance — Meaning of — Mortgage by a tenant of non-transferable holding — Not binding on landlord.

If a tenant of holding mortgages it to a third person notwithstanding the fact that it is not transferable, the landlord of the holding is not bound to recognise the mortgage or admit the mortgagee to be his tenant even though the mortgagee may have obtained a decree on the basis of the mortgage. In such a case if the holding is sold in execution of rent decree and the landlord himself purchases it, there is nothing to prevent him from ignoring the mortgage without ultimately annulling the encumbrance u/s. 167 of the Bihar Tenancy Act. Furthermore, in view of S. 161 (a) of the Bihar Tenancy Act the term "encumbrance" used with reference to a tenancy means, inter alia, an interest created by the tenant on his holding in limitation of his own interest. Therefore in a case where the encumbrance is mortgagee's interest, it would be for the mortgagee who ought to come forward in order to avail of the provisions of S. 167 of the Act. (Para 7)

Cases Referred :	Chronological Paras
AIR 1973 Pat 211	5
AIR 1971 Pat 350	5
1970 BLJR 756	6
AIR 1964 SC 1707	5

Lakshman Sharan Sinha, Shreenath Singh, Shivanand Prasad Sinha, Triyogi Narain Pandey, for Appellants; Balabhadra Prasad Singh and Madhusudan Singh, for Respondents.

JUDGMENT:— The defendants in the action are the appellants here having directed this appeal against a judgment of reversal.

2. The respondents instituted the suit for redemption of a usufructuary mortgage dated 9-11-33 for a consideration of Rs. 180 only with regard to 2.25 acres out of plot No. 1728 appertaining to khata No. 788. Admittedly the plaintiffs respondents' predecessors in interest had a holding comprising khata No. 788 consisting of plot Nos. 1727, 1728 and 2796, the entire measuring 3.46 acres. Out of this area, as stated earlier, 2.25 acres out of plot No. 1728 were mortgaged by the plaintiffs' predecessors in interest in favour of the defendant appellants' family. The plaintiffs' case simply stated is that they approached the appellants to redeem the mortgage by accepting the mortgage dues which the latter declined. As a result, the plaintiffs tendered the money in court in accordance with the provisions of S. 83 of the Transfer of Property Act. The appellants not having redeemed the mortgage, the suit has been instituted.

3. The defence of the appellants was three-fold—

(i) That shortly after the transaction of mortgage it was redeemed on payment. This defence has not been accepted by final court of fact.

(ii) That the mortgagors defaulted in the payment of rent as a result of which a rent suit was instituted and a decree thereon obtained by the landlords of the tauzi. After the rent decree the landlords purchased the holding in execution of the rent decree and came in actual physical possession of the same. Subsequently they settled the land in favour of the appellants and the appellants came in possession as settlee. The equity of redemption was lost and the mortgage extinguished.

(iii) That the appellants have been coming in possession openly and adversely for more than the statutory period to the knowledge of the respondents, thereby acquiring a right of prescription.

4. The trial court had dismissed the suit on the ground that the mortgage has been wiped out by the auction purchase at the rent sale by the landlords. The appellants, it was held, came in possession by virtue of the settlement in their favour and there was no question of the application of the principles of S. 90 of the Trusts Act, 1882 (hereinafter called the Act). The lower appellate court has rather confused the issues. It has held that the rent decree and auction sale seemed to be surreptitious and the landlords' possession sub-

sequent to the auction purchase was doubtful. And, since a part of the rent for the holding was to be paid by the mortgagee, the principles of Sec. 90 of the Act will be attracted, and, therefore, the respondents' suit has been decreed.

5. The true appreciation of the position in law with regard to the application of the principles of trust would not have led to the confusion in the appellate court. The position in law is well settled. The contribution to the bringing about of the sale must be a direct result of the mortgagee's possession as such who purchases the property himself at the sale in execution of the rent decree gaining an advantage by availing himself of his fiduciary position [(refer to Smt. Basanti Devi v. Chamru Sao (AIR 1964 SC 1707)]. The transaction of sale and purchase by the landlord and the subsequent settlements by him should form part of the same transaction or part of the same design, artifice or device brought about by the mortgagee in order to attract the principles of S. 90 of the Act. If the rent sale is a genuine sale, it extinguishes the mortgage and the relationship of mortgagor and mortgagee comes to an end. In such circumstances, the mortgagor or his successors in interest are not entitled to the advantage of S. 90 of the Act. The question as to whether that provision is attracted or not must depend on the facts of each case. The purchase of the holding by the mortgagee himself is an important factor in such cases in order to press in aid the principle of Sec. 90. Even in the absence of such a purchase by the mortgagee himself if it is established that there was some sort of a collusion between the mortgagee and the auction purchaser from whom he subsequently takes by settlement or otherwise, the principle may be invoked. But not so where the mortgagee is nowhere in the picture at the time of the auction sale [refer to Ramjit Choudhary v. Satan Devi (1970 BLJR 756)].

Where the co-owner or the mortgagee is not a purchaser nor has been in any way instrumental in bringing about the auction sale but has merely taken settlement of the original holding from the auction purchaser, S. 90 of the Act cannot be pressed into service [refer to Md. Israfil v. Md. Israil (AIR 1971 Pat 350)]. There is another principle of law relevant in such cases. A decree in a rent suit is a money decree. Where a decree for rent is passed and the mortgaged property is put out to sale what is sold is the mortgagor's right to redeem thereby putting an end to the mortgage. In such circumstances, the purchaser becomes the owner of the property free from encumbrances and, therefore, no question of application of S. 90 of the Act arises [vide Janki Sah v. Girja Singh (AIR 1973 Pat 211)].

6. In such cases, therefore, in order to hold the mortgagor entitled to any relief by virtue of the provision of Section 90 of the Act it is essential to find out as to whether the mortgagee has himself brought about the sale with an ulterior motive to gain advantage of the fiduciary relation that he enjoys. Even if he himself is not the auction purchaser, yet if there be cogent evidence on the record to establish that he has been instrumental in some way or the other by having the property auction-sold through some agency in his collusion and ultimately gains an advantage by holding over the property in question he may be subject to the provision of S. 90. But in such cases there must be clear and unequivocal proof of his collusion. Fraud and collusion can never be presumed. This aspect of the case has been lost sight of by the lower appellate court.

7. There is yet another error of law committed by the learned Additional Subordinate Judge who seems to carry an impression that, unless there was annulment of the encumbrance under Section 167 of the Bihar Tenancy Act, the auction sale could not enure to the advantage of the landlord or the auction purchaser or his subsequent settlee. The position in law is this. If a tenant of a holding mortgages it to a third person notwithstanding the fact that it is not transferable, the landlord of the holding is not bound to recognise the mortgage or admit the mortgagee to be his tenant even though the mortgagee may have obtained a decree on the basis of the mortgage. In such a case if the holding is sold in execution of rent decree and the landlord himself purchases it, there is nothing to prevent him from ignoring the mortgage without ultimately annulling the encumbrance under S. 167 of the Bihar Tenancy Act. Furthermore, it will appear from S. 161 (a) of the Bihar Tenancy Act that the term 'encumbrance' used with reference to a tenancy means, inter alia, an interest created by the tenant on his holding in

limitation of his own interest. In such a case, as the instant one, the encumbrance would be the mortgagee's interest and in order to avail of the provisions of S. 167 of that Act it is the mortgagee who must come forward. It cannot lie in the mouth of the mortgagor to say that the encumbrance created by him in favour of the mortgagee has not been wiped out at the auction sale.

8. A point has further been taken by Mr. Balabhadra Prasad Singh, learned Counsel for the respondents, while supporting the judgment, that the lower appellate court has committed an error of law in treating Exts. Q and Q/1 as substantive pieces of evidence. I, however, refrain from going into this question in view of the fact that I propose to remand the case to the lower appellate court which shall have the opportunity afresh of applying its mind to this argument also since it appears that such an argument was not raised before that court.

9. For the reasons given above, I am constrained to allow this appeal set aside the judgment and decree passed by the lower appellate court and remit the case back to the first appellate court with a direction to hear the appeal afresh and come to a decision in consonance with the principles of law enunciated above and in accordance with law. Cost shall abide the result.

Appeal allowed.

AIR 1979 PATNA 49

(RANCHI BENCH)

MANORANJAN PRASAD, J.

Krishna Kumar, Petitioner v. Raghubir Prasad Yadav and another, Opposite Party.

Civil Revn. No. 82 of 1977 (R), D/- 15-5-1978.*

Civil P. C. (5 of 1908), O. 17 R. 3 and O. 9 R. 13 — Scope and applicability — Defendant participated in trial in first half of the day but subsequently left it after lunch-recess — Judgment passed in his absence — Remedy available — Appeal and not an application under O. 9, R. 13 would be the appropriate remedy as the case would fall under O. 17, R. 3 (a) to which provisions of O. 9 R. 13 do not apply. (Para 7)

Anno: AIR Comm. C. P. C. (9th Edn.) O. 17 R. 3 Notes 1 and 7; O. 9 R. 13, N. 6.

Pandey Akhileshwar Nath Roy, Yatindra Nath Mairh, for Petitioner; Ram Nandan Prasad Sinha, Lala Sachindra Kumar, and Mrs. S. L. Jha, for Opposite Party.

ORDER :— This is an application under S. 115 (1) of the Civil P. C. (hereinafter referred to as the Code) against the order dated 4-2-1977 passed by Shri S. N. Sinha, Second Additional Subordinate Judge, Dhanbad, in Misc. case No. 8 of 1976 under O. IX. R. 13 of the Code setting aside the decree dated 27-7-1976 passed in title suit No. 39 of 1973.

2. The facts leading to the present application are that the plaintiff had filed title suit No. 39 of 1973 against defendants Nos. 1 and 2. In the said suit, defendant No. 1 never appeared. But defendant No. 2 had appeared and had filed his written statement. 14-7-1976 was an adjourned date for hearing, when the plaintiff and defendant No. 2 filed their respective hazris and the suit was taken up for hearing. On that date one witness on behalf of the plaintiff was examined who was also cross-examined on behalf of the defendant No. 2 and thereafter the said witness, who had also proved certain documents, was discharged before lunch recess. When however, the further hearing of the suit was taken after the lunch recess, neither the lawyer for the defendant No. 2 nor any person on behalf of the defendant No. 2 was present and an unstamped petition was filed on behalf of defendant No. 2 for adjourning the trial of the case which was, however, not even moved. and the lawyer for the defendant No. 2 also did not turn up even though he was informed by the peon of the Court. The unstamped petition was, therefore, rejected and the defendant No. 2 was directed to get ready to proceed with the case by 3 P. M. Later on when further hearing of the suit was taken up at 3 P.M. only the plaintiff was present but the defendant No. 2 was not present and one more witness was examined on behalf of the plaintiff who proved certain documents, and, since nobody appeared on behalf of the defendant No. 2 to cross-examine him, the witness was discharged. Thereupon the plaintiff's case was closed and argument was heard on behalf of the plaintiff and the suit

*(Against order of S. N. Sinha, 2nd Addl. Sub. J. Dhanbad. D/- 4-2-1977).

was adjourned to 22-7-1976 for judgment.

3. In the meantime on 19-7-1976, defendant No. 2 filed a petition with a prayer to allow him to examine his witness to which a rejoinder was filed by the plaintiff on 20-7-1976 and on 22-7-1976 the defendant No. 2 filed another petition for recalling the plaintiff's witness for cross-examining him. After hearing the lawyers of both sides the prayer of defendant No. 2 for permission to cross-examine the witness of the plaintiff and to lead evidence was rejected by order dated 24-7-1976. Thereafter on 27-7-1976 the judgment was delivered decreeing the plaintiff's suit against both the defendants which was, however, described in the judgment as ex parte.

4. Thereafter, defendant No. 2 filed a petition under O. IX, R. 13 of the Code which was registered as Misc. case No. 8 of 1976, praying for setting aside the decree dated 27-7-1976 and for restoring the title suit and for hearing it on merit. The plaintiff had filed a rejoinder in the said Misc. Case No. 8 of 1976 for rejecting the petition of defendant No. 2 for setting aside the said decree. The said Misc. case No. 8 of 1976 was allowed by order dated 4-2-1977 and the decree dated 27-7-1976 was set aside and the suit was restored.

5. It is against the said order dated 4-2-1977 that the plaintiff has preferred the present revision application.

6. Mr. Pandey Akhileshwar Nath Roy the learned counsel for the plaintiff-petitioner, has contended that since on 14-7-1976, which was the date fixed for hearing, defendant No. 2 had filed Hazari and had participated in the trial of the suit inasmuch as one witness examined on behalf of the plaintiff was cross-examined on his behalf, and, thereafter, when the further hearing of the suit was taken up after lunch recess an unstamped time petition was filed on his behalf which was not even moved and was consequently rejected and thereafter defendant No. 2 was direted to proceed with the case at 3 P. M. when also the defendant No. 2 did not turn up, with the result that another witness on behalf of the plaintiff was examined who, of course, could not be cross-examined because of the absence of defendant No. 2, and thereafter the plaintiff had closed his case and the suit was adjourned for judgment, the case was really covered by O. XVII, R. 3 (a) of the Code to which the provisions of O. IX, Rule 13 of the Code have got no application and the remedy of defendant No. 2, if any, was by way of appeal against the judgment and decree D/- 27-7-1976 which, though, described as ex parte, was really a contested one, as on the date the trial of the suit was taken up and was also concluded, the defendant No. 2 had appeared and had participated in the trial in the first hour but had subsequently left if after lunch-recess.

7. I see much force in the aforesaid contention of the learned counsel appearing for the plaintiff-petitioner that, in the circumstances of the case mentioned above, it was a case covered by R. 3 (a) of O. XVII of the Code to which the provisions of O. IX, R. 13 of the Code do not apply, and the remedy of the defendant No. 2, if any was by way of appeal and not by way of an application under O. IX, R. 13 of the Code.

8. Consequently, it must be held that in setting aside the said judgment and decreed dated 27-7-1976 of title suit No. 39 of 1973 in Misc. Case No. 8 of 1976 filed by defendant No. 2 under O. IX, R. 13 of the Code, the learned Additional Subordinate Judge acted in exercise of his jurisdiction illegally, and hence the said order dated 4-2-1977 passed by him has got to be set aside.

9. Accordingly, the revision application is allowed and the impugned order dated 4-2-1977 passed in Misc. case No. 8 of 1976 under O. IX, R. 13 of the Code is set aside. There will be no order as to cost.

Revision allowed.

AIR 1979 PATNA 50

BIRENDRA PRASAD SINHA, J.

Awadhendra Prasad Narayan Singh and others, Petitioners v. Raghubansmani Prasad Narayan Singh and others, Opposite Parties.

Civil Revn. No. 1160 of 1974, D/- 16-3-1978.*

(A) Civil P. C. (5 of 1908), Sec. 153, O. 6, Rr. 16 and 17 — Amendment by Court suo motu — Partition suit — Court has no power to add property not

*(Against order of N. K. P. Bhagat, Sub J. No. 2 Patna, D/- 19-6-1974).

included in plaint — Defendant cannot seek relief under Rr. 16 or 17 of O. 6.

Where in a partition suit the plaintiff was opposed to including in the suit a property available after the passing of the preliminary decree for partition by metes and bounds and notwithstanding that such inclusion by amendment of the plaint would prevent multiplicity of proceedings and the plaintiff's refusal in that behalf was unreasonable, the Court had no powers u/s. 153 Civil P. C. to include the property suo motu as it would change the nature of the suit. The defendant could not seek the relief either under R. 16 or R. 17 of O. 6. (Paras 6 & 7)

Anno: AIR Comm. Civil P. C. (9th Edn.) S. 153 N. 6; O. 6 R. 16 N. 1; R. 17 N. 2.

(B) Civil P. C. (5 of 1908), Order 20, R. 18 and O. 6 R. 17 — Partition suit — Suit continues until passing of final decree — Amendment of plaint possible even after preliminary decree.

Since passing the preliminary decree in a suit for partition is but a step in the pending suit, the suit continues until the final decree is passed and therefore the plaint can be amended even after the passing of the preliminary decree. (Para 5)

Anno: AIR Comm. Civil P. C. (9th Edn.) O. 6 R. 17 N. 13 and O. 20 R. 18, N. 5.

Cases Referred : Chronological	Paras
AIR 1969 SC 1267	6
AIR 1959 Andh Pra 26	6
AIR 1935 PC 12 : 1935 All LJ 251	3
AIR 1916 Pat 347 : 1 Pat LJ 393	3

S. C. Ghosh, Kalan Kumar Ghose, Parmeshwar Prasad Sinha and A. B. Mathur, for Petitioners; Tara Kant Jha and Bhupendra Narayan Singh, for Opposite Parties.

ORDER :—This application in revision is by some of the defendants in a partition suit. In 1941 the petitioners and opposite party Nos. 1 and 2 filed Title Partition Suit No. 23 of 1941 at Gaya, against the Raja Bahadur and the Rani of Amawan Estate and others, for division of the joint family properties. One of the properties in the suit was a house at Rajgir. Raja Bahadur Harihar Prasad Narayan Singh, the owner of Amawan Raj, had five sons, Raghubansmani Prasad Narayan Singh, Raghavendra Prasad Narayan Singh, Awadhendra Prasad Narayan Singh, Kaushalendra Prasad Narayan Singh and Awadheshwari Prasad Narayan Singh. The latter three are petitioners in this application and were plaintiffs in Title Partition Suit No. 23 of 1941, along with the other two, Raghubansmani Prasad Narayan Singh and Raghavendra Prasad Narayan Singh. The Raja Bahadur and his wife Rani Bhuvaneshwari Kuer were defendants along with some others. In that suit, the parties entered into a compromise and on 5-9-43 a decree in terms of the said compromise was passed. One of the terms of the compromise was that the plaintiffs, viz., the five sons, and the defendants, viz., the Raja Bahadur and the Rani Sahaba, will have equal shares in the said house at Rajgir, but it will not be partitioned by metes and bounds so long as the Raja Bahadur and the Rani Saheba remained alive. On the 19th Feb. 1951, the Raja Bahadur died. A few months later, i.e., on the 28th Sept. 1951, Rajkumar Raghubansmani Prasad Narayan Singh (opposite party No. 1) filed a partition suit at Patna which was registered as Title Partition Suit No. 90 of 1951. In this suit, he impleaded the Rani Saheba and his other four brothers as defendants. The petitioners, as stated above, are defendants Nos. 3 to 5 in the present suit.

2. The case of the plaintiff-opposite party No. 1 is that under the terms of the compromise a preliminary decree dated the 21st March, 1942, followed by a final decree dated the 5th Sept. 1943, was passed by the Subordinate Judge, III, Gaya, in the said Title Partition Suit No. 23 of 1941. According to the terms of the said compromise, the properties set out in Schedules 1 and 2 of the plaint in the present suit were left undivided, in which the plaintiff's share had been fixed as one-seventh. The Rajgir house was obviously not included in this suit because the Rani Saheba was still alive. The personal properties allotted to the late Raja Bahadur were described in Schs. 3 to 5, which were also sought to be partitioned. A preliminary decree was passed in the suit on the 12th Sept. 1958, and a pleader commissioner was appointed to divide the properties, who later submitted report on the 21st January, 1965. On the 16th Dec. 1967, the Rani Saheba also died, thus, making the Rajgir house divisible by metes and bounds between the brothers, as per decree in the earlier partition suit of 1941. On the 19th Sept. 1973, the learned Subordinate Judge II, Patna, ordered that the properties in the suit be partitioned amongst the brothers, each get-

ting one-fifth share therein. This order, however, was passed by agreement of all the parties. On the 22nd Nov. 1973, the petitioners filed a petition before the court below for a direction to the pleader commissioner to include the Rajgir house also for partition and to the plaintiff to deposit the entire rent up to date in court, the plaintiff being in possession of the said house. The plaintiff-opposite party No. 1 objected. He admitted that the Rajgir house was a joint family property which had become liable for partition after the death of the Raja Bahadur and the Rani Saheba but since the same was not included in the plaint or in the preliminary decree of the present suit, such a direction could not be given to the pleader commissioner. The court below considered this matter and held that the Rajgir house could not be included for partition in the present suit. It is against this order that the petitioners have come up to this Court in revision.

3. Shri Sudhir Chandra Ghose, learned counsel appearing on behalf of the petitioners, submitted that the plaint of the present suit should be interpreted to include also the Rajgir house. He further submitted that the court must look to the subsequent events and, in the interest of justice as also to avoid multiplicity of suits and to shorten the litigation between the brothers, include the Rajgir house also in the present suit. According to him S. 153 of the Code of Civil Procedure empowers the court itself to make all necessary amendments for the purpose. Shri Ghose relied upon the decisions in L. Guran Ditta v. T. R. Ditta (AIR 1935 PC 12) and Mukunda Lal Chakrabarty v. Jogesh Chandra Chakrabarty, 1 Pat LJ 393: (AIR 1916 Pat 347) and some other cases. None of these cases really came to the aid of the petitioners.

4. It is unfortunate that this litigation between the brothers has been continuing for several decades. When the case was heard by me for some time, I suggested that the parties should amicably settle the matter. The case was also adjourned for a few days but unfortunately no settlement could be arrived at. Shri Tara Kant Jha appearing for the plaintiff-opposite party No. 1, submitted that since the Rajgir house was not a subject-matter of the present suit, it cannot be divided in the present proceeding. He stated that his client was not prepared to include the Rajgir house in the present proceeding by asking for an amendment.

5. A preliminary decree has also been passed in the present suit. A suit ordinarily means a Civil proceeding instituted by the presentation of the plaint. The Rajgir house is, admittedly, not mentioned in the plaint of the present suit. Obviously, it could not form part of the preliminary decree. A decree is a formal expression of an adjudication which conclusively determines the rights of the parties with regard to all or any matter in controversy in the suit. A preliminary decree is only a step in the pending suit and the suit continues until the final decree is passed. An application can be made even after a preliminary decree for amendment of the plaint for partition claiming augmented share as a result of the death of the applicant's father. So far as the Rajgir house in concerned, the dispute regarding it had been adjudicated upon between the parties in the previous partition suit of 1941. In fact, nothing remained to be decided between the parties and its division by metes and bounds was only conditional upon the death of the Raja Bahadur and the Rani Saheba. The question is whether such a property can be included in the present suit after the preliminary decree has been passed. Many of the properties which were subject-matter of the earlier suit, and which remained joint under the terms of the compromise referred to above, are subject-matter of the present suit. In respect of the Rajgir house the share of the parties had been defined in the earlier suit but by agreement it was left to be divided by metes and bounds after the death of the Raja Bahadur and the Rani Saheba.

6. O. 6, R. 17 of the C.P.C. provides for amendment of pleadings. According to this rule, the Court may at any stage of the proceedings allow either party to alter or amend his pleadings and all such amendment shall be made as may be necessary for determining the real question in controversy between the parties. The plaint, therefore, can be amended only at the instance of the plaintiff and for the purpose of determining the questions in controversy between the parties. This means that an amendment which will change the nature of the suit cannot be allowed. As stated earlier, the plaintiff, opposite party No. 1 is not prepared to ask for

the amendment of his plaint; rather he is resisting. The petitioners, who are defendants to the suit, obviously, cannot ask for the amendment of the plaint. For this purpose, O. 6, R. 16, also cannot come to the aid of the defendants inasmuch as it contemplates striking out or amending any matter in the pleadings of his opponent which may be unnecessary or scandalous or which may tend to prejudice, embarrass or delay the fair trial of the suit. Under S. 152 of the Code, the Court may of its own motion or on the application of any of the parties correct any clerical or arithmetical error in judgments, decrees or orders, or errors arising therein from any accidental slip or omission. It is plain, therefore, that S. 152 also does not provide the answer to a situation like the present one. Section 153 of the Code clothes the court with a general power to amend any defect or error in any proceeding in a suit. It reads as under:

"The Court may at any time, and on such terms as to costs or otherwise as it may think fit, amend any defect or error in any proceeding in a suit; and all necessary amendments shall be made for the purpose of determining the real question or issue raised by or dependant on such a proceeding."

Shri Ghose has taken shelter under this provision and has submitted that in the ends of justice the Court must exercise its power under S. 153 of the Code. According to him, this will end the litigation between the brothers which has been continuing for decades. The object of the law permitting any amendment is to minimise litigation and to avoid multiplicity of proceedings. The Court's power to allow amendments for raising the real question at issue between the parties cannot be circumscribed by mere technicalities. The Court has to see that substantial justice is done to the parties and no party suffers any injury or injustice. In Jai Jai Ram Monohar Lal v. National Building Material Supply, Gurgaon (AIR 1969 SC 1267), it was held (at p. 1269):

"Rules of procedure are intended to be a handmaid to the administration of justice. A party cannot be refused just relief merely because of some mistake, negligence, inadvertence or even infraction of the rules of procedure. The Court always gives leave to amend the pleading of a party, unless it is satisfied that the party applying was acting mala fide, or that by his blunder, he had caused injury to his opponent which may not be compensated for by an order of costs. However negligent or careless may have been the first omission, and, however, late the proposed amendment, the amendment may be allowed if it can be made without injustice to the other side."

It was also held that in a proper case a Civil Court could permit an amendment of the plaint for determining the real question or issue between the parties. A Division Bench of the Andhra Pradesh in Somereddi Burrayya v. Somireddi Atchayyamma (AIR 1959 Andh Pra 26) held that the language of S. 153 was in wide terms and confers powers on a Court to correct errors in any proceeding at any stage in order to determine the real question and to render justice to the parties. In that case a preliminary decree had been passed in a partition suit and a commissioner had been appointed to partition the properties. Obstruction was offered so far as one item of the property was concerned. A petition was filed by the plaintiff for substituting another item of property which was opposed on the ground that the property sought to be substituted was not a joint family property but was the stridhan property of the defendant. The objection was overruled and the application was allowed. The Court held that O. 6, R. 17 and S. 153 of the Code invested the court with the jurisdiction to allow an amendment even after the preliminary decree in proper cases and render justice to the parties.

7. The problem in the instant case, however, is different. The Rajgir house is, admittedly, not included in the plaint of the present suit and the plaintiff is not prepared to amend the plaint. The Court has no powers to include any property suo motu so as to change the nature of the suit. No authority has been placed before me to show that even without the plaintiff's asking for such an amendment the Court of its own or on the request of the defendants can include a property for partition which was not included in the plaint. However unreasonable the attitude of the plaintiff may be when the Court is not invested with any such power, a direction cannot be given to include the Rajgir property for partition in the present suit. The defendants will have to seek their remedy elsewhere. That being the position, this application has to fail.

8. In the result, this application is dismissed but there shall be no order as to costs.

Petition dismissed.

AIR 1979 PATNA 54

MEDINI PRASAD SINGH, J.

Jhulan Prasad, Appellant v. Ram Raj Prasad and others, Respondents.

A.F.A.D. No. 479 of 1974, D/- 14-3-1978.*

(A) Mahomedan Law — Sale by de facto guardian — A, a minor and B co-sharer— Sale by B and de facto guardian of A — Sale is valid so far as B's share is concerned.

Where an alienation is made by a major Mahomedan co-sharer and the de facto guardian of a minor co-sharer, the sale will be void only as regards the minor co-sharer's share is concerned but is not void so far as it relates to the share of major co-sharer-vendor. AIR 1966 Mad 468, Rel. on; AIR 1954 Pat 6, AIR 1963 Pat 108; AIR 1952 SC 358, AIR 1938 PC 181, Dist. (Para 6)

(B) T. P. Act, S. 43 — Alienation by mother de facto guardian of Mahomedan minor of her share and minor's share — Minor subsequently dying and leaving the mother as his only heir — The alienee gets a good title to the property inherited by the mother from the minor. (Para 6)

Anno: AIR Comm. T. P. Act (4th Edn.), S. 43 N. 10.

(C) Civil P. C., S. 100 — Plea of misjoinder of defendants cannot be taken for first time in second appeal. (Para 6)

Anno: AIR Comm. C.P.C. (9th Edn.), Ss. 100, 100-A and 101 N. 55.

Cases Referred: Chronological	Paras
AIR 1966 Mad 468	6
AIR 1963 Pat 108	4, 5
AIR 1954 Pat 6	4
AIR 1952 SC 358: 1953 All LJ 4	4, 6
AIR 1939 Mad 306	5
AIR 1938 PC 181: 1938 All LJ 549	4, 6
AIR 1918 PC 11: 16 All LJ 800	4
(1912) 39 Ind App 49 : ILR 34 All (PC)	213 5, 6

Sudhir Chandra Ghosh and D. N. Pandey, for Appellant; S. S. Asghar Hussain and Syed Rafat Alam, for Respondents.

JUDGMENT:— This is a Second Appeal by defendant No. 5 Jhulan Prasad from a judgment and decree of the Subordinate Judge, Gopalganj dated 16th March, 1974, who affirmed the judgment of the Additional Munsif, 1st Court, Gopalganj decreeing the suit for redemption in favour of the plaintiffs in respect of certain land and directing mesne profits to be determined in a separate proceeding. The suit land measured 18 kathas 11 dhurs of R.S. Plot No. 789 in village Parsurampur within Gopalganj Police Station. It belonged originally to Bhukhal Mian and Sukhal Mian sons of one Kurkut Mian of the same village. Bhukhal Mian died leaving behind his widow Mst. Chatia and a minor son Shamsuddin.

2. On 16th May, 1949, Sukhal Mian and Mst. Chatia executed a Zarpeshgi deed in favour of respondent No. 4 Jamuna Mahton (defendant No. 2) for a sum of Rs. 1,000 in respect of the suit land and put him in possession. On 5th Nov. 1959, Sukhal Mian and Mst. Chatia for self and as guardian of her son Shamsuddin, executed a registered sale deed (Ext. 2) in respect of the suit land in favour of the plaintiffs who are respondents Nos. 1 and 2 in this appeal. When the zarpeshgidars did not accept the zarpeshgi money tendered to them, the plaintiffs deposited the same in Court under S. 83 of the T. P. Act and brought the present suit for redemption. In the meantime the zarpeshgidars were changing hands, one transferring his Zarpeshgi right to another. The last Zarpeshgidar was the appellant Jhulan Prasad (defendant No. 5). He denied the right of the plaintiffs to redeem the mortgaged property. He contended that Mst. Chatia had no right to sell the right and interest in immovable property of the minor. He further contended that Kurkut Mian the father of Sukhal Mian and Bhukhal Mian died leaving behind his daughter also named Kadirani; that Bhukhal also had a daughter named Hadisan; and that both Kadirani and Hadisan came into possession of their share in the suit land. He pleaded that Kadirani not being a party to the Zarpeshgi deed, her share to the extent of 3 kathas 14 dhurs did not pass to the Zarpeshgidar or to the plaintiffs under the sale deed (Ext. 2) and the same had been sold to him under a registered sale deed (Ext. A/1)

*(From decision of Bhuneshwar Prasad, Sub-J., Gopalganj, D/- 16-3-1974.)

dated 2nd June, 1964. He further pleaded that Hadisan the daughter of deceased Bhukhal had sold 6 kathas 16 dhurs in the suit plot to one Chandraman Bhagat under Ext. A on 2nd November, 1961 when her brother Shamsuddin was already dead. Thus, the appellant (defendant No. 5) claimed 3 kathas 15 dhurs of land as purchaser from Kadiran and the rest as Zarpeshgidar.

3. The two courts below have held: (i) that Mst. Kadirani was not the sister of Bhukhal Mian and Mst. Hadisan was not his daughter and they had no right to execute the sale deeds Exts. A/1 and A respectively, and that these two sale deeds were of Farzi nature; (ii) that the sale deed (Ext. 2) dated 9-11-59 executed by Bhukhal Mian and Mst. Chatia for self and as guardian of her minor son Shamsuddin in favour of the plaintiffs was valid and the plaintiffs were entitled to redeem the property.

4. Mr. S. C. Ghosh, learned counsel, appearing for the appellant has raised three contentions, I will deal with them in seriatim.

Contention No. 1:

His first contention is that Mst. Chatia being merely a de facto guardian had no power to sell any immovable property of her minor son and consequently the sale of his interest was absolutely void. In continuation of this limb of argument, it was further urged that the entire transaction was void. Reliance was placed upon the decisions in Abdul Karim v. Mst. Maniran, AIR 1954 Pat 6 and in M. Zafir v. Sk. Amiruddin, AIR 1963 Pat 108. In the first case (AIR 1954 Pat 6) there was a dispute between the members of a Mohammedan family. The dispute was referred to the arbitration of certain persons. One Bibi Maniran had signed the deed of arbitration agreement for self and as guardian of her minor sons and minor daughters in respect of both movable and immovable properties. Relying upon the decision in Md. Amin v. Vakil Ahmed, AIR 1952 SC 358 and in Imambandi v. Mutsaddi, AIR 1918 PC 11: 45 Ind App 73, it was held that the arbitration agreement was void because a de facto guardian had no power to transfer any right or interest in immovable property of the minors and such a transfer was not merely voidable but void. In view of the fact that the agreement was one and it could not be valid in respect of a part and invalid in respect of the rest, it was further held that the entire reference to the arbitration was invalid. It was observed:

"..... The mother, as de facto guardian, is not competent to enter on behalf of her minor children into an agreement to refer the dispute to arbitration, the agreement being one which will necessarily, if acted upon involve dealings with the immovable properties of the minors. As the deed of agreement stands, the movable properties cannot be severed from the immovable properties. The agreement to refer the dispute to arbitration was in respect of all the properties, and it is not possible to find it valid in respect of a part and invalid in respect of the rest. If the deed of agreement is void, it cannot be void only qua the minors but would be void altogether qua all the parties including those who were majors."

From the above it is clear that the agreement was one and it could not be cut up and upheld in part. It was in those circumstances that the entire arbitration agreement was held to be void.

In Mohammad Amin v. Vakil Ahmed, AIR 1952 SC 358, the Supreme Court held that a de facto guardian had no authority to enter into a family settlement in respect of a minor's property even though the settlement might be for his benefit. While holding that the settlement was void as against the minor, it was further observed (at p. 361):

"If the deed of settlement was thus void, it could not be void only qua the minor plaintiff 3 but would be void altogether, qua all the parties including those who were sui juris."

It is clear that the Supreme Court was dealing with a case of family settlement.

In Pratap Singh v. Sant Kaur, AIR 1938 PC 181 it was held that where the agreement was entered into with two sisters one of whom was represented by a guardian neither appointed by the Court nor could claim to be her guardian under her personal law, the agreement was void not only against the minors but was also unenforceable against her elder sister who was a major. The Privy Council observed:

"The rule of law is firmly established that a minor is not competent to make a contract, and as Gujar Singh had no authority to enter into a contract on her behalf, the deed of settlement must be held to be a void transaction as against her."

This was also a case relating to an agreement and not a deed of conveyance. In Md. Zafir v. Sk. Amiruddin, AIR 1963 Pat 108, the question was as to whether a deed of partition was valid. In that case the mother of the minors acting as their de facto guardian had declared conveyed and extinguished the rights and interests in immovable property belonging to those minors by a deed of partition and the partition was effected by the deed itself. It was held that the mother as de facto guardian was not competent to act for the minors and devide the property. That was also a case of a partition deed and not a case of sale deed. None of these cases was, thus, concerned with a conveyance of property. These cases, therefore, are of no assistance to the appellant.

5. The question is as to whether a conveyance effected by several persons, of whom one or more is a minor and represented by his de facto guardian, is void qua the minor only or against all the co-vendors, major or minor both. The contention of Mr. S. C. Ghosh is that if the sale is void qua the minor represented by the de facto guardian it is void as a whole. I do not agree. It cannot be disputed that every Muslim heir is entitled to sell or mortgage or otherwise encumber his share of the property without reference to the other heirs just like any tenant-in-common: AIR 1939 Mad 306, Khatoon Bibi v. Abdul Wahab. In the case of Md. Zafir, AIR 1963 Pat 108 (supra) also this right of a member of a Mohammedan family was noticed. It was observed that according to the Mohammedan Law each heir of a Mohammedan family has even, when the family remains undivided, a certain definite share in the joint property of which he is the absolute owner; in other words, the property is held in defined shares, though possession is the joint possession of the whole family.

In Matadin v. Ahmad Ali, (1912) 39 Ind. App 49: (ILR 34 All 213) (PC), a Mohammedan executed a mortgage of his immoveable property. He then died leaving a will by which he bequeathed his properties to his four grandsons one of whom was a minor, in equal shares subject to equal obligations in respect other debts of the deceased. The fourth grandson on attaining age of majority instituted a suit for redemption of the mortgage in so far as it related to his share, the claim being based on the ground that his major brothers had no right to act as his guardians and their conveyance on his behalf was void as against him. The Privy Council allowed the claim of the quondam minor to redeem his share. It was held by the Privy Council that the sale though made to satisfy the debts of the deceased, was not binding on the minor and that he was entitled to redeem his 1/4th share of the mortgage property. The implication of this decision is that the quondam minor was allowed to avoid the sale only so far as it related to his share. If the entire sale has to be regarded as void, the quondam minor would have been entitled as a co-owner to redeem the entirety of the mortgage. It is true that the point did not directly arise in that case but this is the logical result of what the Privy Council held therein.

6. In Maimunnissa Bibi v. M. S. N. N. Abdul Jabbar, AIR 1966 Mad 468, a piece of immoveable property jointly belonging to Maimunnessa Bibi, the mother and her three sons, two of whom were minors, was sold to the respondents for Rs. 500. The mother signed the sale deed on her behalf and as guardian of the minors. The executant of the sale deed sued the vendees to set aside the sale contending that the mother as a de facto guardian of the minor vendors could not legally make the conveyance on behalf of the minors and so the entire transaction was void. The trial court accepted this contention and set aside the sale, directing the plaintiffs to pay Rupees 500 to the vendees as a condition to their getting back the properties. The vendees appealed against this judgment and the lower appellate court held that the conveyance was void qua the shares of the minors only and that it was binding on the major vendors as regards their shares. The lower appellate court took this view on the ground that the rule relating to an agreement or a family settlement cannot be extended to the case of a conveyance by persons sui juris in respect of their shares and that the only effect in the incapacity of the mother to represent her minor son and

other executants alone, who were competent to execute it in respect to their shares. In other words the lower appellate court in that case considered that the conveyance was good so far as the major executants were concerned and would pass their shares to the purchasers. It was on this view, the lower appellate court passed a preliminary decree for partition of 21/40 shares representing the shares of the major vendors. The aggrieved vendors, therefore, filed the Second Appeal before the Madras High Court.

On the authority of the Privy Council in Pratap Singh v. Sant Kaur, AIR 1938 PC 181 (supra) and of the Supreme Court in Md. Amin v. Vakil Ahmed, AIR 1952 SC 358 (supra), it was contended on behalf of the appellant that the entire transaction was void. Mr. Justice Veeraswami rejected this contention by distinguishing a conveyance from a family settlement, which was the subject-matter of the case before the Privy Council and the Supreme Court. It was observed that the Privy Council and the Supreme Court were concerned with a contract which by itself from the nature could not be cut up and upheld in one part and held to be void in another part. The nature of a conveyance is not identical with that of a contract or an agreement or family settlement. Accordingly, the learned Judge accepting the ratio of the Privy Council case, Matadin v. Ahmad Ali, (1912) 39 Ind App 49 (PC), affirmed the view of the lower appellate court, that the only effect of the incapacity of the mother to represent her minor son and make a conveyance of his share is that a minor is not a party to the conveyance and, therefore, the conveyance should be deemed to be by other executants alone who were sui juris, and as such they were bound by it. I respectfully agree with this view. Having regard to the principles laid down in this Madras case, I would hold that the sale was void only in so far as it related to the minor and it was good so far as the major executants were concerned and their shares did pass under the sale deed (Ext. 2) to the plaintiffs. It is to be noted that the minor Shamsuddin died before institution of the suit. Hence even if Mst. Chatia had no right to sell his interest, the right and interest of Shamsuddin would obviously devolve upon Chatia and Sukhal who had conveyed their title to the plaintiffs. Under S. 43 of the T. P. Act, 1882, where a person fraudulently or erroneously represents that he is authorised to transfer certain immoveable property and proposes to transfer such property for consideration, such transfer shall at the option of the transferee, operate on any interest which the transferor may acquire in such property at any time during which the contract of transfer subsists. I am of the view that the principles underlying the provisions of this section will apply to the instant case. There is, therefore, no legal flaw in the title of the plaintiffs even with respect to the interest of Shamsuddin. Moreover, the defendant cannot agitate this point. The title of the plaintiffs has not been challenged either by Mst. Chatia or by Sukhal. The appellant is a mortgagee. In my opinion, the plaintiffs have right to redeem the entire mortgaged property. The contention thus has no force.

Contention No. 2:

The second contention of the appellant is that the suit being one for redemption, the plaintiffs had no right to implead Kadirani, Hadisan and the appellant who were claiming paramount title. In my opinion the contention has no merit. This point was not taken in the court below. The trial court framed issue No. 6 as under:—

"Is Mst. Kadirani daughter of Kurkut Mian and Mstt. Hadisan daughter of Bhukhal Mian?"

The parties to the suit produced evidence on that issue and invited the court to decide it. In appeal the appellant by filing his petition under O. 41, R. 27 of the Civil P. C. dated 8th Jan. 1973 tried to prove his case by producing additional evidence. In the circumstances, the appellant cannot, now, make any legitimate grievance on that score in second appeal.

Contention No. 3:

His third contention is that the court of appeal below wrongly refused to allow additional evidence to be produced by the appellant and this it did on a wrong understanding of the scope of the Patna Amendment of O. 41, R. 27 of the Civil P. C. In my opinion, this argument also has no merit. The appellant filed a petition under O. 41, R. 27 for producing two documents as additional evidence in support of his case that Kadirani was the daughter of Kurkut Mian. One was a Sada Zarpeshgi deed dated 30-12-1947 purporting to have

been executed by Sukhal Mian and Mst. Chhathia in favour of one Manager Tiwari, for a sum of Rs. 150. This amount was alleged to have been borrowed for meeting the marriage expenses. It was said that the appellant had come to know about the existence of the document from Manager Tiwari. Another was the Pariwarik Pustika of village Tarua Pratappur prepared in the year 1960 in which Kadirani's name had been recorded as the daughter of Kurkut. It is clear that these documents were existing at the time when the redemption suit was pending. That suit was brought in the year 1962 and it was disposed of in the year 1968. This fact was noticed by the lower appellate court. In the opinion of the court below these documents were brought into existence only for the purposes of the appeal and they could easily be manufactured. The court below also considered the provisions of O. 41, R. 27 of the Civil P. C. in this connection. The matter has been dealt with in paras 9 to 11 of the judgment of the court below. I do not see any error committed by it. The lower appellate court has exercised its discretion properly and it does not require any interference.

7. In the result I arrive at the conclusion that the appellant must fail in this appeal. The appeal is, consequently, dismissed. No costs.

Appeal dismissed.

AIR 1979 PATNA 58

MADAN MOHAN PRASAD, J.

Thakur Chaudhry and others, Petitioners v. Brahmdeo Chaudhry and others, Opposite Parties.

Civil Revn. No. 647 of 1976, D/- 16-2-1978.*

(A) Civil P. C. (5 of 1908), O. 1, R. 10 (2) — Addition of parties or transposition of parties from one category to another when permissible, indicated — Plaintiff and defendant having conflicting case cannot be transposed as defendant and plaintiff until plaintiff is withdrawing from suit.

O. 1, R. 10 (2) permits transposition of parties from one category to another but such transposition is generally not allowed if nature of the suit is likely to be altered. Parties can no doubt be added as plaintiffs or defendants in order to avoid multiplicity of suits. But the addition must be necessary for final adjudication of the question in dispute. It does not permit misjoinder of causes of action. A person can be added as a co-plaintiff only when he can adopt the plaintiff's case. Persons having conflicting claims cannot be made co-plaintiffs. If the plaintiff and the defendant have conflicting case the question of making the defendant a plaintiff and the plaintiff a defendant does not arise until the plaintiff is withdrawing from the suit. Therefore when in a partition suit the claim of some of the defendants is contradictory to the case of the plaintiffs those defendants cannot be made plaintiffs and the plaintiffs the defendants until the plaintiffs are withdrawing from the suit. AIR 1921 All 184 and AIR 1964 Pat 508 and AIR 1947 Mad 395 and AIR 1977 Him Pra 73, Rel. on. (Paras 7, 9)

Anno: AIR Comm. C.P.C. (9th Edn.), O. 1 R. 10 Notes 34, 35, 36.

(B) Civil P. C. (5 of 1908), S. 115 — Approaching case from wrong point of view is material error justifying interference in revision.

Approaching a case from a wrong point of view entirely such as transposing the plaintiff as defendant and the defendant as the plaintiff on the assumption of facts that the plaintiff was withdrawing from the suit which had no existence is a material error in the exercise of jurisdiction justifying interference in revision. (Para 10)

Anno: AIR Comm. C.P.C. (9th Edn.), S. 115 N. 22B.

Cases Referred: Chronological	Paras
AIR 1977 Him Pra 73	7
AIR 1964 Pat 508	7
AIR 1947 Mad 395	7
AIR 1921 All 184: 19 All LJ 833	7

Sujay Prakash Lal, for Petitioners; Kaushal Kishore Sinha, Mahendra Prasad Singh and Niranjan Prasad (D. R. guardian), for Opposite Parties.

ORDER:— This application is directed against an order by which the court below has transposed the plaintiffs to the category of defendants and defendants second party to the category of plaintiffs.

2. It appears that a suit for partition was filed by the original plaintiffs for

*(Against order of B. N. Sinha, Addl. Sub-J. Begusarai, D/- 24-4-1976.)

partition of the ancestral properties between them and the defendants second party. It was further stated that some properties had originally belonged to the ancestor (sic) of these parties and one Ram Kheli Choudhry and one Gudar Chaudhry, but they had been partitioned in the year 1940 between them on the one hand and the ancestor of the plaintiffs and defendants first party on the other. Thus different shares were claimed by the plaintiffs in respect of those properties as also the other ancestral properties. It may be mentioned that the plaintiffs' case was that plaintiff No. 1 had been adopted in the Kritrim form by his father's brother and, therefore, was entitled to the lands and interest as a whole and claimed half share besides the 1/4th share, he was entitled to in respect of his natural father. Gudar's descendants and Ramkheli Chaudhry were impleaded as defendants second and third parties.

3. The defence of the defendants first party was that the plaintiff had been adopted in the Duttak form of adoption and thus could not claim with respect to the natural father's properties and so they were entitled to only half share. The defendants second party however, filed a written statement alleging that their ancestor Gudar was a full brother of the father of the plaintiffs and the defendants first party, and, therefore, they were entitled to share in the entire properties. Their case further was that Gudar continued to be joint with his brothers. They also challenged the story of adoption. Accordingly, they claimed that only Gudar and the father of the plaintiffs being the only coparcener, they were entitled to half share in the entire properties.

4. During the pendency of the suit, on the 25th of March, 1976 the defendants second party-opposite party here, filed a petition stating that since they had filed their written statement, the plaintiffs had given up taking any steps in the suit with a view to have it dismissed for default which would prejudice them and in view of this as also with a view to avoid multiplicity of suit they should be transposed to the category of plaintiffs and the plaintiffs be made defendants. The court below accepted the prayer. Hence this application.

5. Reading the order I find that having stated the claim of the defendants and then the objection of the plaintiffs to the effect that the transposition would change the nature of the suit, the learned Judge held that the plaintiffs having admitted that Gudar's branch had 1/6th share in some of the lands and the defendants second party claiming only their share in the lands, the nature of the suit would not change. Further he held that in order to avoid multiplicity of suits it is proper to transpose the parties as stated above.

6. I have perused the entire order-sheet in order to find out, the court below not having given any express finding on the question of fact, whether the plaintiffs had stopped taking steps in the case and wanted to get the suit to be dismissed. The finding is however implicit inasmuch as he would not transpose the plaintiffs to the category of defendants if he had not been convinced of that, for if the plaintiffs were diligently prosecuting the suit, there would be no question of relegating them to the category of defendants. The question, therefore, arises whether on the facts the court below had any material at all, on the basis of which he could come to the said finding. In this respect I have scrutinised the order sheet with a view to find that steps were taken by the plaintiffs and I find that this suit was transferred to the court of the learned Judge on 14th March, 1976 and on every date thereafter both the parties, the plaintiffs and the defendants, had taken one step or the other. Even before the suit was transferred to the learned Subordinate Judge, on earlier occasions also, the plaintiffs were prosecuting the suit. It was only on two dates that they were absent and had taken no steps, namely, 18th Feb. 1976 and 3rd March, 1976. But on numerous dates before that the plaintiffs were present and had taken steps. It is obvious thus that the court below did not apply its mind to the question as to whether the allegation of the defendants, to the effect that the plaintiffs wanted to have the suit dismissed, had any basis. It was on this assumption however, that he allowed the prayer and the assumption had no basis to warrant it.

7. It is well known that when a plaintiff comes before a court, he has a right to have his dispute adjudicated upon and unless he chooses to withdraw the suit or there is some other good reason available in law, the court cannot refuse to adjudicate upon the claim

put forward by him. It is true that O. 1, R. 10, sub-rule (2) of the Civil P. C. enables a court to transpose the parties from one category to the other. It is, however, well settled that such a transposition is generally not allowed if the nature of the suit is likely to be altered. A person can be added as a co-plaintiff with another only when he can adopt the plaintiff's case. Persons having conflicting cases cannot be made co-plaintiffs and if the plaintiff and the defendant have conflicting cases, the question of making the defendant a plaintiff and the plaintiff a defendant does not arise until such a contingency occurs when, for instance, the plaintiff is withdrawing from the suit. It is not necessary to cite authorities on these propositions, for they are so obvious. I would, however, mention them, for counsel for the petitioners has placed reliance thereon. The first is the decision in the case of Jagrao Kunwar v. Bhagwan Kunwar (AIR 1921 All 184); Ram Prasad Choudhary v. Mst. Fulia (AIR 1964 Pat 508); Ramaswami Reddi v. Deivasigamani Pillai (AIR 1947 Mad 395) and Kalyan Singh v. Kagdi Ram (AIR 1977 Him Pra 73).

8. Turning back to the facts of the present case, it needs to be pointed out that the plaintiffs had impleaded defendants second party merely as persons who were descendants of Gudar and who earlier had some interest in some of the lands alone and had been given a share on partition between them and the ancestors of the plaintiffs and defendants first party. It has been urged that they were merely pro forma defendants. Same is the situation with regard to the defendants third party. In other words, they were treated as strangers to the family and as persons being co-sharers in respect of some of the lands at one time which had been partitioned in the year 1940. Thus, there was no claim of such defendants recognised nor any reliefs were prayed for as against them. It is quite obvious thus that the claim made by these defendants (second party) is contradictory to the case of the plaintiffs. They claim to be descendants of a coparcener of the same family as the plaintiffs. They challenged the factum of adoption of plaintiff No. 1 by his uncle, even though that is admitted by the second (first?) party, though there is difference with regard to the form of adoption. There cannot be a slightest doubt that their case is absolutely contradictory to the case of the plainiffs as also of defendants first party. The main questions if they are allowed to be the plaintiffs, would be whether their ancestor Gudar belonged to the family of the plaintiffs and the defendants first party at all and further whether, plaintiff No. 1 was at all adopted.

9. It is true that parties can be added as plaintiffs or defendants in order to avoid multiplicity of suits. But it must be remembered that the addition of such parties must be necessary for final adjudication of the question in dispute. It does not permit a misjoinder of causes of action. If causes of action of different parties are entirely different from each other, they cannot be put in the same category of plaintiffs and asked to prosecute the suit, each plaintiff seeking for a decree contrary to the decree sought for by another.

10. It is thus obvious that in the present case the learned Subordinate Judge acted on assumption of facts which has no existence and the order is thus clearly without jurisdiction. I may further observe that the court below has not appreciated at all the law on the point, in respect of grant of an order of transposition of parties where cases are conflicting or where it would have the result of changing the nature of the suit entirely. It is well known that approaching a case from a wrong point of view entirely, is a material error in the exercise of jurisdiction. For the reasons aforesaid, I have to set aside the order passed by him.

11. In the result, the application is allowed. But in the circumstances of the case, there will be no order as to costs.

Application allowed.

AIR 1979 PATNA 60

SHAMBHU PRASAD SINGH AND HARI LAL AGRAWAL, JJ.

Jhauri Paswan and others, Petitioners v. Lobhi Paswan and others, Opposite Parties.

Misc. Judicial Case No. 187 of 1967, D/- 31-1-1978.

Civil P. C. (1908), S. 151, O. 20, R. 3 — Suit decreed in favour of A against B — Appeal by B — A dying pending appeal — Appellate Court ordering A's heirs to

pay deficit court-fee on the plaint and dismissing suit for default — Order is without jurisdiction — High Court can restore decree under its inherent powers.

A filed a plaint with deficit court-fee. The defect was not noted by the office and a decree was passed in favour of A against B the defendant. B appealed and A died after the filing of the appeal. The appellate Court found out the defect in the valuation and payment of court-fee on the plaint and ordered the legal representatives of A (who were added as parties in the appeal) to pay the deficit. On default the appellate Court rejected the plaint and dismissed the suit. On application by the legal representatives of A to set aside the order, Held; that the appellate Court had no jurisdiction to reject the plaint after the passing of the decree by the lower Court. The High Court in the exercise of its inherent powers under S. 151 of the Code recalled the order rejecting the plaint. The language of Section 151 of the Code itself makes it clear that where it is necessary to exercise inherent powers for the ends of justice or to prevent the abuse of the process of the Court, no limitation can be put on that power.

(Paras 4, 5)

Anno: AIR Comm. C.P.C. (9th Edn.), S. 151 N. 1; O. 20 R. 3 Notes 3, 4.

Cases Referred: Chronological Paras

AIR 1978 Pat 339 (FB)	4
1971 BLJR 1029	3
(1967) Civil Appeal No. 115 of 1967, D/- 22-8-1967 (SC)	3
AIR 1961 SC 832	3
AIR 1961 SC 882: 1961 BLJR 495	5
AIR 1953 SC 23	5
AIR 1949 Pat 366	5
AIR 1941 Lah 212	5
AIR 1936 Pat 123	5
AIR 1923 Pat 354: 4 Pat LT 261	5
(1871) 3 PC 465: 17 ER 120, Rodger v. Comptoir D'Escompte De Paris	3

Jagdish Pandey and Indu Bala, for Petitioners; Mahesh Prasad Ramanuj Prasad Singh and Ramjiwan Pd. Vidyarthy, for Opposite Parties.

JUDGMENT:— Second Appeal No. 913 of 1964 was filed on 2nd of December, 1964. On 17th of December, 1964, the Taxing Officer of the Court passed an order directing the trial court to fix the market value of property under dispute with reference to date of the institution of the suit as the Stamp Reporter had reported that the value of the suit land as given in the plaint and in the memorandum of appeal at Rs. 25 only was low since the lands measured 9½ dhurs and were situate in the town of Patna. It appears that the sole plaintiff respondent Barhu Paswan died on the same day i.e. 17th of December, 1964. A substitution petition was filed within time to substitute the brother and sister of deceased Barhu Paswan in his place. The Registrar of the Court allowed the prayer for substitution subject to such objections which might be raised later on. The trial court reported that the value of the suit land should be Rs. 260. The appellant was permitted to correct the valuation and pay the court fee for the memorandum of appeal on the said valuation of Rs. 260. Thereafter, the appeal was admitted on 1st of February, 1966. Notices of the appeal were validly served on the substituted heirs of the deceased respondent but they did not appear to contest the appeal. The office thereafter put up the matter as to realisation of deficit court fee on the plaint on the basis of valuation fixed by the trial court. The matter came before a learned single Judge of this Court and on 5th of January, 1967 he passed the following orders:

"Issue notice to the heirs of the deceased respondent, who have been brought on the record in his place, to show cause why the suit will not stand dismissed for non-payment by the plaintiff a sum of Rs. 31.25 which has been assessed as the amount of deficit court-fee payable on the plaint. In case the plaintiff's heirs do not appear on a date to be fixed for payment of this amount, the suit will stand dismissed. Two weeks' time is allowed to the appellants to file talvana etc."

The appellants did file talbana etc. within the time allowed by the Bench and house service was effected on the substituted respondents on their refusal to accept the notices. However it appears that no date for appearance was fixed by the Court. It was fixed as usual by the office in the notices issued to the substituted respondents. They again did not appear and the matter was put up before the same learned single Judge on 14th of April, 1967 when he passed the following order:

"The suit giving rise to this appeal now stands dismissed owing to default on the part of the plaintiff respondent to deposit the requisite amount of court-fee within the time allowed by this court. The suit must accordingly be dismissed. The judgment and decree passed by the courts below are set aside and in the circumstances, this appeal has become infructuous."

As against this order allowing the appeal and dismissing the suit the present miscellaneous judicial case has been filed by the petitioners who claim to be donees from the original plaintiff respondent.

2. Various grounds have been taken on behalf of the petitioners in this miscellaneous judicial case including that the persons who were substituted in place of the deceased sole plaintiff respondent were not his heirs. The petitioners claim that the deceased sole respondent had executed a registered deed of gift in favour of the petitioners on 8-1-1964 and the persons who were substituted in the place of the deceased even if they were his heirs were left with no interest in the property in dispute and it was in those circumstances that they did not appear in the second appeal and file the deficit court-fee on the plaint. The petitioners claim is that they being the legal representatives of the deceased sole respondent should have been substituted in his place. It is further claimed by the petitioners that they had no knowledge of the pendency of the second appeal in this Court and as soon as they came to know of it they filed the present application. They have also challenged the fixation of the valuation by the Trial Court on the ground that it was done ex parte after the death of the sole respondent.

3. It appears that the appellants of the second appeal who are opposite party in this miscellaneous judicial case took a stand that the miscellaneous case was not maintainable at the instance of the petitioners and when the matter came before the learned Single Judge who had allowed the appeal and dismissed the suit by his order dated 14th of April, 1967, he referred this miscellaneous judicial case to a Division Bench after formulating the points which arose for decision in the case according to him as follows :—

"(1) Whether, when a respondent dies and wrong persons are brought on record and appeal is allowed the persons claiming to be rightful heirs of the deceased can make an application either under S. 151 or by way of review of the order of this Court for setting aside the order or judgment of this court on the ground that wrong persons were brought on record?

(2) In the peculiar circumstances of this case whether the petitioners who claimed to be donees of Barhu Paswan and as such claimed to be the legal representatives of Barhu Paswan should have been brought on record so that they might pay the deficit court-fee, for default of payment of which the plaint of the plaintiff respondent was dismissed?

(3) Whether this court can reopen the question in the second appeal which was disposed of in terms of the order passed in respect of court-fee, or the remedy of the petitioners, if any, would be by way of separate suit?

After formulating the points he further observed as follows :—

"It will be open of course to the defendant appellants in the second appeal who are opposite party to this application to raise any contention if in law the same be open to them that the legal representatives who were brought on record were the legal representatives and not these petitioners."

After having heard learned counsel for the petitioners, and learned counsel for the opposite party we are of the opinion that on the facts and in the circumstances of the case it is not necessary for us to decide any of the points as formulated by the learned Single Judge while referring the case to a Division Bench. In Md. Munif Khan v. Md. Shahbuddin Khan (Civil Appeal No. 115 of 1967 decided on 22nd of Aug, 1967) the Supreme Court set aside the order of this court setting aside the decree of a subordinate court passed in favour of the plaintiff of that case for default by him in carrying out the order of this Court relating to the demand of court-fee on the plaint with the following observations :

"In a suit which had already been decreed, the High Court directed that the plaint filed in the court of first instance do stand rejected even though court-fee

as directed by the decree was paid. It is not necessary to decide whether the appellants were not liable to pay the additional amount of court-fee demanded nor whether there was sufficient cause for non-payment, for, in our view, the order passed by the High Court is wholly without jurisdiction. Once the decree was passed by the court of first instance, it could be modified by the appellate court on the merits of the dispute or by consent of the parties. The High Court had no power to set aside the decree for default by the appellant in carrying out the order relating to payment of court-fee. It is true that the liability of the appellants to pay appropriate court-fee was not wiped out because the decree was passed by the trial court in favour of the appellants. The liability remained; but the plaint could not be rejected either by the order of the court of first instance or by the appellate court after a decree was passed in favour of the appellants." Following the aforesaid decision of the Supreme Court a Bench of this court in the case of Raj Kumar Madan Mohan Singh v. Rukmini Devi (1971 BLJR 1029) reviewed the orders passed by the court dismissing the suits which had been decreed by the trial court on account of non-payment of deficit court-fee on the plaint as demanded by this court with the observation that the mistakes were committed by the office of the Court and the orders passed by the court, which were without jurisdiction, had resulted in miscarriage of justice. The Bench further observed that it was settled law that the litigant deserved to be protected against the default committed or negligence by the Court or its officers in the discharge of their duties. It relied on a decision in Rodger v. Comptoir D' Escompte de paris ((1871) 3 PC 465) in which it had been held that one of the highest duties of all courts was to see that the act of the court did not cause injury to any of the suitors. The view taken in Rodger's case has also been approved by the Supreme Court in Jagat Dhish Bhargava v. Jawahar Lal Bhargava (AIR 1961 SC 832). The Bench in the said case, therefore, further opined that that was a fit case where the court should in exercise of its inherent jurisdiction recall the orders passed allowing the appeal and dismissing the suit for non-payment of court-fee on plaint after the suit had been decreed. True it is that that order was passed by the Bench on an application made for review but as observed earlier the order could also be set aside in exercise of inherent jurisdiction.

4. Section 151 of the Code of Civil Procedure (hereinafter referred to as the Code) lays down that nothing in the Code shall be deemed to limit or otherwise affect the inherent powers of the court to make such orders as may be necessary for the ends of justice and to prevent abuse of the process of the court. In a recent Full Bench decision (of five Judges) in Civil Revision Nos. 713 and 917 of 1970 and No. 396 of 1972 decided on 12th May, 1977 (reported in AIR 1978 Pat 339) the scope of S. 151 of the Code has been examined with reference to various Supreme Court decisions. It has been held in that case that the provision in the Code that an appeal would lie against an order under O. 9, R. 13 would not stand as a bar to setting aside of such an order in exercise of powers under Section 151 of the Code merely because an appeal was not preferred. The learned Chief Justice who delivered the leading judgment in the case while summarising the proposition which emerged from the discussion of various Supreme Court decisions said that one of such propositions was that "inherent powers are to be exercised where specific provision does not meet the necessities of the case." The language of S. 151 of the Code itself makes it clear that where it is necessary to exercise inherent powers for the ends of justice or to prevent the abuse of the process of the court, no limitation can be put on that power. In our opinion, the case before us is a case where the order allowing the appeal and rejecting the plaint and thus dismissing the suit for non-payment of deficit court-fee on the plaint should be recalled in exercise of inherent powers of the Court. According to Supreme Court decision in Mohammad Munif's case, that order was wholly without jurisdiction. Further even the peremptory order dated 5th of Jan., 1967 did not call upon the substituted heirs of the sole plaintiff respondent to pay the deficit court-fee within a specified time and did not direct that in case they failed to do so the plaint would be rejected. They were merely called upon to show cause why the suit would not stand dismissed for non-payment of deficit court-fee on the plaint. As already pointed, out even

the date for their appearance was not fixed by the court but by the office. According to order dated 14th of April, 1967 passed in the second appeal, the suit stood dismissed for non-compliance of the peremptory order dated the 5th of Jan., 1967. In our opinion the order dated 5th of Jan., 1967 was not of such a nature as to justify automatic dismissal of the suit if it was not complied with.

5. Learned counsel appearing for the opposite party has placed reliance on certain decisions, namely, Rameshwardhari v. Sadhu Saran Singh (4 Pat LT 261) : (AIR 1923 Pat 354); Gobardhan Mukharji v. Saligram Marwari (AIR 1936, Pat 123); Jiwan Das v. Rakhmat Din (AIR 1941 Lah 212) and Ganga Prasad v. Smt. Girja Devi (AIR 1949 Pat 366). He has strongly relied on R. 3 of O. 20 of the Code of Civil Procedure which lays down that once the judgment was signed it shall not afterwards be altered or added to, save as provided by S. 152 or on review. He has laid great stress on a decision of this Court in Rameshwardhari Singh's case in which a Bench of this Court held that where a court rejected a plaint under O. 7, R. 11 Clause (c) of the Code for non-payment of deficit court-fee, the order operated as a decree and when the decree had been signed and perfected the court had no jurisdiction to restore the suit under Order 9, Rule 9 or under its inherent powers under Sec. 151, the proper remedy of the plaintiff being by way of an application for review under O. 47, R. 1 of the Code. Apart from the fact, that that decision is distinguishable on the ground that there the learned Judges were referring to an order rejecting the plaint by the trial court itself, the rigor of that decision has been mellowed to a great extent by the decision of the Supreme Court in Ram Das v. Ganga Das (1961 BLJR 495) : (AIR 1961 SC 882). There had been divergence of judicial opinion on the question whether in an appropriate case a judgment could be set aside under S. 151 of the Code in spite of the provision of R. 3 of O. 20; some High Courts taking the view that it could be done, others that it could not be. The decision of the Supreme Court in Keshardeo Chamaria v. Radha Kishen (AIR 1953 SC 23) supports the view that in an appropriate case a decree could be set aside under S. 151 of the Code in spite of the provision of O. 20 R. 3 of the Code. As already stated a point was taken on behalf of the opposite party that the miscellaneous judicial case at the instance of the petitioners was not maintainable. We do not intend to examine that question in detail but prima facie, we think that there may be substance in that contention. If that be so then the injustice done by the order of this court dated 5th of Jan., 1967 and 14th of April 1967 passed in the second appeal which were wholly without jurisdiction according to the said decision of the Supreme Court, cannot be set right unless recourse is taken to the provision of S. 151 of the Code and orders are recalled under inherent powers of the Court. We are satisfied that it is a case where if those orders are allowed to stand, there will be abuse of process of the Court and that they should be recalled for the ends of justice. If only one of these conditions exists, the inherent powers under Section 151 of the Code can be exercised and there can be no limitation on that and this is a case where both the conditions are satisfied.

6. We accordingly recall both the orders, namely, dated 5th of Jan., 1967 and 14th of April, 1967 passed in second appeal 913 of 1964 in exercise of our inherent powers. The result of this order will be that the suit will stand revived and the judgments and decree passed by the courts below shall remain valid so long as they are not interfered with by a superior court. The second appeal shall now stand restored to file and parties to that appeal will now take appropriate steps therein for its quick disposal. It will be open to the petitioners in the miscellaneous judicial case to make an application in the second appeal or being added as a party respondent therein. The miscellaneous judicial case 187 of 1967 stands disposed of accordingly. There will be no order as to costs.

Application allowed.

AIR 1979 PATNA 65

B. P. JHA AND S. K. JHA, JJ.

Koshila Devi, Petitioner v. Parvati Devi, Opposite Party.

Civil Revn. No. 310 of 1977, D/- 6-9-1978.*

(A) Constitution of India, Art. 246 — Scope and extent of legislative powers.

If the subject-matter of a particular legislation falls exclusively within any of the items enumerated in List I, i. e., the Union List, no amount of presidential assent to any State enactment encroaching upon the field exclusively assigned to the Union Parliament can validate it. It shall be void ab initio and shall be struck down as invalid on the ground that it has trespassed into a field which is forbidden to it by Article 246. So also, if the Union Parliament purports to legislate on a subject which is assigned exclusively to the State under any of the items enumerated in the State List, i.e., List II, the Union Act, to the extent of such clear contravention, must invariably be struck down as trenching upon a field not assigned to it under the Seventh Schedule read with Art. 246 of the Constitution. (Para 12)

Anno : AIR Comm. Constn. of India (2nd Edn.), Art. 246 N. 15.

(B) Constitution of India, Art. 254 — Question of repugnancy between Central Act and State Act — When open — Bihar Land Reforms (Fixation of Ceiling Area and Acquisition of Surplus Land) Act (12 of 1962), S. 16 (2) (iii) — Bihar Ceiling Act, if inconsistent with Indian Succession Act — Art. 254 (2), if attracted — Probate proceeding — Registration of will under S. 16 (2) (iii) of Bihar Ceiling Act, if necessary. AIR 1976 Pat 193, Overruled.

The question of repugnancy between an Act passed by the Union Parliament and one passed by the State Legislature can arise only in respect of the purported exercise of power by either legislature with regard to a subject enumerated in any of the items of List III, i. e., the concurrent list. The question of invoking the overriding powers of the State Legislature as enjoined in Article 254 (2), can arise only in cases of repugnancy. And, such repugnancy must be in respect of a subject-matter of legislation falling within an item of the concurrent list with regard to which both the Parliament and the State Legislature have purported to enact. (Para 13)

The Bihar Ceiling Act (12 of 1962) is an Act covering primarily the agriculture or horticulture. The subject-matter of S. 16 (2) (iii) is agricultural or horticultural land. Certainly item 6 of List III, which deals, inter alia, with wills, intestacy and succession, has got nothing to do with the Ceiling Act. So also, the subject regarding the transfer of property other than agricultural land or registration of those documents mentioned in item 6 of List III cannot by any stretch of imagination be said to cover the subject matter of legislation of the State law, namely, the Bihar Ceiling Act. AIR 1976 Pat 193, Overruled. (Paras 14, 15, 17, 5)

The provisions of S. 16 (2) (iii) of the the Bihar Ceiling Act cannot but be held to be a machinery for regulating the purpose of the Ceiling Act. Mere registration of any deed of transfer, even does not make any particular transaction binding on the revenue authorities if such a transfer has been effectuated either for the purpose of retaining illegally some area of land in excess of the ceiling area which a person was not entitled to retain or by acquisition of any new land where a landholder is likely to exceed the ceiling area permissible under the Act for him to retain. Scope and object of the Bihar Ceiling Act and functions of revenue authorities thereunder pointed out. (Para 15)

The jurisdiction of a court of probate is not to go into the questions of title but merely to judge the genuineness of any will in question. The court of probate which has to determine merely the question of genuineness or otherwise of a will cannot refuse to grant either probate or letters of administration with regard to a will which is not registered. Sec. 16 (2) (iii) of Bihar Ceiling Act does not apply to the grant of probate or letters of administration by a court. It is not at all necessary that the wills should be registered for the purpose of granting probate or letters of administration as there is no such provision in the Succession Act nor in the Registration Act. Therefore, the Bihar Ceiling Act does not fall within any matters enumerated in the concur-

*(Against Order of Siya Kant Jha, Dist. J., Saran, D/- 18-12-1976).

rent list and hence Art. 254 (2) does not apply to such a case. AIR 1976 Pat 193 Overruled. (Paras 16, 5 to 8)

Anno : (1) AIR Comm. Constn. of India (2nd Edn.), Art. 254 N. 12 (F); (2) AIR Manual (3rd Edn.) Succ. Act, Section 273 N. 1.

Cases Referred : Chronological Paras

AIR 1976 SC 1031 : (1976) 1 SCC 466 14
AIR 1976 Pat 193 1, 7, 9, 18
AIR 1959 SC 749 14
AIR 1957 SC 297 : 1957 Cri LJ 409 14
AIR 1947 PC 72 14
AIR 1947 PC 60 11
AIR 1941 FC 47 : 1940 FCR 188 11
(1937) 3 All ER 598 : 1937 AC 863, Gallagher v. Lynn 15

Rameshwar Nath Rai and Ali Mozaffar, for Petitioner; Fanish Singh and Gopal Shankar, for Opposite Party; K D. Chatterji, Advocate-General, for State.

B. P. JHA, J.:— By virtue of an order dated 21st July, 1978 a learned single Judge referred this civil revision petition to a Division Bench for deciding the correctness of the judgment of H. L. Agrawal, J. in Smt. Dil Kuer v. Hari Chandar Prasad (AIR 1976 Pat 193). H. L. Agrawal, J. is of the opinion that the court shall grant probate or letters of administration provided the will is registered in view of S. 16 (2) (iii) of the Bihar Land Reforms (Fixation of Ceiling Area and Acquisition of Surplus Land) Act, 1961 (Bihar Act 12 of 1962) (hereinafter to be referred to as the Act), H. L. Agrawal, J. is further of the opinion that the provisions of Art. 254 (2) of the Constitution shall apply to the present case.

2. I respectfully disagree with the opinion of H. L. Agrawal, J. for the reasons mentioned below.

3. It is relevant to quote Art. 254 (2) of the Constitution which runs as follows :—

"254 (2). Where a law made by the Legislature of a State with respect to one of the matters enumerated in the concurrent List contains any provision repugnant to the provisions of an earlier law made by Parliament or an existing law with respect to that matter, then, the law so made by the Legislature of such State shall, if it has been reserved for the consideration of the President and has received his assent, prevail in that State;".

If the Legislature of a State has enacted any law in respect of the matters enumerated in the concurrent list then, in that case, the law made by the Legislature of State shall prevail in the State provided it has been reserved for consideration of the President and has received his assent. In the present case, the Act was reserved for the consideration of the President and it received the assent of the President.

4. The only question for consideration is: whether the Act falls within one of the matters enumerated in the concurrent list or not?

5. In my opinion, the answer must be given in negative. The present Act falls within Item 18 of List II (State List). Item 18 of List II is as follows :

"18. Land, that is to say, rights in or over land, land tenures including the relation of landlord and tenant, and the collection of rents; transfer and alienation of agricultural land; land improvement and agricultural loans; colonization."

In my view, the present Act does not fall within any of the matters enumerated in List III (concurrent list) and hence the provisions of Art. 254 (2) of the Constitution do not apply to the present Act. If it is so, then the provisions in the Act shall not prevail upon the provisions of the Indian Succession Act, 1925 (Central Act XXXIX of 1925) (hereinafter referred to as the Central Act) which was enacted by the Central Government. Wills, intestacy and succession fall within item 5 of the concurrent list. The impugned Act is not covered by item 6 of the concurrent list. In the present case there is no conflict between the matters enumerated in concurrent list. In the present case the Act occupies the field as enumerated in List II and the "wills" occupy the field as enumerated in item 5 of List III. In this circumstance, I hold that the question of repugnancy also does not arise.

6. A person applies for grant of probate or letters of administration under S. 273 of the Central Act. A complete machinery has been set up for grant of probate or letters of administration under the provisions of the Central Act. If it is so, the court granting or refusing the probate or letters of administration shall be governed by the provisions of the Central Act and not by the provisions of the impugned Act. If it is so, the court granting the probate or letters of administration cannot refuse to grant the same simply because the will is not registered in accordance with Sec-

to a subject enumerated in any of the items of List III, i.e., the concurrent list. It is only in order to facilitate the Court to determine as to which particular statute and to what extent is valid or invalid that the framers of our Constitution engrafted in it Art. 254. Even at the cost of repetition, I would prefer to reproduce all the provisions of Art. 254 which reads thus :

"254. (1) If any provision of a law made by the Legislature of a State is repugnant to any provision of a law made by Parliament which Parliament is competent to enact, or to any provision of an existing law with respect to one of the matters enumerated in the concurrent List, then, subject to the provisions of Cl. (2), the law made by Parliament, whether passed before or after the law made by the Legislature of such State, or, as the case may be, the existing law, shall prevail and the law made by the legislature of the State shall, to the extent of the repugnancy, be void.

(2) Where a law made by the Legislature of a State with respect to one of the matters enumerated in the concurrent List contains any provision repugnant to the provisions of an earlier law made by Parliament or an existing law with respect to that matter, then, the law so made by the Legislature of such State shall, if it has been reserved for the consideration of the the President and has received his assent, prevail in that State :

Provided that nothing is this clause shall prevent Parliament from enacting at any time any law with respect to the same matter including a law adding to, amending, varying or repealing the law so made by the Legislature of the State."

From the provision of Art. 254 (1) of the Constitution, it would appear that any provision of law made by a State Legislature which is repugnant to any provision of law made by Parliament, which Parliament is competent to enact, or to any provision of any existing law with respect to one of the matters enumerated in the concurrent list which is subject to the provision of Cl. (2), the law made by the Parliament, whether passed before or after the law made by the Legislature of such State, or the existing law, shall prevail. Cl. (2) of Art. 254, which is to some extent an overriding provision over Art. 254 (1), lays down that if one of the matters enumerated in the concurrent list is legislated upon by a State Legislature and such law contains any repugnant provision to an earlier law made by the Parliament or any existing law with respect to that very subject-matter then the law made by the State Legislature shall prevail subject to the condition that it had been reserved for the consideration of the President and has been duly assented to by him.

The proviso gives further power to the Union Parliament for enacting from time to time any law with respect to a subject-matter covered by a State legislation including a law adding to, amending, varying or repealing the State law. The question of invoking the overriding powers of the State Legislature as enjoined in Art. 254 (2), it is now well settled, can arise only in cases of repugnancy. And, such repugnancy must be in respect of a subject-matter of legislation falling within an item of the concurrent list with regard to which both the Parliament and the State Legislature have purported to enact.

14. I shall, therefore, test the reasoning of H. L. Agrawal, J. keeping in mind these well-settled principles of law. The learned Judge has treated the provisions of S. 16 (2) (iii) of the Ceiling Act as covering a field assigned to the Legislature under item 6 or List III, i.e. with regard to 'registration of deeds and documents'. With great respect, I venture to say that this argument cannot be held to be tenable as would appear from the preamble to the Ceiling Act. It has been enacted to provide for fixation of ceiling, restriction on sub-letting and resumption by certain raiyats for personal cultivation of land, acquisition of status of raiyat by certain under raiyats and acquisition of surplus land by the State in the State of Bihar and matters connected therewith.

Sec. 2 (f) of the Ceiling Act defines 'land' as meaning land which is used or capable of being used for agriculture or horticulture and includes land which is an orchard, Kharhur or pasturage or the homestead of a land-holder. In the explanation to S. 2 (f) 'homestead' has again been further explained as meaning a dwelling house for the purpose of living or for the purpose of letting out on rent together with any courtyard, compound, attached garden, orchard and out-building and includes any out-building for the purpose connected with agri-

culture or horticulture. It would thus be seen that the Ceiling Act is an Act covering primarily the agricultural land and incidentally homestead having a nexus with agriculture or horticulture. Let us now look to the provisions of S. 16 (2) (iii). S. 16 (2) (iii) reads thus:

"No land shall be transferred, exchanged, leased, mortgaged, bequeathed or gifted without a document registered in accordance with the provisions of the Indian Registration Act, 1908 (XVI of 1908)."

It is clear from the definition that the subject-matter of S. 16 (2) (iii) is agricultural or horticultural land. Can it then be said that the provisions of Section 16 (2) (iii) of the Ceiling Act, while dealing with certain transfers or bequests, are the subject-matter within item 5 or item 6 of List IIII? Certainly item 5 of List III, which deals, inter alia, with wills, intestacy and succession, has got nothing to do with the Ceiling Act. So also, the subject regarding the transfer of property other than agricultural land or registration of those documents mentioned in item 6 of List III cannot by any stretch of imagination be said to cover the subject-matter of legislation of the State law, namely, the Ceiling Act. My learned Brother has already made reference to item 18 of List II which includes land, i.e., rights in or over land, land tenures including the relation of landlord and tenant, and the collection of rents; transfer and alienation of agricultural land; land improvement and agricultural loans; colonization.

It has already been noticed that the definition of 'land' in S. 2 (f) of the Ceiling Act read with the preamble to the Act makes it obvious that the said Act is a piece of Legislation exclusively under item 18 of the State List (List II). The entire Ceiling Act deals either with rights in or over agricultural land or transfer and alienation of agricultural land and land improvement. It can, therefore, by no stretch of imagination be taken to cover any of the subjects enumerated either in item 5 or item 6 of the concurrent list. Certainly — and I say so with certain amount of confidence — provisions of S. 16 (2) (iii) even if they be disintegrated from the Act as a whole, which it is not permissible for us to do, can at best be said to deal with transfers or bequests of agricultural land, but that too it is not possible to hold by dissecting the various provisions of the said Act. The well-settled position in law is, as observed by Venkatarama Aiyar, J., speaking for the Supreme Court in A. S. Krishna v. State of Madras (AIR 1957 SC 297) that to ascertain the true character of the legislation which falls to be considered in such cases, one must have regard to the enactment as a whole, to its objects and to the scope and effect of its provisions.

It would be quite an erroneous approach to the question to view such a statute but as an organic whole, but as a mere collection of sections, then disintegrate it into parts, examine under what heads of legislation those parts would severally fall and by that process determine what portion thereof fell within one list and what within another list. The Ceiling Act, therefore, must be considered as an organic whole for the purpose of determining as to under which item of which list this piece of legislation can be said to fall. It needs no persuasion or argument to hold that the whole of the Ceiling Act in pith and substance is a legislation in respect of one of the matters falling exclusively within the domain of the State Legislature, namely, entry 18 of list II. It cannot even incidentally be said to trench upon a field covered by a Union Legislature or an existing Central law. As was observed by the Privy Council in the case of Megh Raj v. Allah Rakhia (AIR 1947 PC 72) which was a case under S. 107 of the Govt. of India Act, 1935, corresponding to the provisions of Art. 254 (1) of our Constitution:

"S. 107 (Government of India Act, 1935) has no application in a case where the Province (State) could show that it was acting wholly within its powers under the provincial list and was not relying on any power conferred on it by concurrent list and accordingly questions of repugnancy do not arise in such a case". (Vide placitum), (words within parenthesis are mine).

The Ceiling Act is limited to the agricultural lands and as a whole, as already observed above, it falls within the powers given to the State by item 18 of List II of the Seventh Schedule. The Indian Succession Act, which was an existing Central Act, is a piece of legislation falling exclusively within item 5 of the concurrent list (List III) covering, inter alia, the field of wills, intestacy and succession. In such cases,

therefore no question of repugnancy arises. Calling into aid the principles of Art. 254 (2) of the Constitution, therefore, is fallacious. If authority need be cited for this well-settled proposition of constitutional law that the provisions of Art. 254 of the Constitution can be pressed into service only in cases of repugnancy between a Union Act and a State Act in respect of a matter covered by any of the entries in List III, I may merely refer to some of the decisions of the Supreme Court.

In the case of Kerala State Electricity Board v. Indian Aluminium Co, Ltd. (1976) 1 SCC 466: (AIR 1976 SC 1031) it has been held that the Kerala Essential Articles Control (Temporary Powers) Act, 1961 is not a legislation with respect to electricity and therefore does not fall under entry 38 of List III. The main purpose of the Electricity (Supply) Act, 1948, it was held, was for rationalisation of production and supply of electricity and the regulation contemplated in entries 43 and 44 of List III was not regulation of the business of production, distribution and supply of electricity of the corporation. It was further held that the question of repugnance arises only in cases where both the legislations fall within the same entry in List III. There can, therefore, be no question of repugnance between the Electricity Act and Electricity (Supply) Act on the one hand and the Kerala Act on the other, since the former fell within List I or List III and the latter in List II.

In the case of Prem Nath Kaul v. State of Jammu and Kashmir (AIR 1959 SC 749) Gajendragadkar, J., as he then was, speaking for the Supreme Court, held that the essential condition for the application of Art. 254 (1) is that the existing law must be with regard to one of the matters enumerated in the concurrent list and unless it is shown that the repugnance is between the provisions of a subsequent law and those of an existing law in respect of the specific matters, that Article would be inapplicable.

15. It is a consequence of the doctrine of pith and substance that once a law in pith and substance falls within a legislative entry, an incidental encroachment of an entry on another list does not affect its validity. In the case of Gallagher v. Lynn ((1937) AC 863) where the provisions of the Milk and Milk Products Act (Northern Ireland), 1934 were being considered, it was held by the House of Lords that the impugned Act was in pith and substance an Act to protect the health of the inhabitants of Northern Ireland and though it incidentally affected trade, it was not passed 'in respect of' trade. Similarly, while scanning the provisions of the Ceiling Act, it was clear that in pith and substance it is a Legislation on land falling exclusively within item 18 of List II. The existing Central Act, namely, the Indian Succession Act was a matter directly covered by item 5 of List III. The main purpose of the Ceiling Act, as already pointed out above, is for regulating the acquisition of status of raiyat by certain under-raiyats, acquisition of surplus land by the State and fixation of ceiling restriction. Judged in this light, the provisions of S. 16 (2) (iii) of the Ceiling Act cannot but be held to be a machinery for regulating the purpose of the Ceiling Act.

Apart from the definition of 'land' in S. 2 (f) of the Ceiling Act, some other provisions of the Act need be noticed here. S. 5 (1) (i) of the Ceiling Act says that it shall not be lawful for any family to hold, except as otherwise provided under that Act, land in excess of the ceiling area. Cl. (ii) of sub-sec. (1) of S. 5 further enjoins that if a land-holder holds land in excess of the ceiling area then with effect from the commencement of the 1972 amendment Act till the publication of notification under Section 16, no such land-holder can transfer any land except with the previous permission of the Collector in writing. The Collector may refuse to give such permission if, for reasons to be recorded in writing, he is satisfied that the transfer is proposed to be made with a mala fide intention of defeating the object of the Ceiling Act.

Cl. (iii) of S. 5 (1) further empowers the Collector to make enquiries in respect of any transfer of land by a land-holder "whether by a registered instrument or otherwise" made after 22-10-59 and if the Collector is satisfied that the transfer in question was made with the object of defeating the provisions of the Act or was in contravention thereof or for retaining benami or farzi land in excess of the ceiling area, he (the Collector) may annul such transfer after giving reasonable notice to the parties concerned to appear and be heard. It will be seen, therefore, that irrespective of the fact whether there is a document

registered or not, the registration of a deed of transfer of which the subject-matter is agricultural land falling within the ambit of the Ceiling Act does not give any seal of sanctity to it nor does it bind the revenue authorities under the Ceiling Act. The object and the main purpose of the provisions of the Ceiling Act being with regard to fixation of ceiling area and non-retention of any surplus land other than the ceiling fixed, the question by the revenue authorities to be gone into in such cases is as to whether the acquisition by virtue of such transfer was bona fide or not.

The revenue authorities in such cases have to determine a number of pertinent points, namely, whether by virtue of the transfer one seeks mala fide to retain some land in excess of the ceiling area by creating documents in the name of persons benami or farzi; whether at any time or through acquisition even bona fide a land-holder comes in possession of any land on any future date which is surplus over the ceiling area fixed by the Ceiling Act. In all such cases, therefore, the revenue authorities are guided by considerations of bona fides or otherwise of the transfers in question. Mere registration of any deed of transfer, as I have already observed, even does not make any particular transaction binding on the revenue authorities if such a transfer has been effectuated either for the purpose of retaining illegally some area of land in excess of the ceiling area which a person was not entitled to retain or by acquisition of any new land where a land-holder is likely to exceed the ceiling area permissible under the Act for him to retain. It is in this context that the provisions of S. 16 (2) (iii) must be viewed.

16. On the contrary, it shall be seen, the Indian Succession Act is an Act to consolidate law applicable to intestate and testamentary succession and such intestate and testamentary succession fell exclusively within entry 5 of List III, as already pointed out above. The upholding of the view of H. L. Agrawal, J., would lead to such absurdities and anomalies which the Courts shall not permit in construing the provisions of the two Acts. If at all, for the sake of argument, it be assumed that the provisions of S. 16 (2) of the Ceiling Act pertain to the subject of testamentary or intestate succession either directly or indirectly in the purported exercise of the legislative power under entry 5 of List III, then, so far as the State of Bihar is concerned, no probate or letters of administration can be granted on the basis of a will which is not registered in accordance with the provision of the Indian Registration Act, 1908. On the contrary, a person on the basis of any will which covers properties falling within the State of Bihar and elsewhere or, for instance, the State of West Bengal, is at liberty to apply for probate or letters of administrations in either of the two States.

While, on the one hand, the court in the State of Bihar shall refuse to grant probate or letters of administration on the basis of an unregistered will, the court in West Bengal, where there may not be any provision corresponding to the provision of S. 16 (2) (iii) of the Ceiling Act shall be at liberty to grant such probate or letters of administration. It is a universal rule that the jurisdiction of a court of probate is not to go into the questions of title but merely to judge the genuineness of any will in question. Whereas, on the one hand, the courts in the State of Bihar by refusing to grant probate or letters of administration on the ground of non-registration of the will shall be holding it to be not genuine impliedly, the grant of probate or letters of administration of the same will by courts in another State would be deemed to have given a seal of genuineness to such a document notwithstanding the fact that it is not registered. Can the two pieces of legislation be, therefore, viewed as H. L. Agrawal, J., has viewed the provisions of S. 16 (2) (iii) of the Ceiling Act?

The answer is obvious: the provisions of S. 16 (2) (iii) cannot be so construed as to result in the aforesaid absurdities and anomalies. Apart from that, the provisions of Part VII of the Indian Succession Act dealing with protection of the properties of deceased and those of Part VIII thereof dealing with representative title to properties of a deceased on succession will be rendered wholly nugatory, if it be held that the Ceiling Act has been enacted under any of the entries of List III. All the provisions of the whole of Part IX of the Indian Succession Act, namely, probate, letters of administration and testamentary assets of deceased shall be held to be abrogated by mere insertion of such an incidental provision like S. 16 (2) (iii) of the Ceiling Act. I have, therefore, no

hesitation in holding that the court of probate which has to determine merely the question of genuineness or otherwise of a will cannot refuse to grant either probate or letters of administration with regard to a will which is not registered.

17. A question may be posed that the aforesaid view will render the provisions of S. 16 (2) (iii) of the Ceiling Act with regard to registration of wills in the matter of bequests otiose and nugatory. My answer to that question is clear and unequivocal. Firstly, S. 16 (2) (iii) merely deals, if at all, with wills covering agricultural lands and, that too merely for the purpose of enabling the revenue Courts under the Ceiling Act to decide as to whether, by virtue of such bequests, a person has come into possession of and is likely to retain land in excess of the ceiling area. In the event of such a contingency, the revenue courts under the Ceiling Act shall certainly take into consideration for the purpose of deciding the question of the bona fides or otherwise of the transaction as to whether in spite of the will having been probated or letters of administration having been granted on the basis thereof it should be held to be binding and entitling the person in whose favour the bequest has been made to retain any land in excess of the ceiling area or not.

As already observed earlier, if by virtue of such bequest a land-holder comes in possession of any area of land in excess over the ceiling area, that will be illegal in view of the provisions of Section 5 (1) (i) of the Ceiling Act. It would thus be seen that the provisions of Section 16 (2) (iii) in so far as they incidentally touch upon the matter of registration of wills and bequests being unregistered documents, such incidental trenching upon the field of legislation or otherwise cannot be attributable to the legislative power of the State either under entry 5 or entry 6 of List III which must be confined to and be read as only covering the legislative field assigned to the State Legislature exclusively under item 18 of List II. Thus considered, there is no anomaly, no inconsistency and no repugnancy between the State Act, namely, the Ceiling Act and the Indian Succession Act, namely, the existing Central Act.

18. In the result, therefore, I am constrained to hold that the judgment of H. L. Agrawal, J., in the case of Smt. Dil Kuer (reported in AIR 1976 Pat 193) does not lay down a correct position in law and must be and is hereby overruled. The application, therefore, as observed by my learned Brother, must succeed.

Application allowed.

AIR 1979 PATNA 73

MADAN MOHAN PRASAD, J.

Basudeb Narayan Singh and others, Petitioners v. Shesh Narayan Singh and others, Opposite Parties.

Civil Revn. No. 179 of 1977, D/- 19-5-1978.*

(A) Civil P. C. (5 of 1908), O. 23, R. 1 — Application for withdrawal of suit — Cannot be granted if certain right in respect of subject matter of suit vests in defendant after filing of suit.

The plaintiff under sub-rule (1) of R. 1 of O. 23 has a right to withdraw a suit at any stage. However such a right of the plaintiff is limited to the extent that it does not result in defeating a right which has already vested in the defendant, such a right may have become vested in the defendant either on account of a compromise or a concession or a decree or an award or similar circumstances. Case law discussed. (Paras 12, 13)

Anno: AIR Comm. C.P.C. (9th Edn.), O. 23 R. 1 N. 10.

(B) Civil P. C. (5 of 1908), O. 1, R. 10 — Transposition of defendant to category of plaintiff and vice versa — Is permissible if claim in suit is founded on same cause of action — In a suit for partition such a transposition is always permissible as cause of action in such suit whether it be in respect of plaintiff or defendant remains same. AIR 1965 SC 1812; AIR 1931 PC 162, Ref. (Para 15)

Anno: AIR Comm. C.P.C. (9th Edn.), O. 1 R. 10 N. 34.

Cases Referred: Chronological	Paras
AIR 1973 SC 643	7, 11, 13
AIR 1973 Orissa 214	9
AIR 1968 SC 111	6, 10
AIR 1967 Pat 326	9
AIR 1965 SC 1812	16

*(Against decision of Ashok Kumar Pd., 2nd Addl. Sub. J., Monghyr, D/- 3-2-1977.)

AIR 1963 SC 1566	10
AIR 1957 Cal 57	10
AIR 1949 Mad 772	10
AIR 1934 Mad 485	10
AIR 1931 PC 162	15
AIR 1926 All 582	11
AIR 1926 Cal 184	11
AIR 1925 Bom 425	10
AIR 1920 Mad 546 (1)	10
(1905) ILR 29 Bom 13	10, 11

ORDER:— This application is directed against an order refusing leave to the plaintiffs to withdraw their suit and transposing the defendants to the category of plaintiffs.

2. It appears that a suit for partition of certain properties was filed by the plaintiffs-petitioners originally against defendants 1 to 3. The plaintiffs alleged that plaintiff No. 1 and defendant No. 1 were sons of one Girwar Narain Singh; that on his death defendant No. 1 became the karta of the family and looked after the management of the properties; that the relationship between the two brothers had become strained and hence the demand for and the suit for partition. According to the defendants, the aforesaid Girwar Narain Singh had a brother Mahendra Narain Singh who had separated from his brother and he had gifted away his property to defendant No. 1. The defendants further alleged that they had also separated from the plaintiffs.

3. Thereafter one Janki Devi claiming to be the widow of Mahendra Narain Singh filed a petition under O. I, R. 10 of the Civil P. C. (hereinafter called 'the Code') for being impleaded as a defendant and it was allowed. She made out a case that she had inherited and got the properties of her husband Mahendra and not the first defendant. There was another parson Permila Devi claiming to be the daughter of said Mahendra Narain Singh from his first wife who filed a similar petition for being impleaded as an intervenor defendant. Her prayer was also allowed. She made out a third case to the effect that Mahendra and Girwar were joint with one Nagendra Narain, their stepbrother. According to her, all of them were in joint possession of the property. The claim of this lady was denied by the other defendants. It appears next that she filed a petition on 17-7-75 for appointment of a receiver in respect of the suit properties.

It is said that this application was rejected by the trial court but an order for payment of ad interim maintenance in favour of the said Parmila Devi was passed. As against that, there were civil revision applications in this court. In this court she said that she would not claim maintenance. In that view of the matter this court said that the order regarding maintenance would not be given effect to. For that reason the applications in this court were withdrawn. Next it appears that in the court below she pressed the point and ultimately by an order dated the 3rd of Feb. 1976 a receiver was appointed. There was no appeal or revision against this order and it became final.

4. It appears that much before this, Parmila Devi had filed a petition for being transposed to the category of the plaintiffs in case the plaintiffs wanted to withdraw the suit. It appears from the order sheet that the petition was not moved and was kept on record. On the 15th of Jan. 1977, the plaintiffs filed a petition under O. 23, R. 1 of the Code for permission to withdraw the suit. A rejoinder was filed by Parmila Devi objecting to the aforesaid course. The other defendants did not object to the withdrawal. The matter was heard on the 3rd of Feb. 1977. On that date Parmila Devi again filed a petition for being transposed to the category of plaintiffs. The learned Judge allowed her prayer by ordering her transposition to the category of plaintiffs and of the plaintiffs to the category of defendants and also refused the prayer of the plaintiffs to withdraw the suit. Hence this application.

5. The court below held that in a suit for partition every defendant is in the position of a plaintiff and the suit could not, therefore, be allowed to be withdrawn. In view of the aforesaid the prayer of defendant Parmila Devi was considered fit to be allowed.

6. Counsel for the petitioners has urged that a plaintiff has an absolute right granted by O. 23, R. 1 of the Code to withdraw the suit and the court below had, therefore, no jurisdiction to refuse the prayer. In this connection he placed reliance on a decision of the Supreme Court in the case of M/s. Hulas Rai Baij Nath v. Firm K. B. Bass & Co. (AIR 1968 SC 111).

7. On the other hand, it has been urged by counsel for the opposite party that where a valuable right has, during the course of the suit, accrued in favour

of any of the defendants, the suit should not be allowed to be withdrawn. Counsel placed reliance on another decision of the Supreme Court in the case of R. Ramamurthi Aiyar v. Rajeshwararao (AIR 1973 SC 643).

8. The point for decision thus arises as to whether in the circumstances of the present case the plaintiffs could be allowed to withdraw the suit.

9. Before entering into the question I must first decide a preliminary objection which was raised on behalf of the opposite party in their counter-affidavit, namely, that there were two orders passed in the case, one rejecting leave to the plaintiffs to withdraw the suit and the other on the application of the intervenor defendants to be transposed to the category of plaintiffs and thus two civil revision applications should have been filed in the present case. Reliance was placed in this connection on a decision of this court in Mahabir Prasad Singh v. Narmedeshwar Prasad Singh (AIR 1967 Pat 326) and Dr. Mrs. Sarojini Pradhan v. Khirode Chandra Pradhan (AIR 1973 Orissa 214). Counsel for the petitioners, however, said that he is prepared to pay additional court-fee on the basis of two applications. It has been pointed out that by the present application the prayer has already been made to set aside the order as a whole and thus in both respects. I would accordingly direct the petitioners to pay additional court fee for one more application. The point is thus disposed of.

10. Reverting to the point for decision in this case it appears that in the case of M/s. Hulas Rai Baij Nath (AIR 1968 SC 111) (supra) it was a suit for rendition of accounts filed by the principal against his agent. Issues had been framed there and some evidence had been recorded but no preliminary decree for rendition of accounts had been passed. There was no prayer for permission to file a fresh suit under sub-rule (2) of R. 1 of O. 23 of the Code, nor any counter claim was made for set off. In such circumstances their Lordships held that the plaintiff had a right to withdraw the suit. On the basis of this decision counsel for the petitioners in the present case urged that the principle of law to be deduced from this decision is that where a preliminary decree has not been passed, and in that respect a partition suit is similar to a suit for accounts — the suit can be withdrawn by the plaintiffs under sub-rule (1) of R. 1 of O. 23 of the Code. Another decision of the Supreme Court to which learned counsel drew attention is in the case of Bijayananda Patnaik v. Satrughna Sahu (AIR 1963 SC 1566). There the question was of withdrawal of an election appeal.

The learned Judges held that it could be allowed to be done on the strength of O. 23, R. 1 (1) of the Code which grants a plaintiff an absolute right to withdraw a suit unconditionally. There are however, a few other decisions which may be relevant to the present discussion. In the case of Sm. Saraswati Bala Samanta v. Surabala Dassi (AIR 1957 Cal 57) there was a partition suit in which at the close of the argument the plaintiff having found that he could not succeed, applied for withdrawal of the suit. The suit was allowed to be withdrawn and said to amount to dismissal for non-prosecution. In this respect the learned Judges said that where the plaintiff desires to withdraw the suit and does not want permission to institute a fresh suit, he is at liberty to do so under R. 1 of O. 23 of the Code, and by this withdrawal he is precluded from instituting a fresh suit, but the withdrawal does not amount to a dismissal for non-prosecution.

In the case of Hasan Badsha v. Sultan Raziah Begum (AIR 1949 Mad 772) Viswanatha Sastri, J. held that the right of withdrawal is subject to the condition that the defendant has not obtained a valuable right by reason of anything done such as compromise on preliminary decree during suit till application for withdrawal. This was also a suit for partition. In this case the property was held to be incapable of division and thus the defendant had applied for purchasing the same under S. 3 of the Partition Act. It was held that no right had accrued on that account and thus the plaintiff could withdraw the suit. In the case of V.E.A.R.M. Annamalai Chettiar v. Koothappudayar (AIR 1934 Mad 485) a learned single Judge of that Court held that in partition suits the power of the plaintiff to withdraw has been limited to this extent only that it can be exercised only till a right in the defendant in the continuance of the suit or its determination in a particular way has been legally created, as for example, by a preliminary decree or a compromise or agreement or award.

Reliance was placed by the learned Judge on various decisions in Suram-

palli Ramamurthi v. Surampali Reddy (AIR 1920 Mad 546 (1)), Satyabhamabai v. Ganesh Balkrishna ((1905) ILR 29 Bom 13) and Tukaram Mahadu Tandel v. Ramchandra Mahadu Tandel (AIR 1925 Bom 425). In Satyabhamabai's case (supra) in a suit for partition a decree had been passed on an agreement and an appeal by the plaintiff was pending when he wanted to withdraw the suit. It was held that it was not open to the plaintiff who had made the concession to annul it by withdrawing from the suit.

11. There are a few other cases to which reference may be made. In Debi Chand v. Parbhu Lal (AIR 1926 All 582) a preliminary decree in a suit for accounts filed by one partner against the others had been passed. Thereafter there was a prayer for withdrawal of the suit to which the defendant objected. The learned Judges held that the proper course was to transpose the defendant to the category of plaintiff. In Loke Nath Saha v. Radha Govinda Saha (AIR 1926 Cal 184) there was a suit for partition where it was held that every defendant is in position of a plaintiff and, therefore, can claim partition. In the case of R. Ramamurthi Aiyar (dead) by L. Rs V. Raja v. Rajeswararao (AIR 1973 SC 643) a property was considered to be indivisible and thus a prayer was made for sale of half share of the property and payment to the plaintiff of proceeds thereof. The defendant, on the other hand, said that the property was divisible but in case of sale he was prepared to buy the other half belonging to the plaintiff. This right was invoked under S. 3 of the Partition Act.

The plaintiff then wanted to withdraw the suit with liberty to institute a fresh suit. The trial Judge held that since no decree had been passed it was open to the plaintiff to withdraw the same. The suit was dismissed as withdrawn. The learned Judges of the Supreme Court held that the plaintiff could not be allowed to withdraw the suit after the defendant had gained or acquired the privilege of buying the share of the plaintiff in accordance with the provisions of S. 3. Reliance was placed on the decision in the case of Tukaram Mahadu Tandel ((1905) ILR 29 Bom 13) (supra). The learned Judges referred to the following observation of Crump J. :—

"But there are other and wider considerations which lead me to hold that plaintiff could not have withdrawn so as to defeat the defendants' claim. It is relevant to point out that in a partition suit a defendant seeking a share is in the position of a plaintiff and one plaintiff cannot withdraw without the permission of another (O. XXIII, R. 1 (4))." Further, the learned Judges observed as follows :—

"It seems to us that the true position under Ss. 2 and 3 of the Partition Act so far as O. 23, R. 1, C.P.C. is concerned must be determined in the light of the rule enunciated by Crump J., in the above case as that rule has seldom been doubted and there is a large body of judicial opinion to support it."

12. The principles which can be deduced out of the cases aforesaid are clearly the following.

(1) The plaintiff under sub-r. (1) of Rule 1 of Order 23 of the Code has a right to withdraw a suit at any stage; (2) that such a right of the plaintiff is limited to the extent that it does not result in defeating a right which has already vested in the defendant, such a right may have become vested in the defendant either on account of a compromise or a concession or a decree or an award or similar circumstances; (3) that in a partition suit every defendant is virtually in the position of a plaintiff, his claim being founded on a claim similar to that of the plaintiff; and (4) that O. 23, R. 1, sub-r. (1) of the Code applies even to a partition suit, subject to the aforesaid limitation.

13. In this background of the law the point arises as to whether the circumstances of the present case have created any vested right in the defendant which should justify the refusal of the prayer of the plaintiff to withdraw the suit. From the facts stated earlier it would appear that defendant Parmila Devi claimed a share on the allegation that she was the daughter. On this allegation she had a right to file a suit for partition independently. She was allowed to join as an intervenor defendant. Thereafter she alleged waste of the properties by the other parties and accordingly she prayed for the appointment of a receiver. In this connection the plaintiffs gave an undertaking that that they would not transfer any of the properties during the pendency of the suit. The trial court first refused her prayer for appointment of receiver and granted her a maintenance. She, however, waived this right to maintenance and prayed for appointment of receiver

3. It may be mentioned further that on the very date the suit was filed a petition for ad interim injunction had also been filed for restraining the defendants from constructing a house on the lands in suit. The learned Munsif directed notices to issue in this respect to the defendants for showing cause by the 10th of May, 1976. On that date the defendants appeared and prayed for time to file the petition showing cause. Time was granted till 18th of May, 1976. On similar prayer by the defendants, time was allowed till 27th May, 1976 and again on the defendants' prayer for time, 4th of June, 1976 was fixed. On the last mentioned date defendant No. 1 filed a show cause petition on behalf of the defendants. The hearing of the matter could not be done on account of lack of court's time as also at the prayer of the defendants for adjournment and the case was finally fixed for the 4th April, 1977. Meanwhile, however, the present application in revision was filed on the 3rd of Feb., 1977 and by an order dated 14th of March, 1977 further proceedings in the court below were stayed. As a result the injunction matter could not be heard.

4. The only point raised by the counsel for the petitioners is that the court had no jurisdiction to take away the right of the defendants to file written statement at or before the first hearing of the suit. It has been urged that in this case notice having been issued to the defendants for framing of issues, that was the "first hearing" within the meaning of R. 1 of O. VIII of the Civil P. C. (hereinafter to be referred to as 'the Code') and as such the defendants had a right to file the written statement until the issues were actually framed and the right could not be taken away. Reliance has been placed on a decision of a learned single Judge of the Andhra Pradesh High Court in the case of Chikkula Chendraiah v. Tata Seetarammaiah reported in AIR 1961 Andh Pra 102. It has been further urged that a defendant is not bound to file a written statement in a case unless required by court and he may do so in the first case either on his own or if required by the court at or before the first hearing or within such time as the court may permit. In such circumstances it is said that the court had no jurisdiction to refuse to accept a written statement at or before the first hearing.

5. I would first read the relevant provisions, viz. Rr. 1, 9 and 10 of Order VIII (as they stood prior to the amendment in 1976). They were as follows:—

Rule 1. "The defendant may, and, if so required by the court, shall, at or before the first hearing or within such time as the court may permit, present a written statement of his defence.....".

Rule 9. "No pleading subsequent to the written statement of a defendant other than by way of defence to a set off shall be presented except by the leave of the court and upon such terms as the Court thinks fit, but the court may at any time require a written statement or additional written statement from any of the parties and fix a time for presenting the same".

Rule 10. "Where any party from whom a written statement is so required fails to present the same within the time fixed by the court, the court may pronounce judgment against him, or make such order in relation to the suit as it thinks fit."

6. I will now refer to the decision in relation to these provisions. In the case of Chikkula Chandraiah (AIR 1961 Andh Pra 102) (supra), a learned single Judge of the Andhra Pradesh High Court was faced with a somewhat similar question. The facts of that case were as follows. A party was not made originally defendant, later a petition was filed for impleading him and it was granted; the suit was thereafter put up for filing written statement. By the next order it was said that the aforesaid defendant in spite of many opportunities had failed to comply with the order of the court for submitting the written statement: hence, his right to file written statement was forfeited and the suit was ordered to be put up for framing of issue. Thereafter an application was filed for setting aside the above order but the same was rejected, because the Munsif believed that he was prohibited to entertain the written statement after the order of forfeiture passed earlier by the court. In these circumstances, the learned Judge relying upon R. 1, O. VIII held as follows :

"The language is plain enough to concede the right to the defendant the option of filing the written statement at or before the 'first hearing' or with the

permission of the court thereafter; but it is incumbent upon the defendant—for no option is given to him in such a case —to file the written statement into court when so ordered by the court. But even in the later contingency, it appears from the language of this rule the court cannot compel the filing of the written statement before the first hearing."

It was further observed :

"Moreover it might be possible for a defendant, where compliance with the order to file a written statement at or before the first hearing is rendered difficult, to obtain time and having obtained time and having so got the permission exercise his right to present a written statement of his defence. There is thus nothing in this rule which enables a court of first instance to pass an order forfeiting the right of the defendant to file a written statement even though the written statement has not been filed in spite of the orders of the court at or before the final hearing, for, it is apparent on a reading of this rule that the time for filing the written statement could be extended.

Further it is not as though the unavailing of opportunities by a defendant because the case underwent several adjournments that could be taken as the criterion for placing any embargo on the right of the defendant to file a written statement, but only the non-compliance with an order of the court and non-filing of the written statement where there is one such order at or before the first hearing that entails the necessity for obtaining permission for further time."

It was also held that the 'first hearing' means the date of framing the issues and, therefore, the defendant had right to file the written statement till that date, that when no order requiring the defendant to file the written statement had been made by the court in accordance with R. 1 O. VIII the mere fact that there had been opportunities given for filing written statement, before the issues were framed, would not by itself preclude the defendant from exercising his right to file a written statement.

7. In the case of Binda Prasad v. United Bank of India (AIR 1961 Pat 152), a written statement has been filed after the settlement of issues and the question arose there whether it could be accepted. In this case Raj Kishore Pd. J. held that the first hearing of the suit means the date of settlement of issues and that if the defendant does not present a written statement the court can insist that he shall, and, if on being required to do so, he fails to comply with the order, R. 10 of O. VIII, which provides that the court may pronounce judgment against him, or make such order in relation to the suit as it thinks fit, applies. The learned Judge further held that the penalty under R. 10 applies only to some default of a party under R. 9 and an order under R. 10 cannot be passed when a defendant fails to file written statement under R. 1. The learned Judge took the view that "a party to a suit, as such, is not bound to put in a written statement; if he does not do so, he is taken to admit the allegations in the plaint, but he is entitled to appear and submit any argument open to him on the plaint....." Thereafter the learned Judge went on to consider the question whether, as a rule the written statement filed after the settlement of issues should be rejected and answered it in the negative.

8. There is another decision of this court in Sial Sinha v. Shivadhari Sinha (AIR 1972 Pat 81) of Untwalia J. (as he then was). In that case the defendant in spite of service of summons had not appeared and had not filed any written statement for about three years, thereafter he had appeared and prayed for time to file written statement but this was refused and he was also not permitted to be present at and take part in the hearing of the suit. Against this order he had come up to this court. The learned Judge held that under O. VIII, R. 1, the petitioner had to file a written statement at or before the first hearing which he did not do and, therefore, the order refusing permission to file written statement was correct. The learned Judge, however, held that the suit not having been fixed for ex parte hearing, the defendant had a right to take part in the hearing of the suit even in the absence of a written statement. The learned Judge observed that "if a defendant does not file a written statement it cannot be said that he has admitted all the facts pleaded by the plaintiff." He relied on a Bench decision in the case of J. B. Ross and Co. v. C. R. Scriven (AIR 1917 Cal 269 (2)). The decision in the case of Binda Prasad v. United Bank of India (AIR 1961 Pat 152) where the learned Judge had ob-

served that if a party does not file written statement he is taken to admit the allegations in the plaint, was not considered.

9. There is another decision of a Bench of this court reported in the case of Smt. Ramsurat Devi v. Satraji Kuer (AIR 1975 Pat 168). In this case the learned Judge held that "non-filing of the written statement by the defendant .....would not amount to admission of all the facts pleaded in the plaint by the plaintiff." The decision in the case of Siai Sinha v. Shivadhari Sinha (supra) as also in the case of J. B. Ross and Co. (supra) were relied upon. Again it appears that the decision in the case of Binda Pd. v. United Bank of India (AIR 1961 Pat 152) (supra) was not brought to the notice of the learned Judges.

10. Another decision of this court, which may be referred to is in the case of Govind Ram Agrawalla v. Harsukhrai Doshi (1969 Pat LJR 65). In that case on the failure of the defendant to file written statement, the court had adjourned the suit for ex parte hearing and ultimately an ex parte decree had been passed. The defendant had then applied under O. IX, R. 13 which application also was rejected. Thus he had come up in appeal. The learned Judges held that the order for ex parte hearing was not correct because it was not a case where the court had required the defendant to file a written statement under R. 1 of order VIII and therefore it was not obligatory on him to do so. The learned Judge, however, observed that R. 10 of O. VIII applied to both cases where a court required a defendant to file written statement either under R. 1 or R. 9, and that, where the court did not require him to do so. R. 10 of O. VIII had no application. The learned Judges further held that where a defendant had failed to file a written statement, when not required by court, the suit should be posted for hearing and not for ex parte hearing and the defendant cannot be debarred from taking part in the hearing of the suit.

11. There are some other decisions of other High Courts, which may usefully be referred to. In the case of Ram Rakhan v. Govind Das (AIR 1945 All 352) the defendant had not filed a written statement on or before the date fixed for the filing thereof. The date fixed for framing issues was, however, a later date but at the end of the day fixed for filing of the written statement, the plaintiff had requested the court to proceed to decide the suit. The court passed an order on the application that it may be put up on the next date. On the next date the defendant did not appear and the evidence of the plaintiff was recorded ex parte and a decree was passed. The defendant filed an application to set aside the decree. The court rejected the application. Thus an appeal was filed before the High Court. The learned Judge held that "a defendant is not compelled to file a written statement unless he is definitely directed to do so by the court" and he can exercise that discretion at any time before the first hearing or up to some date which is fixed by the Court. The learned Judges held that the date of settlement of issues being subsequent, the defendant was not bound to file it at an earlier date and was entitled to exercise his discretion till the date of framing of issues. In the case of Kalloo v. Mt. Imaman (AIR 1949 All 445) a learned single Judge also held that the first hearing in a suit commences when the court looks into the plaint in order to formulate the points in controversy between the parties. In the case of Union of India v. Bhagwan Das (AIR 1976 Delhi 96), on the failure of the defendant to file a written statement within the time allowed by the court, the court had pronounced judgment against the defendant. The learned Judge held that R. 10 of O. VIII does not apply to a case where the court has not required the defendant to file the written statement. The learned Judge also held that non-filing of the written statement does not amount to admission of the allegations contained in the plaint, as Rule 5 of O. VIII does not apply to such a case.

12. I would now refer to certain decisions which appear to be contrary to the views expressed above. In Vinayak Shreedhar Kulkarni v. Chintaman Vaman Kulkarni (AIR 1938 Bom 470), the defendant did not file a written statement and prayed for time, the prayer was rejected and the case was fixed for ex parte hearing. The learned Judges held that "a party is not bound to put in a written statement; if he does not do so, he is taken to admit the allegations in the plaint, but he is entitled to appear and submit any argument open to him on the plaint....." In an earlier case of that court Shriram Surajmal v.

Shriram Jhunjhunwalla (AIR 1936 Bom 285), a Division Bench of that court also relying upon R. 5, O. VIII, had held that where there is no pleading, there is no denial or non-admission on defendant's part and he is bound by all the allegations in the plaint. In this case the learned Judges had dissented from the decision of Calcutta High Court in the case of J. B. Ross and Co. (AIR 1917 Cal 269 (2)) (supra) to the effect that O. VIII, R. 5, had no application to a case where there was no written statement at all. In another case Timber Pvt. Ltd. v. Chandu Lal (AIR 1964 J & K 58) it was held that "the court had ample power under O. VIII, R. 10 of the Civil P. C. to pronounce judgment against the defendant when he failed to present a written statement in spite of the instructions of the court, or pass any other order which the court thought fit in relation to the suit."

13. It will thus appear that in view of R. 1 of O. VIII (as it stood prior to amendment in 1976) it was held that the defendant was not bound to file a written statement unless specially required by the court to do so; that he had a right to file a written statement at or before the first hearing; that the first hearing, is the date fixed for framing of issues where summons issued is for framing of issues or the date of final hearing where the summons issued is for that purpose; that according to some decisions the provisions of Rule 10 of O. VIII do not apply to a case where the court does not require the defendant to file a written statement under the provisions of R. 9, whereas according to other decisions R. 10 applies even to a case where there is a failure to file a written statement when required by the court to do so under R. 1 as well; that if the defendant failed to file a written statement when not required by the court to do so, his right to file the written statement could not be taken away before the date of first hearing; that in cases where no written statement is filed, when not required by the court to do so, the defendant has a right to appear and participate in the trial of the suit even in the absence of a written statement, though his participation may be to a limited extent. There is a conflict of decisions on the point as to whether in the absence of a written statement the defendant is supposed to be bound by all the facts pleaded by the plaintiff in his plaint. In most of the decisions referred to above it was also held that if the defendant has not filed the written statement on his own at or before the first hearing the suit should be fixed for hearing and not for ex parte hearing.

14. As I have already stated earlier, counsel for the petitioners placed great reliance on the decision in the case of Chikkula Chendraiah (AIR 1961 Andh Pra 102) (supra). I have, however, already shown that the decision was on a different set of facts inasmuch as in that case the order forfeiting the right of filing written statement was taken away much before the first date of hearing. The learned Judge was, therefore, not called upon to answer the question as to what would happen if the defendant did not file the written statement after the first day of hearing, namely, the date of framing the issues, within the time permitted by court. There are observations, however, quoted earlier which are relied upon by counsel for the petitioners in support of the argument that there is nothing in Rule 1 which enables a court to forfeit the right of filing a written statement except in cases where the court requires him to do so. With very great respect, I am not prepared to concur in the view. This is the solitary decision in which such an observation has been made. In the decision of this court in the case of Siai Sinha (AIR 1972 Pat 81) (supra) Untwalia, J. had held that the refusal by the court to permit a defendant who had not filed written statement within the time permitted by the court, was correct. True, no reasons have been given for the conclusion aforesaid. However, it seems to me that it is clear that the right of the defendant to file a written statement in a case where he is not required by the court to do so enures only until the first day of hearing. After that day it is open to the court to grant time for the same or refuse to do so. The right does not continue where the court refuses to extend the time. In my view, it is the inherent right of the court to regulate the procedure according to the Code. If the Code gives an option to the defendant to file such a written statement by a certain date, this option must be deemed to come to an end after that date and in such circumstances the defendant is at the mercy of the court. Therefore, the correct view in law according to me is that after this day of first hearing it is open to the court to

grant extension of time for filing the written statement or not and it is the inherent right of the court either to grant such time or to refuse it. The right of filing the written statement can, therefore, be forfeited after the day of first hearing, though not before it. The mere fact that Rule 1 does not contain such a provision is of no importance for the simple reason, as I have said above, that the court has the inherent power to do so.

15. In the present case the defendant did not file the written statement within the time permitted by the court and the court, therefore, said that no further time would be granted and fixed the case for hearing; while doing so the court further said that the defendant would be entitled to take part in the proceedings of the suit even in the absence of the written statement. That is in accordance with the decisions of this court. Thus, in the present case the order does not suffer from any illegality.

16. In the result, I find that the court below had jurisdiction to pass the impugned order. There is thus no merit in this application and it is accordingly dismissed with costs.

Petition dismissed.

AIR 1979 PATNA 83

B. P. JHA AND
NAGENDRA PRASAD SINGH, JJ.

Bihar State Electricity Board, Patna and another, Appellants v. M/s. Gaya Cotton Jute Mills Ltd., Respondents.

A. F. O. D. No. 52 of 1968, D/- 26-4-1978.*

(A) Electricity (Supply) Act (54 of 1948), Ss. 5 and 60 — Take over of Electricity Power House of a Private Mills by State Government in 1951 — Constitution of a State Electricity Board from 1-4-1958 — Debts due to State Government on account of arrears of Electricity charges can only be realised by the Board after 1-4-1958 — State Government has no locus standi to institute suit for such debts. (Para 5)

Anno: AIR Manual (3rd Edn.) Electricity (Supply) Act, S. 5 N. 1; S. 60 N. 1.

(B) Limitation Act (9 of 1908), Articles 116 and 149 — Electricity (Supply) Act (54 of 1948), S. 60 — Debts on account of supply of electric energy due to State Govt. — Suit filed after constitution of Electricity Board — Limitation is governed by Art. 116 and not Art. 149.

The Board is statutory corporate body and it has its own legal entity and in that sense it is neither an agent nor a department of the Govt. Therefore the benefit of Art. 149 is not available to the Board. (Para 5)

Any such suit filed on behalf of the Board has to be treated as a suit filed on behalf of any other person and the provisions of Limitation Act applicable to persons other than State Govt. are applicable. As such, the suit should have been filed within 6 years from the date when the amounts became due. (Para 6)

Anno: AIR Comm. Lim. Act (3rd Edn.), Art. 116 N. 1; Art. 149 N. 2.

(C) Electricity (Supply) Act (54 of 1948), S. 60-A (as added by Act 30 of 1966) — Revival of time-barred claims — Non obstante clause — Effect.

Section 60-A has a non obstante clause which means that notwithstanding anything in the Limitation Act the said section has to prevail; this is the command of the Parliament which has ample power to pass a retrospective legislation so as to affect even rights of the parties which had become final under the then existing law. (Para 7)

In view of the language of S. 60-A itself it cannot be held that suits in respect of claims which had become barred cannot be instituted thereafter. The purpose of S. 60-A itself appears to give a new lease of life to such suits which otherwise would not have been entertained. In view of this provision, it was open to the Electricity Board to file suit for realisation of the amounts in question within three years from coming into force of the said Amending Act, Merely because the suit was pending when the said Amending Act came into force it cannot be held that the benefit of this section is not available to the Board. (Para 7)

Cases Referred: Chronological Paras

AIR 1953 SC 244 7

1952 AC 109: (1951) 2 All ER 587, East End Dwellings Co. v. Finsbury Borough Council 7

AIR 1951 Bom 440 7

K. B. Verma and Dinesh Charan, for Appellants; Rameshwar Prasad No. 2, Upendra Prasad and O. P. Agrawal, for Respondents.

*(From decision of Ajit Nath Sarkar, Addl. Sub. J. Gaya, D/- 29-9-1967.)

LV/LV/F194/78/USD/VBB

NAGENDRA PRASAD SINGH, J.:— The Bihar State Electricity Board (hereinafter to be referred to as the Board) and the State of Bihar are the appellants in this appeal which has been filed for setting aside a judgment and decree passed by the learned Additional Subordinate Judge, Gaya dismissing the suit of the plaintiff-appellants. The suit in question had been filed on their behalf against the sole defendant for realisation of Rs. 41,446.37 paise.

2. According to the case of the plaintiffs, the defendant, which is M/s. Gaya Cotton Jute Mills Ltd. (hereinafter to be referred to as the Mills), had a power house for supplying electricity. By a registered deed of lease-cum-mortgage dated 14-12-1951 (Ext. 5) the said Power House was taken over by the State Government, but it was agreed that it shall be run by the State Government and the electric energy required will be supplied to the Mills on payment of usual charges for which bills shall be presented by the State Government to the Mills in question from time to time. In clause 6 of the said deed, it had been agreed that, "bills will be presented on behalf of the State Government from month to month for energy supplied to the company and the amount covered by bills so presented shall be paid by the company within three months of presentation and in case of non-payment within the said period the company will be liable to pay interest at the rate of (six) per cent (per) annum, "over the current due.....". The said clause further provided that if the entire amount of dues under different bills remained unpaid for a period of six months, then it shall be realised as a public demand by process of law and the State Government will be at liberty to take action under the provisions of Indian Electricity Act, 1910. It is the case of the plaintiffs that bills were presented from time to time and payments were also made by the Mills, but, later it was discovered that by mistake bills for incorrect amounts had been presented, and, as such, later a corrected revised bill was presented to the Company for Rupees 27,683/6/6 pies. The Mills, however, did not pay the said amount, giving cause of action to the plaintiffs to file the suit in question for realisation of the aforesaid amount along with the interest till the date of suit, which comes to Rs. 41,446.37 paise.

3. The defendant-Mill disputed its liability to pay the said amount on several grounds, including that the said claim was barred by limitation. It was also asserted on its behalf that whatever bill was presented on behalf of the State Government from time to time had been paid by it and there was no occasion to submit a revised bill after a lapse of several years.

4. In support of the respective stands taken by the parties, oral and documentary evidence were adduced. Learned Additional Subordinate Judge, however, was of the opinion that the suit in question having been filed on 27-9-1962 in respect of the dues which were payable for the period between June 1950 to February 1955, was barred by limitation. He was also of the view that the plaintiffs have failed to prove that any such amount was due from the Mill. Being aggrieved by the aforesaid findings, the two appellants have challenged them before this Court.

5. Before I discuss the merit of the respective contentions, I may point out that in the agreement, referred to above, regarding taking over of the Power House belonging to the Mill, it was agreed to supply the electric energy to the Mill on payment of the charges for such supply. This agreement was entered into between the State Government and the Mill in question. Later, in accordance with Section 5 of the Electricity (Supply) Act, 1948 (hereinafter to be referred to as the Electricity Act), the Bihar State Electricity Board was constituted on 1-4-1958. Sub-sec. (1) of Section 60 of the Electricity Act is as follows:—

"All debts and obligations incurred, all contracts entered into and all matters and things engaged to be done by, with or for the State Government for any of the purposes of this Act before the first constitution of the Board shall be deemed to have been incurred, entered into or engaged to be done by, with or for the Board; and all suits or other legal proceedings instituted or which might but for the issue of the notification under sub-sec. (4) of Section 1 have been instituted by or against the State Government may be continued or instituted by or against the Board."

Sub-section (4) of Section 1 of the Electricity Act, which has been referred to in Section 60 (1) authorises the different State Governments to notify dif-

ferent dates when the Act in question shall come in force. The effect of sub-section (1) of Section 60 is that after the Board was constituted, the debts which could have been realised by the State Government has to be realised by the Board. Perhaps, that is the reason that the suit in question was filed on behalf of the State Government as well as on behalf of the Board. The Board is a statutory corporate body and it has its own legal entity and in that sense it is neither an agent nor a Department of the State Government. Learned Additional Subordinate Judge, while holding that the suit in question was barred by limitation, pointed out that if the amount in question can be realised by the State Government, then the suit is not barred by limitation because under Article 149 of Limitation Act, 1908, a period of 60 years has been provided for any suit by or on behalf of the Central Government or any State Government. He further pointed out that if it is held that in view of sub-section (1) of Section 60, on and after 1-4-1958 only the Board can file a suit for realisation of the dues in question, then the benefit of aforesaid Article 149 is not available to the Board because it is a statutory body and in such a suit the Board will not be deemed to be agent of the State Government; for Board, Article 116 of the old Limitation Act may be applicable which prescribes a period of six years only which had expired before the suit in question was filed.

According to the learned Subordinate Judge, the State Government had no locus standi to file the suit in question and the suit on behalf of the Board was barred by limitation. Learned counsel appearing for the Board, in view of Section 60 (1) of the Electricity Act, could not urge that even after the constitution of the Board, it was open to the State Government to file a suit for realisation of any amount which was due to it. From a plain reading of that section it is apparent that after the constitution of the Board, it is the Board which is entitled to realise any dues which may be payable to the State Government in respect of the energy supplied by it to different consumers prior to the constitution of the Board. As such, I am also of the view, that the State Government had no locus standi to institute the suit in question, and in that view of the matter, there is no question of applicability of Article 149 of the Limitation Act.

6. Now the question is as to whether the Board can realise the amount aforesaid. Learned counsel appearing for the Board made a vain attempt to submit that Article 149 of the Limitation Act will also be applicable to the Board, This cannot be accepted because the Board being a statutory authority can by no stretch of imagination be held either an agent of the State Government or a department of the Government. Any such suit filed on its behalf has to be treated as a suit filed on behalf of any other person and the provisions of Limitation Act applicable to persons other than State Government, are applicable. As such, the suit should have been filed within six years from the date when the amounts became due. I have already pointed out that the amounts which are being claimed on behalf of the Board were payable during the period June, 1950 up to February, 1955. The six years period expired some time in February, 1961. The result is that when the suit was filed on 27-9-1962, the claim had become barred.

7. However, in the year 1966, by Act 30 of 1966, the Electricity (Supply) Act was amended. Apart from other amendments, a new Section 60-A was added. which is as follows:—

"60-A. Where the right to recover any amount due to the State Government for or in connection with the consumption of electricity is vested in the Board and the period of limitation to enforce such right has expired before the constitution of the Board, or within three years of its constitution, then, notwithstanding anything contained in the Indian Limitation Act, 1908 or any other law for the time being in force relating to limitation of action, the Board may institute a suit for the recovery of such amount—

(i) where it has been constituted before the commencement of the Electricity (Supply) Amendment Act, 1966, within three years of such commencement; and

(ii) where it has been constituted after such commencement, within three years of its constitution."

This section provides that where the period of limitation to enforce the right to recover any amount due to the State

Government has expired before constitution of the Board or within three years of its constitution then notwithstanding anything contained in the Limitation Act, the Board may institute a suit for recovery of such amount within three years of the commencement of the aforesaid Amending Act. In other words, if any claim or amount became barred by limitation within three years of the constitution of the Board, then in view of clause (i) of Section 60-A, the suit could be instituted within three years of the coming into force of the aforesaid Amending Act (Act 30 of 1966). The relevant provision of this Act came in force sometime in September, 1966.

According to the Board, after the introduction of Section 60-A, a suit for realisation of any amount can be filed within three years from September, 1966, even in respect of claims which were barred by limitation within three years of the constitution of the Board, i.e., within three years from 1-4-1958. In the present case, admittedly the claim was barred in respect of the amount in question on different dates between 1st April, 1958 and February, 1961, which will be within three years of the constitution of the Board, as required by Section 60-A, then the suit in respect of such barred claims could have been filed within three years from September, 1966. Learned Subordinate Judge, however, has taken the view that S. 60-A cannot revive the right of the Board to recover the amount in question which had been barred by limitation before the aforesaid section came in force so as to affect the right of the defendant-Mill retrospectively.

In my opinion, learned Subordinate Judge has not appreciated the scope of the retrospective legislation. Sec. 60-A has a non obstante clause which means notwithstanding anything in the Limitation Act the said section has to prevail; this is the command of the Parliament which has ample power to pass a retrospective legislation so as to affect even rights of the parties which had become final under the then existing law. Reference in this connection may be made to an observation of Chagla C. J. (as he then was) in the case of Abdul Majid Haji Mahomed v. P. R. Nayak (AIR 1951 Bom 440) where it was observed in connection with an Ordinance which was brought in force and which purported to affect certain rights which had become final. It was observed (at p. 447):—

"The language used in Section 58 is both striking and significant. It does not merely provide that the orders passed under the Ordinance shall be deemed to be orders passed under the Act, but it provides that the orders passed under the Ordinance shall be deemed to be orders under this Act as if this Act were in force on the day on which certain things were done or action was taken. Therefore the object of this section is, as it were, to antedate this Act so as to bring it into force on the day on which a particular order was passed which is being challenged."

In the case of State of Bombay v. Pandurang Vinayak (AIR 1953 SC 244 at p. 246) it was observed in connection with a deeming clause:—

"When a statute enacts that something shall be deemed to have been done, which in fact and truth was not done, the Court is entitled and bound to ascertain for what purposes and between what persons the statutory fiction is to be resorted to and full effect must be given to the statutory fiction and it should be carried to its logical conclusion."

Reference was also made to oft-quoted observation of Lord Asquith in East End Dwellings Co. Ltd. v. Finsbury Borough Council, (1952) AC 109:—

"If you are bidden to treat an imaginary state of affairs as real, you must surely, unless prohibited from doing so, also imagine as real the consequences and incidents which, if the putative state of affairs had in fact existed, must inevitably have flowed from or accompanied it..... The statute says that you must imagine a certain state of affairs; it does not say that having done so, you must cause or permit your imagination to boggle, when it comes to the inevitable corollaries of that state of affairs."

The powers of Parliament to affect rights which have attained finality have always been recognised, except if it is found to be ultra vires for some other reasons.

I am of the opinion that in view of the language of Section 60-A itself it is difficult to hold that suits in respect of claims which had become barred cannot be instituted thereafter. The purpose of Section 60-A itself appears to give a new lease of life to such suits which otherwise would not have been enter-

tained. In view of this new provision, it was open to the Board to file suit for realisation of the amounts in question within three years from the coming into force of the said Amending Act. If this is the legal position, then I am not able to appreciate as to how merely because the suit was pending when the said Amending Act came into force, the benefit of that provision shall not be available to the Board. It was urged on behalf of the defendant-Mill that if the suit would have been taken up for hearing some day prior to September, 1966, then, in usual course, it would have been dismissed on the ground of limitation. That is a different matter. But, once it remained pending and Section 60-A extended the period of limitation for such suits, in my opinion, it cannot be held that benefit of this section is not available to the plaintiffs who had instituted the suit prior to coming into force of Section 60-A. It is just a consequence of retrospective provision under Section 60-A, and while deciding this, the court should not allow one's imagination to boggle. Accordingly, I hold that the suit, which was filed on behalf of the Board, will not be deemed to be barred by limitation.

8. This takes me to the next question as to whether the Board has been able to substantiate its claim. I have already pointed out that the learned Subordinate Judge has recorded a finding against the Board on this issue. Learned counsel appearing for the appellants has placed different materials on the record. From the plaint itself it appears that the defendant has made payments in respect of bills which had been presented to it from time to time. The claim, which is in dispute, was made several years after, on the basis, that the bills had been submitted for lesser amounts due to mistake. In what respect this mistake had occurred is not clear from the records of the case. In this connection I may refer to a letter dated 8-8-1960 (Ext. 3/a) addressed by the Board to the defendant before institution of the suit. While saying that an amount of Rs. 27,683/8/6 was outstanding and payable by the Mill on account of energy charges, it has not been mentioned as to under what head that amount was due. In that connection only this was mentioned:—

"The difference is due to wrong method and principles adopted by the company in calculating and fixing actual cost of production."

In my opinion, this is absolutely vague. Even at the trial, the witnesses, who have been examined on behalf of the plaintiffs, have simply proved certain accounts. Even the original account books and papers were not before the court. Learned Subordinate Judge has pointed out that from the evidence of those witnesses, it is not clear as to why the amount claimed for, remained unpaid. Learned counsel who appeared before us for the appellants also could not explain the exact nature of the demand and as to how this mistake was discovered after several years. He conceded that this could have been explained by an Electrical Officer whose services are not available for the present. In such a situation, I find it difficult to reverse the finding of the learned Subordinate Judge on this issue. The initial onus of proving the claim made on behalf of the plaintiffs was on them. The onus will be all the more heavy on them because admittedly the defendant has made payments in respect of the bills which had been submitted to it from time to time. This amount is said to be due in respect of which demand could not be made earlier. In such a situation, the board was required to substantiate its claim to the satisfaction of the court which they have failed to do. Apart from that I have not been able to appreciate as to how this claim is being made after several years, in view of the specific condition regarding the adjustment of accounts made in the aforesaid deed of lease-cum-mortgage (Ext. 5), the relevant portion of which is as follows:—

"Adjustment of accounts, and on account of the bills payable by the company for energy supplied as above on the basis of actual cost of production and administration and supervision charges as aforesaid shall be paid in each year as soon as the cost of production for the previous year is actually worked out and difference, if any, shall be adjusted in accounts by the State Government in the following year by debit or credit, as the case may be. And difference arising about working or fixing of actual cost of production as aforesaid shall be arbitrated by an Electrical Officer serving under the Union Government of India whose service may be spared by the Union Government at the request of either party."

According to this term, a period was fixed within which the accounts had to be adjusted. If there was any difference on that account, such dispute had to be referred to the named Arbitrator for arbitration. The State Government or the Board should have adjusted the accounts each year as soon as the cost of production for previous year is actually worked out and difference, if any, should have been adjusted in accounts by the State Government in the following year by debit or credit. Learned counsel could not point out as to why such step was not taken. Any way, as I have already held above, the claim having not been substantiated, the Board is not entitled to the decree prayed for.

9. In the result, the appeal fails and is dismissed. But, in the circumstances of the case there will be no order as to costs.

B. P. JHA, J.:— 10. I agree with the judgment of my learned Brother. The simple question in this case is:

Whether the Board can submit a revised bill of Rs. 27,683/8/6 pies after a lapse of so many years. The answer must be given in the negative in view of clause 6 of the lease-cum-mortgage bond, dated 14-12-1951 (Ext. 5), Clause 6 of the lease-cum-mortgage bond clearly prescribes the mode of presentation of the bills and the way in which payment is to be made by the defendant-Mill. In view of the fact that there is no clause in the mortgage bond to furnish a revised bill, and as such it is contrary to Cl. 6 of the mortgage bond. Hence, I hold that on this ground the suit of the Board must be dismissed.

Appeal dismissed.

AIR 1979 PATNA 88

R. P. SINHA AND B. P. JHA, JJ.

Rukmini Devi, Appellant v. Pawan Kumar Gupta, Respondent.

Misc. (Second) Appeal No. 277 of 1974, D/- 23-2-1978.

(A) Civil P. C. (5 of 1908), S. 47, O. 6, R. 17 — Agreement for sale of immovable property — Suit for specific performance — Decree passed only against vendor and not against subsequent purchaser — Execution of decree against latter even by amendment of plaint, is not permissible — Amendment at execution stage cannot be allowed even by applying Ss. 22 and 19 (b) of Specific Relief Act — (Specific Relief Act (47 of 1963), Ss. 22, 19 (b)). AIR 1954 SC 75 Rel. on; AIR 1976 Delhi 56 and AIR 1976 Delhi 181, Disting. (Paras 5, 6, 7)

Anno: AIR Comm. C.P.C. (9th Edn.), S. 47 N. 2; O. 6 R. 17 N. 13; AIR Manual (3rd Edn.) Specific Relief Act, S. 19 N. 3.

(B) Civil P. C. (5 of 1908), S. 152 — Decree — Amendment — When permissible.

The decree cannot be amended if it is prepared on the basis of the judgment If there is variance with the judgment and decree then only, the decree can be amended otherwise not. (Para 7)

Anno: AIR Comm. C.P.C. (9th Edn.), S. 152 N. 6.

Cases Referred : Chronological	Paras
AIR 1976 Delhi 56	6
AIR 1976 Delhi 181	6
AIR 1954 SC 75	5

Kailash Roy and Binod Kumar Roy, for Appellant; T. K. Jha, Shashi Shekhar Drivedi and Binod Shankar Tiwari, for Respondent.

B. P. JHA, J.:— The decree-holder preferred an appeal against the judgment of Sri Manoranjan Sahay Verma, 1st Additional District Judge, Chapra dated 31st July, 1974 in Miscellaneous Appeal No. 74 of 1972.

2. The plaintiff decree-holder filed a suit for specific performance of a contract against Hirdya Narain (defendant No. 1) and Pawan Kumar Gupta (defendant No. 2). The court passed the ex parte decree (Ext. F) against Hirdya Narain. The court directed Hirdya Narain to execute a sale deed within three months from the date of decree provided the plaintiff deposits Rs. 7,300 in court. It also directed that if defendant No. 1 fails to execute the sale deed by 5th July, 1969 then is that case the court shall execute the sale deed in favour of the plaintiff decree-holder. After the passing of the decree, the plaintiff decree-holder applied for execution in execution case No. 12 of 1969. The plaintiff deposited Rs. 7,300 in court. Though plaintiff complied with the direction of the court, Hirdya Narain (defendant No. 1) did not execute the sale deed as per direction of the court. In this circumstance, the court executed the sale deed in favour of the plaintiff decree-holder. Thereafter, the plaintiff decree-holder applied for delivery of

possession under O. 21, R. 35 of the Code of Civil Procedure. The execution court issued the writ of delivery of possession and the Nazir effected the delivery of possession on 3rd April, 1970 (Ext. C/3). On 1st April, 1970, Pawan Kumar (defendant No. 2) filed a petition under Section 47 of the Code of Civil Procedure and prayed that delivery of possession be stayed. The court by its order dated 3rd April, 1970 stayed the delivery of possession. The concurrent findings of both the courts are that the writ of delivery of possession was served by the Nazir on 3rd April 1970.

3. In the objection petition under S. 47 of the Civil P. C., the defendant No. 2 raised several objections to the following effect:—

1. that the decree is inexecutable as no decree was passed against defendant No. 2.

2. that the decree did not provide for delivery of possession.

3. the court did not direct defendant No. 2 to deliver possession of the suit property.

4. After considering the objections of defendant No. 2 both the courts concurrently held:—

1. that the decree was inexecutable against defendant No. 2.

2. that delivery of possession effected by the Nazir on 3rd April, 1970 was illegal and the property should be redelivered to defendant No. 2 in accordance with law.

5. In the present case the short point for consideration is: whether the decree for specific performance of contract passed against Hirdya Narain (defendant No. 1) is executable against Pawan Kumar (defendant No. 2-respondent)? In my opinion the impugned decree is inexecutable against Pawan Kumar (respondent). In this connection learned counsel for the respondent relied on a decision of the Supreme Court in Durga Prasad v. Deep Chand (AIR 1954 SC 75). In that case their Lordships of the Supreme Court held as follows (at p. 81):—

"In our opinion, the proper form of decree is to direct specific performance of the contract between the vendor and the plaintiff and direct the subsequent transferee to join in the conveyance so as to pass on the title which resides in him to the plaintiff."

In my opinion the decision of the Supreme Court applies to the facts of this case. If there is no decree against the subsequent purchaser (defendant No. 2) then, in my opinion, the decree cannot be executable against him. The reason is this :—

By virtue of the subsequent sale, title of the vendor (defendant No. 1) passed on to defendant No. 2. Unless and until the title of the subsequent purchaser (defendant No. 2) is cancelled or declared void, the executing court cannot ask defendant No. 2 (subsequent purchaser) to deliver possession of the property which he had validly purchased from the vendor (defendant No. 1). It is in this circumstance the Supreme Court was of the opinion that in a case of specific performance of the contract, the subsequent transferee and the vendor both should execute the sale deed in favour of the plaintiff. In the present case Hirdya Narain (defendant No. 1 vendor) was directed by virtue of the decree (Ext. F) to execute a sale deed in favour of the plaintiff on depositing Rs. 7,300/-. By virtue of this decree (Ext. F), the subsequent purchaser (defendant No. 2) was not directed to execute sale deed in favour of the plaintiff along with Hirdya Narain (original vendor). In the absence of such direction, the decree (Ext. F) cannot be executable against subsequent transferee-Pawan Kumar. If it is so, the defendant No. 2 is not entitled in law to relinquish his title or to deliver possession of the property which he had validly purchased from Hirdya Narain. In this circumstance, I hold that the decree is inexecutable against the subsequent purchaser (defendant No. 2) and delivery of possession effected by the Nazir on defendant No. 2 is illegal and not in accordance with law. The concurrent findings of both the courts are that the Nazir effected the writ of delivery of possession on 3rd April, 1970. Both the courts concurrently held that the delivery of possession was illegal for the simple reason that the decree did not require defendant No. 2 to deliver possession. Hence both the courts concurrently held that defendant No. 2 may take re-delivery of possession of the property through the court in accordance with law. In my opinion there is no reason to differ with the concurrent findings of the courts below.

6. Learned counsel for the appellant contends that it is the duty of the executing court to amend the plaint under O. 6 R. 17 in order to do justice

between the parties. In this connection learned counsel for the appellant contends that O. 6 R. 17 provides that the court may at any stage of the proceeding amend pleadings. He submits that the words "at any stage of the proceedings" include the execution stage. I am unable to accept his argument. In my opinion the words occurring in O. 6 R. 17 "at any stage of the proceedings" mean the trial stage or the appellate stage arising out of the suit and not the execution stage. If the pleadings are being amended at the execution stage then there will be a fresh trial in the execution stage and a fresh judgment will have to be passed by the executing court. In my opinion such practice is quite foreign to the Civil P. C. In this connection learned counsel for the appellant relied on a decision of Delhi High Court in M/s. Ex-Servicemen Enterprises v. Sumey Singh (AIR 1976 Delhi 56). In that case the Delhi High Court interpreted S. 22 of the Specific Relief Act. Section 22 of the Specific Relief Act, 1963 runs as follows :—

"22. (1) Notwithstanding anything to the contrary contained in the Civil P. C. 1908, any person suing for the specific performance of a contract for the transfer of immovable property may, in an appropriate case, ask for—

(a) possession, or partition and separate possession, of the property, in addition to such performance, or

(b) any other relief to which he may be entitled, including the refund of any earnest money or deposit paid or (made by) him, in case his claim for specific performance is refused,

(2) No relief under Cl. (a) or Cl. (b) of sub-sec. (1) shall be granted by the court unless it has been specifically claimed: Provided that where the plaintiff has not claimed any such relief in the plaint, the court shall, at any stage of the proceeding, allow him to amend the plaint on such terms as may be just for including a claim for such relief.

(3) The power of the court to grant relief under Cl. (b) of sub-sec. (1) shall be without prejudice to its powers to award compensation under S. 21."

While interpreting the words "at any stage of the proceeding" the Delhi High Court held that the words "at any stage" include the execution stage. In my opinion the decision of the Delhi High Court does not apply to the facts of this case. In the present case I am not required to interpret Sec. 22 of the Specific Relief Act. The same matter again came for discussion before the learned single Judge of Delhi High Court (See AIR 1976 Delhi 181). When plaint was amended, the defendant also amended the written statement and the defendant wanted that the case should be tried by the executing court. The Delhi High Court rejected this contention of the defendant. In the case before the Delhi High Court a compromise was entered into between the plaintiff and the defendant and the defendant had agreed to execute the sale deed and also to deliver possession to the plaintiff for a sum of Rs. 1,16,100/-. In that case the plaintiff did not claim the delivery of possession in the relief portion of the plaint. In order to remove the technical difficulty the court allowed the plaintiff to amend the plaint in respect of delivery of possession under S. 22 of the Specific Relief Act, 1963. It is, therefore, clear that there was a valid decree against the defendant and as such the court was justified while interpreting S. 22 of the Act to direct the plaintiff to amend the plaint. In the present case no decree has been passed against defendant No. 2 for the specific performance of contract nor defendant No. 2 was asked to deliver possession of the suit property to the plaintiff. Hence in the absence of any such decree, the delivery of possession of the property of defendant No. 2 cannot be effected for the simple reason that the defendant No. 2 is holding the property on the basis of the valid sale deed executed by defendant No. 1 in his favour.

7. Learned counsel for the appellant contends that in view of S. 19 (b) of the Specific Relief Act, 1963, the decree of the specific performance of contract can be enforced against the subsequent purchaser. He contends that all the averments in the plaint suggest that the subsequent purchaser purchased it to the knowledge of the original contract. If it is so, learned counsel for the appellant contends that it is within the power of the executing court to amend the plaint so that the specific relief against defendant No. 2 be added.

In my opinion such amendment cannot be allowed at the execution stage. If it is allowed the defendant will file

fresh written statement, the court will have to frame issue and to deliver fresh judgment on the facts of the case. In my opinion such procedure was never envisaged by the framers of the Civil P. C. Hence I am unable to allow the plaintiff decree-holder to amend the plaint at this belated stage in the execution proceeding. In this connection the plaintiff decree-holder filed a petition for amendment of judgment and decree for passing a decree against defendant No. 2. This prayer was rejected on 15-9-69. No revision was preferred against the order dated 15-9-69 and, therefore, it has become final between the parties. The executing court was justified in refusing to amend the decree for the simple reason that no relief was claimed in the plaint against defendant No. 2. If no relief was claimed against defendant No. 2, the executing court was justified in refusing to amend the decree. It is a settled law that the decree cannot be amended if it is prepared on the basis of the judgment. If there is variance with the judgment and decree then only the decree can be amended otherwise not. In the present case there is no variance with the judgment and decree and as such it cannot be amended.

8. Learned counsel for the appellant contends that it is the duty of the court to pass the decree and if there is any mistake in the decree it can be amended by the executing court. In my opinion there was no mistake in the decree. The plaintiff prayed for passing a decree against defendant No. 1 (Hirdya Narain) for specific performance of contract. The trial court passed the ex parte decree in favour of defendant No. 1 on the basis of the claim of the plaintiff decree-holder. The plaintiff never prayed that the decree be passed against defendant No. 2 and hence the trial court did not pass any decree against defendant No. 2. Hence in my opinion the trial court did not commit any mistake in preparing the decree. Hence there is no need of amendment of decree.

9. The point of law raised in this appeal is summarised thus:—

The words "at any stage of the proceedings" occurring under O. 6 R. 17 of the Civil P. C. mean the trial stage or at the appellate stage arising out of the suit. It does not include execution stage. In a decree for specific performance of contract, the decree must direct the original vendor and the subsequent purchaser to execute the sale deed in favour of the petitioner. If the subsequent purchaser has not been directed to execute the sale deed in favour of the petitioner, the decree cannot be executed against him. Hence in a case of specific performance of contract such decree must be passed in order to effect delivery of possession on the subsequent purchaser.

Ordinarily the decree should not be amended. If there is variance between the judgment and decree the decree can be amended otherwise not.

10. In the result the appeal is dismissed and parties will bear their own costs.

R. P. SINHA, J. :— I agree with the order proposed.

Appeal dismissed.

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K. B. N. SINGH, C. J. AND S. SHAMSUL HASAN, J.

Dr. (Mrs.) Shakuntala Singh and another, Petitioners v. State of Bihar and others, Respondents.

Civil Writ Jur. Case No. 1336 of 1977, D/- 4-9-1978.

(A) Patna Municipal Corporation Act (13 of 1952), S. 270 (2) — Notice to owner intimating intention of declaring street as public street — Remedy available to the owner.

An appeal lies only against a notice intimating the intention of declaring a street as a public street under S. 270 (2) within thirty days the notice is first exhibited, and no appeal lies from the notice declaring a street as a public street. Two alternative remedies are available to the owner of the land, i.e. (i) to file an objection, as provided under subsec. (2) of S. 270 of the Act, within thirty days of the first exhibition of the notice intimating the intention to declare a 'street' as a 'public street', or (ii) to file an appeal within the same period before the District Judge, as provided under S. 270 (3) of the Act.

(Para 3)

(B) Patna Municipal Corporation Act (13 of 1952), Ss. 270 (2) and 4 (pp) and (vv) — Private passage — Exclusive pos-

session with owner — Not being a street within S. 4 (vv) cannot be declared a public street. (Interpretation of Statutes.)

It is only in respect of any street that the Chief Executive Officer can by notice give intimation to declare it a public street, and, if no objection is filed by the owner or the majority of owners of such street within a period of one month next after such notice is first exhibited, then and then only the Chief Executive Officer is entitled, by means of a second notice exhibited in such street, to declare it a public street vested in the Corporation. In case of objection by the owner or the majority of owners of such street within the statutory period the second notice declaring it to be a public street and vesting in the Corporation cannot be issued. The reason behind such restriction is that a street belonging to an individual or a group of persons can only vest in the Corporation either by his or their consent, or by acquisition, and non-filing of objection by the owner or majority of owners will be taken as a tacit consent to such declaration by the Corporation as a public street and vesting in the Corporation. Any other construction will make the provision unconstitutional, inasmuch as it would amount to acquisition of one's property without payment of any compensation and thus violative of Art. 31 (2) of the Constitution. (Para 7)

It is well settled principle of construction of a provision of a statute that where two interpretations thereof are possible, the one which sustains the vires of the provisions and subserves its purpose is to be preferred to the one which makes it ultra vires. (Para 7)

It, therefore, becomes manifest that the Corporation before issuing a notice under S. 270 (2) intimating its intention to declare a street to be a public street, must satisfy itself, first, that the so-called street really comes within the definition of 'street' as given in S. 4 (vv). Since the Corporation is in possession of all the materials which could indicate the nature of a particular property situate within the Corporation, it is not open to it to indulge in a roving enquiry in this regard with regard to any holding, for asserting that the property is a street, by issuing a notice of intention under S. 270 (2). (Para 9)

B. C. Ghose and Dilip Kumar Sinha, for Petitioners; S. N. Jha, Standing Counsel No. 2 and B. P. Pandey, Jr. Counsel, for the State; Basudeva Prasad (for Nos. 2, 3 and 4), Radha Mohan Prasad and Mrs. Renuka Sharma (for No. 7) and Birendra Mohan Singh (for No. 2), for Respondents.

S. SHAMSUL HASAN, J.:— The petitioners in this writ application have prayed for quashing two notices, one dated the 28th July, 1977 (Annexure 4) and the other dated the 30th July, 1977 (Annexure 8), both issued by the Patna Municipal Corporation (Respondent No. 2-hereinafter to be referred to as "the Corporation"), as also for issuance of writ of mandamus restraining respondent No. 2 and its officers (respondents Nos. 3 and 4) from interfering with the petitioners' personal private property and their rights over the lands described in the two sale deeds, extracts copies of which have been filed as Annexures 1 and 2 to this writ application.

2. The petitioners' case, in short, which is also not in dispute, is that they are purchasers of ten kathas of land bearing plots Nos. 31C and 32/2055 appertaining to Khata No. 540, situated in Mauza Dhakanpura Lodipur (now commonly known as the Boring Road area), Police Station Kotwali, from one Shrimati Hemawati Sinha, wife of Shri Shivaji Prasad Sinha, I.P.S., Additional I.G. of Police, Bihar, by means of two sale deeds, both dated the 12th July, 1973, one in favour of petitioner No. 1 in respect of seven kathas (Annexure 1), and the other executed in favour of petitioner No. 2 in respect of three kathas (Annexure 2). Originally, the aforesaid plots of land belonged to one Babulal Gope, who sold the same to one Smt. Satirani Devi, by a registered sale deed dated the 20th Sept. 1937. Smt. Satirani Devi, in her turn, sold those two plots to the aforesaid Smt. Hemawati Devi by a registered sale deed dated the 31st May 1949 and the latter got herself mutated in respect of the lands purchased by her. At about the same time, one Smt. Usha Sinha, sister of Smt. Hemawati Sinha also purchased ten kathas of land appertaining to the same plots, adjacent north, and her land lay to the adjacent south of Boring Road. By a mutual agreement Smt. Usha Sinha gave a small strip of land to Smt. Hemawati Sinha, her sister, to provide her an access to Boring Road, and the latter, in lieu thereof, gave an equivalent area of land lying adjacent to her sister's land

to Smt. Usha Sinha, and it is said that after this mutual arrangement, both the sisters got the entire area, including the passage, enclosed by a pucca boundary wall in 1966. The passage is never meant for public use, which fact is supported by an affidavit filed by Shri Shivaji Sinha, husband of Smt. Hemawati Sinha, in a revision petition arising out of a proceeding under S. 144 of the Cr. P. C. relating to the land, which petition was disposed of by the 4th Additional Sessions Judge, Patna. The right of the petitioners over the strip of land, meant for private passage to the Boring Road, as mentioned earlier, was recognised by the Patna Improvement Trust, Patna Water Board and the State of Bihar, and, petitioner No. 1 constructed a drain and laid out water pipe over the land with the approval of the Water Board, the Public Works Department and the Corporation. According to the petitioners, no part of the aforesaid strip of land was a means of access for the public and has never been a public thoroughfare. Since the date of the purchase, it is stated, the petitioners have right, at all times and hours, to prevent all other persons from going over the said land and using it in any way and, as stated above, the land is bounded by a pucca boundary wall with a gate at the entrance facing Boring Road. A petition was, however, filed by one Shri Gyandeo Sharma (respondent No. 9) along with several other persons before the Corporation, stating that as the land in question is a road, it should be taken over by the Corporation for the benefit of the people of the locality. That petition, signed by sixteen persons gave details of the petitioners' land along with other lands. I may mention here that subsequently, several of the aforesaid signatories of the petition, filed affidavits saying that they had signed the petition in question under a misconception that it was actually a petition to the Corporation for arranging for proper drainage of the area and not for asking for a road through plots Nos. 31C and 32/2055 belonging to the petitioners. In their affidavits they have also averred that a petition to this effect was also filed before the Assistant Administrator of the Corporation on the 15th Nov. 1977 and a copy thereof was also annexed to the affidavits. Having come to know of the filing of the petition by Gyandeo Sharma and others requesting the Corporation to take over the petitioners' aforesaid strip of land as a public road, the petitioner filed a petition before the Administrator of the Corporation on the 28th April, 1977 (Annexure 5) bringing to his notice the fact that the passage in question is not a road but a private link meant to connect the house of the petitioners with Boring Road, and pointing out to him the existence of a public passage running northward, a little away, to the east and west of the plots of the petitioners, and asserting as false and mala fide the claim made by Gyandeo Sharma and others for taking over this passage of the petitioners as a public road. In spite of this objection made by the petitioners, the Administrator of the Corporation (respondent No. 3) issued a notice (Annexure 4) on the 28th July, 1977, purporting to be one under sub-sec. (2) of S. 270 of the Patna Municipal Corporation Act 1951 (hereinafter to be referred to as 'the Act') intimating his intention to declare the aforesaid private and personal passage of the petitioners to be a public street, avoiding therein all reference to the plot numbers of the petitioners' land, and, as will appear from the notice itself, even without forwarding a copy thereof to the petitioners. It will not be out of place to mention here that only a day before, by a letter dated the 27th July, 1977 (Annexure 7) the petitioner No. 2 and others had been asked by the Chief Engineer of the Corporation to appear before the Administrator on the 2nd Aug., 1977, in connection with the hearing of the objection petition filed by the petitioners on the 28th April, 1977 (Annexure 5), as mentioned earlier. On getting information about the issue of the notice (Annexure 4) and on receipt of the second notice (Annexure 8) dated the 30th July, 1977, asking petitioner No. 2 to stop construction of the garage on the passage in question, petitioner No. 2 vide his letter dated the 30th July, 1977 (Annexure 9) objected to it, and also asserting that the garage had been built on his own private land, which does not come within the purview of the definition of 'street' as given in S. 4 (vv) of the Act, and that it had been built according to the approved plan. In spite of the fact that the notice (Annexure 4) speaks of one month's time to file objection to the intended declaration of the petitioners' private land as public street, and petitioner No. 2 had, in fact, filed an objection on the 30th July, 1977 (vide Annexure 9), the Corporation got

a proceeding under S. 144 of the Cr P. C. started against petitioner No. 2, restraining him from constructing the garage on the land in question and a notice to that effect was received by petitioner No. 2 from the Subdivisional Magistrate, Sadar, Patna—vide Annexure 10 dated 1/2-8-77 to the writ application. Against the order starting a proceeding under S. 144 of the Cr. P. C. the petitioner moved the Sessions Judge of Patna under S. 397 of the Cr. P. C., which application was disposed of in favour of petitioner No. 2 by the 4th Additional Sessions Judge, Patna, by his order dated the 21st Sept., 1977.

3. When this writ application had earlier come up for hearing on the 26th Nov. 1977, it was urged on behalf of the Corporation (respondent No. 2) that as an alternative remedy by way of appeal to the District Judge under sub-sec. (3) of S. 270 of the Act was available to the petitioners and the petitioners had filed such an appeal against Annexure 4 before the District Judge of Patna, they should seek their remedy there. Learned counsel for the petitioners, on the other hand, contended that the subject-matter of the writ application was of a much wider amplitude than that of the appeal under S. 270 (3) of the Act. The writ application is one under Article 226 (1) (a) of the Constitution for enforcing the petitioner's fundamental right under Art. 19 (g) of the Constitution in respect of their property and hence there was no question of exhausting the alternative remedy by way of appeal to the District Judge. Learned counsel for both the parties, however, agreed that the writ application be kept pending and the appeal filed by the petitioners against Annexure 4 before the District Judge, Patna, be directed to be disposed of within one month, and it was ordered accordingly. In the appeal before the District Judge, however, a completely opposite stand was taken on behalf of the Corporation to the effect that no appeal under sub-sec. (3) of Section 270 of the Act lay against the first notice of intention to declare a 'street' as a 'public street' but against the second notice declaring a 'street' as a 'public street' and the appeal filed by the petitioners was premature. This stand of the Corporation found favour with the District Judge and he held that the appeal filed by the petitioners was not maintainable. Thereafter, when the writ application was taken up for hearing, Mr. Basudeva Prasad, learned counsel appearing on behalf of the Corporation fairly conceded, at the outset, that the above stand of the Corporation taken before the District Judge was incorrect, and that an appeal lay only against a notice intimating the intention of declaring a street as a public street under S. 270 (2) within thirty days the notice is first exhibited, and no appeal lay from the notice declaring a street as a public street. Mr. Prasad also fairly conceded, and in my opinion, correctly, that two alternative remedies are available to the owner of the land, i.e. (i) to file an objection, as provided under sub-sec. (2) of S. 270 of the Act, within thirty days of the first exhibition of the notice intimating the intention to declare a 'street' as a 'public street', or (ii) to file an appeal within the same period before the District Judge, as provided under S. 270 (3) of the Act.

4. Mr. B. C. Ghose, learned counsel appearing on behalf of the petitioners has urged that the Corporation has no jurisdiction to issue notice under Section 270 (2) of the Act in respect of a private land belonging exclusively to an individual over which the outsiders have no access, for declaring it to be a public street, and, that such notice can only be issued in respect of a 'street' as defined in S. 4 (vv) of the Act. According to Mr. Ghose, before acting under S. 270 (2) of the Act for the purpose of issuing such a notice, the Corporation must satisfy itself that the land in question comes within the definition of a 'street' as laid down in S. 4 (vv) of the Act.

5. The second contention of Mr. Ghose is that if the owner of a land lodges objection to the intended declaration of that land as a public street, the Chief Executive Officer of the Corporation has to stay his hands and is precluded from declaring it as a public street, as provided under S. 270 (2) itself. Mr. Ghose has contended that as the petitioners in the instant case filed objections on the 19th and the 20th Aug., 1977 respectively to the proposed declaration of their land as a public street by the Corporation under S. 270 (2) of the Act within the statutory period of thirty days of the issue of the notice (Annexure 4), Annexure 4 was rendered nugatory in terms of the provisions of sub-sec. (2) of S. 270 itself. According to Mr. Ghose, the Chief Executive Offi-

cer of the Corporation can declare a 'street' to be a 'public street' only when the owner or the majority of the owners of such a street have no objection thereto and not otherwise, and after objection by the petitioners, the notice dated the 28th July, 1977 (Annexure 4) has to be treated as cancelled. In support of his contention Mr. Ghose has referred to the judgment of the Additional Sessions Judge (Annexure 11) from which it appears that a Judicial Magistrate was deputed to hold local inspection of the disputed passage and to report about its physical features. The order (Annexure 11) shows that the passage of the petitioners which is the subject-matter of the notice (Annexure 4) was enclosed on all sides by old compound wall. Mr. Ghose has also contended that the said land is undoubtedly a part of the compound of the petitioners without anyone else's house abutting on it, and in view of the fact that no outsider ever used the passage or has been allowed to it as a means of egress and ingress to the Boring Road, it does not at all come within the definition of 'street' as given in S. 4 (vv) of the Act.

6. The petitioners' assertion that plots Nos. 31C and 32/2055 (in which they have their disputed private road or passage) belong to them has not been controverted in the counter-affidavit filed on behalf of respondent No. 3 nor has it been pointed out to us that anybody other than the petitioners and the members of their family has a right to use it or has ever used it for any purpose whatsoever. Mr. Basudeva Prasad also fairly conceded that it is not the Corporation's case that the petitioners were not the owners of the aforesaid plots including the passage and that the impugned notice does not relate to that passage in the petitioners' land. It is thus manifest that the petitioners having exclusive control over this private road or passage of theirs, such a piece of land or road cannot come within the purview of the definition of the expression 'street' as given in S. 4 (vv) of the Act, which reads as follows:—

"'street' means any road, lane, gulley, alley, passage, pathway, square or court, whether a thoroughfare or not which is accessible to the public whether permanently or temporarily; and includes every vacant space, notwithstanding that it may be private property and obstructed wholly or partly by any gate, post, chain or other barrier, if houses, shops or other buildings abut thereon and if it is used by any persons, whether occupier of such buildings or not, as a means of access to or from any public place or thoroughfare, but shall not include any part of such vacant space which the occupier of any such building has a right at all hours to prevent all other persons from using as aforesaid." (Underlinings are mine).

At this juncture, it will be useful to refer to the definition of the expression "Public street", as given in S. 4 (pp) of the Act, the relevant portion of which reads as follows :

"'public street' means any street—

(a) heretofore levelled, paved, metalled, channelled, sewered and repaired out of municipal or other public funds over which the public have a right of way; or

(b) which under the provisions of Section 270 is declared to be or under any provisions of this Act becomes, a public street;"

From the aforesaid definition it is apparent that a 'public street' means a street which is maintained out of the municipal or other public fund and over which the public have a right of way, or any other such street which under S. 270 is declared to be, or under any provisions of the Act, becomes a 'public street'. What is of importance is that under the Act only a 'street' can be declared to be a 'public street'. Under Section 71 of the Act, with the coming into force of the Act, the properties belonging to the Patna City Municipality, Patna Administration Committee and Patna-Bankipore Joint Water Works Committee vest in the Corporation. By virtue of S. 72 all property of public institutions and endowments for the management, control and administration of which the Corporation is charged also vests in the Corporation for the purposes mentioned in that section. The other mode of acquisition of property by the Corporation is by way of acquisition of immoveable property or easement by agreement as envisaged under S. 73, and where that is not possible, it can acquire such property as needed for public purposes under the Land Acquisition Act, 1894, on payment of compensation. A private person can also get his land converted into a 'street' within the definition given in S. 4 (vv) of

the Act by offering his land for the purpose in accordance with the provisions contained in Ss. 266 to 269. It is not the Corporation's case that the petitioners have, in any manner or at any point of time, offered their aforesaid piece of land for being converted into a 'street', as envisaged in Ss. 266 to 269 of the Act.

7. It is in this background that the question of conversion of a street into a public street, as envisaged under S. 270, needs to be examined. Under sub-s. (1) of S. 270, a piece of land owned by an individual, if offered by the owner for being converted into a street in accordance with the provisions contained in Ss. 266 to 269 and converted as such, can be declared, on his offer, as a 'public street' by the Corporation. Sub-ss. (2) and (3) of S. 270, which are relevant in this case, may be usefully quoted :—

"(2) The Chief Executive Officer may, at any time, by a notice exhibited in any street or part of a street not maintained by the Corporation, give intimation of his intention to declare the same a public street and, unless within one month next after such notice is first exhibited the owner or the majority of owners or such owners of such street or such part of street, lodges objection thereto with the Corporation, the Chief Executive Officer may, by a notice exhibited in such street or part, declare the same to be a public street vested in the Corporation.

(3) Any person aggrieved by a notice under sub-sec. (2) may appeal within thirty days from the date the notice is first exhibited, to the District Judge, who shall give reasonable opportunity of being heard to the appellant and the Corporation."

From the aforesaid provisions it is manifest that it is only in respect of any street that the Chief Executive Officer can by notice give intimation of his intention to declare it a public street, and if no objection is filed by the owner or the majority of owners of such street within a period of one month next after such notice is first exhibited, then and then only the Cheif Executive Officer is entitled, by means of a second notice exhibited in such street, to declare it a public street vested in the Corporation. In case of objection by the owner or the majority of owners of such street within the statutory period mentioned above, the second notice declaring it to be a public street and vesting in the Corporation cannot be issued. The reason behind such restriction is that a street belonging to an individual or a group of persons can only vest in the Corporation either by his or their consent, or by acquisition, and non-filing of objection by the owner or majority of owners will be taken as a tacit consent to such declaration by the Corporation as a public street and vesting in the Corporation. Any other construction will make the provision unconstitutional, inasmuch as it would amount to acquisition of one's property without payment of any compensation and thus violative of Art. 31 (2) of the Constitution. It is well settled principle of construction of a provision of a statute that where two interpretations thereof are possible, the one which sustains the vires of the provisions and subserves its purpose is to be preferred to the one which makes it ultra vires. As already observed, it admits of no doubt that in case of objection by the owner or majority of owners, the first notice under S. 270 (2) intimating the intention of the Corporation to declare a street as public street lapses with that objection, leaving no scope for issue of a second notice declaring it to be a public street and vesting in the Corporation. As I have discussed earlier, under Sec. 73 of the Act acquisition of an immoveable property can be made by the Corporation by agreement or by acquisition under S. 74. The Act does not empower the Corporation to take somebody else's property by any other method than by his consent, either express or implied.

8. The main contention of Mr. Basudeva Prasad appearing on behalf of the Corporation, based on the counter-affidavit filed on behalf of the Corporation is that the Chief Executive Officer is entitled in law to issue the first notice under Section 270 (2) intimating his intention to declare a private street as public street and to consider and dispose of objections, if any, filed within the statutory period. He has submitted that filing of an objection to the first notice under S. 270 (2) within the statutory period, does not make the notice as to the intention to declare a street as public street nugatory, as contended by Mr. B. C. Ghose. According to his submission, the present writ application is premature, inasmuch as the Chief Executive Officer of the Corporation has not as yet disposed of the objection fil-

ed consequent upon the issue of the first notice (Annexure 4) which he is entitled to dispose of under the law, one way or the other. He has further contended, though not seriously, that compliance with the provisions of S. 4 (vv) is not a precondition for initiation of a proceeding under S. 270 (2) for declaring a street as a public street.

9. The rival contentions of learned counsel for the parties in this regard now remain to be considered. I have already held that it is only such road of a private individual which comes within the definition of street as given in Section 4 (vv) that can be declared to be a public street under Section 270 (2). It, therefore, becomes manifest that the Corporation before issuing a notice under Section 270 (2) intimating its intention to declare a street to be a public street, must satisfy itself, first, that the so-called street really comes within the definition of 'street' as given in S. 4 (vv). Since the Corporation is in possession of all the materials which could indicate the nature of a particular property situate within the Corporation, it is not open to it to indulge in a roving enquiry in this regard with regard to any holding, for asserting that the property is a street, by issuing a notice of intention under Section 270 (2). That question has first to be determined and is a condition precedent for issue of a notice like Annex. 4. I have already stated that in the present case, the passage in the petitioners' plots, which is sought to be declared as a public street, is undoubtedly not a road, lane, gulley etc. and the petitioners have a right, at all hours, to prevent others from making use of it as a passage. This fact has not been denied by the Corporation nor is it asserted that the petitioners' private passage comes within the mischief of the definition of a 'street' as given in Sec. 4 (vv) nor the petitioners' right to prevent all others from using it as a passage has been denied. It will be relevant to mention here that much before the issue of the impugned notice (Annexure 4), when the petitioners came to know of the sinister move of Gyandeo Sharma and others for getting their private passage declared as a public street, they filed their objection (Annexure 5) on the 28th April, 1977, pointing out that it is their private passage meant exclusively for their use and as such it cannot be declared to be a public street and also mentioned therein that there are public passages running northwards a little away to the east and west of the petitioners' plots. As a matter of fact, on the 27th July, 1977, the Corporation issued a notice (Annexure 7) fixing 2nd Aug., 1977 for consideration of this objection. Surprisingly enough on the very next day of issue of Annexure 7 and a few days earlier than the date fixed for hearing the objection, the impugned notice (Annexure 4) was issued on the 28th July, 1977, intimating the intention to declare the petitioners' private passage as a public street. It may be emphasised, as found by me, that the petitioners have exclusive right over the passage at all hours to prevent all other persons from using it as a passage to Boring Road, there being no other residence abutting the passage. It will not be out of place to mention here that from the sketch map of the locality filed by the petitioners, the correctness of which has not been challenged by the respondents, it appears that there is a separate road in the vicinity which serves as a means of access for the public to Boring Road. Moreover, it is also not without significance that although respondents Nos. 8 and 9 filed counter-affidavit, none appeared to oppose the writ application nor Mr. Basudeva Prasad relied upon any portion of their counter affidavit. In my concluded opinion, therefore, the Corporation has no jurisdiction to issue the notice (Annexure 4), inasmuch as the basic condition for issue of a notice of the kind was completely lacking in the present case.

10. On a close reading of the provisions of S. 270 of the Act it is manifest that in respect of a street the Chief Executive Officer has to issue a notice indicating his intention to declare it a public street and to wait for a period of one month. If no valid objection is filed to such a notice, then alone he gets jurisdiction to declare the street in question as a public street vesting in the Corporation. It seems to be the scheme of the Act that such vesting of a street has to be made by the tacit consent of the owner or the majority of the owners of such a street and not otherwise. The section does not authorise the Chief Executive Officer, in case of objection filed within the statutory period, to declare the street as a public street. After a valid objection, he must stay his hands and the notice loses all its force. Had it

not been so, then a remedy by way of appeal against the second notice declaring the street to be public street would have been also provided in the Act itself. It has not been contended by Mr. Prasad that there is any provision for appeal from such an order before the District Judge. It is, therefore, manifest that no power vests in the Corporation to declare a street as public street, once an objection to the earlier notice intimating such intention is filed by the owner or majority of owners is filed within the statutory period.

11. As a result of my above findings, the impugned notice (Annexure 4) must be held to be illegal, or at any rate, having lost its force after the objection filed by the petitioners and has to be quashed.

12. Coming to the notice dated the 30th July, 1977 (Annexure 8), it is apparent that it is an off-shoot of the first notice (Annexure 4) issued under S. 270 (2) of the Act. It is stated in Annexure 8 that petitioner No. 2 is contemplating construction of a garage, without permission on the passage which was sought to be declared as a public street which is illegal, and petitioner No. 2 has been asked to stop the construction of the aforesaid garage within his compound wall. This gave rise to a proceeding u/s. 144 of the Code of Criminal Procedure, which has been quashed and decided in favour of petitioner No. 2, as already mentioned above. In the counter-affidavit filed on behalf of respondent No. 3, it has been stated in para 7 that petitioner No. 2 obtained sanction for construction of the garage from the Patna Regional Development Authority, which sanction was obtained mala fide immediately after the notice under Ss. 237 and 242 (2) and (3) of the Act (Annexure 8) was served on the 30th July, 1977. Petitioner No. 2 in para 12 of his reply to this counter-affidavit has characterised this allegations as maliciously false and has asserted that he had applied for such sanction much earlier, which was granted on the 30th July, 1977. In this background, when Annexure 4 is being quashed, this notice (Annexure 8), which seems to be an off-shoot of Annexure 4, has lost its force. Mr. Basudeva Prasad has rightly not put forward any argument in support of this notice.

13. In the result, the writ application is allowed and Annexures 4 and 8 are quashed. In the circumstances of the case, there will be no order as to costs.

K. B. N. SINGH, C. J.:— I agree.

Writ petition allowed.

AIR 1979 PATNA 98

MADAN MOHAN PRASAD, J.

Siya Ram Das and another, Petitioners v. State of Bihar and others, Opposite Parties.

Civil Revn. No. 540 of 1977, D/- 11-5-1978.*

(A) Civil P. C. (5 of 1908), Or. 6, R. 17 — Amendment not to be refused merely for delay or negligence.

Words "at any stage of the proceedings" in R. 17 of Or. 6, would show that prayer for amendment of pleadings seeking to bring out the real dispute for decision could not be refused merely on the ground of delay, even amounting to negligence and the circumstance that the court ought to consider in this behalf was, if granting of the relief at that stage would result in injury to the other side.

In the instant case the plaintiff in a suit for a mere declaration sought to amend the plaint at the stage of hearing arguments in the case, to include a prayer for confirmation or in the alternative, for recovery of possession. It was resisted on the ground that the application ought to have been filed soon after the filing of the defence where the defendants claimed to be in possession and further challenged the maintainability of the suit. Challenge specifically based on S. 34, Specific Relief Act was raised only at the time of arguments. Although there was no issue relating to possession the parties entered issue and adduced evidence on that point; Held that the delay in the absence of any injury to the defendants could not bar the relief sought and that in the circumstances, the plaintiff's application could not be said to be mala fide. AIR 1969 SC 1267, (1887) 19 QBD 394, AIR 1924 Pat 310, (1912) ILR 39 Cal 704 and AIR 1974 Delhi 234, Rel. on.

(Paras 8, 10, 11, 16 & 17)

Anno: AIR Comm. C.P.C. (9th Edn.), Or. 6 R. 17 Notes 7 and 13C.

*(Against order of O. P. Singh, 2nd Addl. Munsif, Gopalganj, D/- 4-4-1977).

KV/LV/E758/78/TVN/VBB

(B) Civil P. C. (5 of 1908), O. 6 R. 17 — Change in the nature of suit — New relief on same set of facts and cause of action does not effect any change.

Since a set of facts giving rise to a cause of action might entitle to a number of reliefs, the fact that the plaintiff had initially asked for some only of such reliefs and subsequently sought the other relief or reliefs would not render the cause of action any the different. If, however, additional facts or ideas were relied upon thus bringing about a new cause of action, a fresh relief sought might be said to change the nature of the suit. The Plaintiff contending that he was in possession of the lands prayed for a mere declaration as to his possession. The defendants claimed possession to be with them and questioned the frame of the suit and subsequently specifically relied on S. 34, Specific Relief Act. Though no issue as to possession was framed, parties adduced evidence on the point. To meet the defence pleas, plaintiff sought to amend the plaint to include prayer for confirmation of possession or in the alternative for recovery of possession. Rejecting the objection that the amendment would change the nature of the suit it was held that the real dispute for decision in the suit was as to who was in possession, the fresh prayers sought to be added did not change the nature of the suit. The amendment which did not prejudice the defendants in any way was allowed. AIR 1967 SC 96, (1962) 1 All E R 303 and AIR 1921 P C 50 Rel. on.

(Paras 13, 15, 16, 17)

Anno : AIR Comm. Civil P. C. (9th Edn.), O. 6 R. 17 N. 3C and 8.

Cases Referred : Chronological	Paras
AIR 1974 Delhi 234	12, 14
AIR 1969 SC 1267	9, 12
AIR 1967 SC 96	13, 16
(1962) 1 All ER 303 : (1962) 2 WLR 250, Dornan v. J. W. Ellis & Co.	13
AIR 1924 Pat 310	12
AIR 1921 PC 50	14, 16
(1912) ILR 39 Cal 704	12
(1887) 19 QBD 394 : 56 LJQB 621, Weldon v. Neal	9

S. S. Dwivedi and B. S. Tewary, for Petitioners; Umeshwar Pd. Singh, Yadubans Giri and B. P. Pandey, for Opposite Parties.

ORDER :— This is an application directed against an order rejecting an application for amendment of a plaint made under O. VI R. 17 of the Civil P. C. (hereinafter to be referred to as 'the Code').

2. It appears that the plaintiff filed the present suit in the year 1967 for a declaration "that the disputed land with trees was previously the Brit tenure of the plaintiff and is now the occupancy land of the plaintiffs under the provision of Land Reforms Act and is in possession of the plaintiffs....." He further prayed for a declaration that the order passed by the Block Development Officer assessing the rent of the disputed land in the names of defendants 2 and 3, is illegal, void and without jurisdiction and not binding upon the plaintiffs.

3. Briefly stated, the plaintiff's case is that the property in suit belonged to his Guru who was the Mahanth and after him he stepped into his shoes and came into possession of the property left behind by him; that Babu Jharu Das was a devotee of the late Mahanth and defendants 2 and 3 are his sons; that at the time of vesting of zamindari the aforesaid two defendants were acting as pairvikar of the plaintiffs but dishonestly they took advantage of the situation and got themselves recorded as raiyats in respect of the lands in dispute. As a result, a cloud was cast on the title of the plaintiff. Hence the suit.

4. On the other hand, the defendants' plea was a denial of the status of the plaintiff as the chela of the late Mahanth, and according to them, their father Jharu Das had purchased the property by an oral sale. Thus they claimed title and possession of the land as such.

5. At the trial the parties joined issues on the following questions :—

(i) Is the suit as framed maintainable?
(ii) Have the plaintiffs got cause of action for it?
(iii) Have the plaintiffs got right, title and interest over the suit property?
(iv) Is the story of oral sale as set up by the defendants correct?
(v) To what relief, if any, are the plaintiffs entitled?

The parties adduced evidence on these points. During the course of argument, however, a fresh point was raised as to whether the suit was maintainable in view of S. 34 of the Specific Relief Act. At this stage the plaintiff filed the present application for leave to amend the plaint. By this application the plaintiff

sought permission to amend the plaint by adding a relief for confirmation or, in the alternative, for recovery of possession of the disputed land. He offered to pay ad valorem court-fee as well.

6. The court below rejected the prayer mainly on the ground that the petition had been filed late after the arguments in the case had been made. Secondly that since there was an objection to the maintainability of the suit raised as early as in the written statement, and further in view of the statement in the written statement that the plaintiff was not in possession but the defendants were, it is not a case of bona fide mistake on the part of the plaintiff to omit the relief prayed for. Thirdly, that the aforesaid amendment would change the nature of the suit.

7. Counsel for the petitioners has urged that the court below has illegally refused to exercise jurisdiction in the circumstances mentioned above and the grounds therefor are not tenable in law. It has been contended in this respect that the delay in filing the petition was not by itself a ground on which the court below should have rejected the prayer. Secondly, it is said that the objection with regard to the maintainability of the suit was a vague and general statement and the actual objection with regard to the suit being hit by S. 34 of the Specific Relief Act was not raised at any point of time earlier than the stage of arguments. Thirdly, it is said that a mere addition to the relief, for confirmation or recovery of possession, could not change the nature of the suit.

8. Before I discuss the points raised I would do well to indicate for the purposes of the guidance of courts below, the considerations which have to be borne in mind by any court in accepting or refusing a prayer for leave to amend a plaint or written statement. First I should wish to draw attention to the language of R. 17 of O. VI of the Code itself. Although there are numerous cases where it has been held that in view of the aforesaid rule containing the words "at any stage of the proceedings", a petition can be filed at any stage before Judgment, courts below still fail to keep this consideration in mind. It is well settled that the discretion of the court in this respect is very wide and a pleading may be allowed to be amended even at the appellate stage. Of course, the court has to keep other considerations as well in mind. For instance, whether this would take away any valuable right which has accrued to the other party. But that apart, the mere fact that an application for leave to amend a plaint or written statement has been filed at a late stage of the suit is not by itself a proper ground for rejecting the prayer. The second point which I wish to draw attention to, is that while determining the question as to whether the pleading should be allowed to be amended, courts must bear in mind the point that the amendment must be necessary "for the purpose of determining the real questions in controversy between the parties", as stated in R. 17 itself. In this connection it is hardly necessary to state that when a litigant comes to court and the parties join issues, the very purpose of framing issues being to determine the points at which the parties are at controversy, if in a case the real question in dispute is not raised as in an issue and if the same is raised at a later stage, the purpose of a court being to decide the real dispute between the parties, it will not be injustice to either party to take into consideration the real question in controversy.

9. Having said that, I feel tempted to point attention to what was said long time ago that the rules of procedure are after all handmaid to the administration of justice. The power to grant amendment of the pleadings is intended to serve the ends of justice and is not governed by narrow or technical limitations (see Jai Jai Ram Manohar Lal v. National Building Material Supply, Gurgaon; AIR 1969 SC 1267), Shah J., speaking for the court said (at p. 1269):

"Rules of procedure are intended to be a handmaid to the administration of justice. A party cannot be refused just relief merely because of some mistake, negligence inadvertence or even infraction of the rules of procedure. The court always gives leave to amend the pleading of a party unless it is specified that the party applying was acting mala fide, or that by his blunder, he had caused injury to his opponent which may not be compensated for by an order of cost. However negligent or careless may have been the first omission, and, however late the proposed amendment, the amendment may be allowed if it can be allowed without injustice to other side." Similar words were uttered by Lord Justice Lopes in the case of Weldon v.

Neal reported in (1887) 19 QBD 394. The learned Lord Justice said :—

"I think the court ought to give all reasonable indulgence with regard to amending and I quite agree with the rule that has been laid down, namely, that, however negligent or careless the first omission and however late the proposed amendment, the amendment should be allowed if it can be allowed without injustice to the other side."

It will appear that our Supreme Court has adopted the very principle which we find enunciated in the case of Weldon v. Neal (supra).

10. In the aforesaid background I will consider now the points raised in this case. With regard to the first ground taken by the court below, I have already observed earlier that the mere fact that the petition was filed at a late stage is not a ground for rejecting the prayer for amendment of the pleading. It may be an omission or it may be negligence, the fact cannot, however, be gainsaid that if the pleading is being amended with a view to bring to the surface the real controversy at issue between the parties and to ask the court to adjudicate thereupon, even though the petition was filed late, it ought not to have been refused on the ground of its late filing.

11. The same observation applies to the second ground urged by the court below to the effect that the plaintiffs did not take care to amend the plaint at the earlier stage when the written statement pleaded that the defendants were in possession and not the plaintiffs. I do not find any good reason to accept the conclusion of the learned Munsif when he says that this conduct shows that the mistake on the part of the plaintiffs was not bona fide. It may be that it was a negligence on the part of of the counsel that the amendment petition was not filed soon after the filing of the written statement, but that will not make it mala fide. In the present case it would appear that the plaintiff said that he was in possession of the property in dispute and thus all that he wanted was a declaratory decree. True, the defendants came up to say that they were in possession and not the plaintiff. It was open to the plaintiff and, perhaps, if he had been diligent he would have filed the petition at that very time but one does not know why the plaintiff was not so advised. The advice to amend the plaint came only at a stage when specifically the defendants raised the point with regard to maintainability of the suit in view of S. 34 of the Specific Relief Act. It must be kept in mind that this objection was not specifically raised in the written statement. It never occurred to the parties till then. I have purposely quoted the issues which were framed to show that no issue was raised on this specific ground; nor was any issue raised with regard to the posssession either of the plaintiffs or of the defendants. I am, however, informed by the counsel for the parties that evidence has been adduced by both parties on the question of possession and it was on the basis of such evidence that it was argued that the plaintiffs not being in possession the suit was hit by S. 34 of the Specific Relief Act. If there was no issue raised regarding possession, there was no question of parties leading evidence unless it was with a purpose to show that a mere declaratory suit could not lie and if that were the intention, then an issue with regard to the maintainability of the suit under S. 34 of the Act should have been framed. When the point was specifically raised, it occurred to the plaintiff to make a prayer for amendment of the plaint. In such circumstances, I am unable to understand as to how it can be treated as mala fide.

12. Counsel for the petitioners has placed great reliance on a Bench decision of this Court in the case of Sheopujan Rai v. Kesho Prasad Singh (AIR 1924 Pat 310). In that case the learned Judges held that where a plaintiff has framed a suit bona fide believing that consequential relief is not open to him and that he is entitled to a declaration, the court would be justified in allowing him to amend the plaint even in appeal. The learned Judges placed reliance on a decision of the Calcutta High Court in the case of Deokali Koer v. Kedar Nath ((1912) ILR 39 Cal 704). Mullick, J. further observed :—

"Therefore I do not think it is an inflexible rule that no amendment can be allowed if the plaintiff has notice in the trial court of the defendant's objection that the frame of the suit is bad."

In the aforesaid case the plaintiff had asked simply for a declaration on the footing that he was in possession. The trial court had found in his favour. In appeal the District Judge had found

against him. In such circumstances, he had made a prayer for amendment of the plaint in this Court so that it may conform to the provisions of S. 42 of the Specific Relief Act. The other decision on which learned counsel placed reliance is in the case of Sehdev v. Smt. Vidya Wati (AIR 1974 Delhi 234). The facts of that case were also similar. The plaintiff had asked for merely a declaratory decree on the ground that she was in possession. Subsequently she had made a prayer for adding a relief of possession to the plaint. In that case, the application for amendment was filed at a late stage about five years after the institution of the suit. The objection on the ground of late filing was repelled and reliance was placed on the decision in the case of Jai Jai Ram Manohar Lal (AIR 1969 SC 1267) (supra). The learned Judge observed that in the circumstances of that case no valuable right had accrued to the defendants and the delay in filing the petition for amendment would thus not cause any injury which could not be compensated by cost.

13. I will now come to the last point as to whether the nature of the suit would change by allowing the amendment prayed for. What is meant by a nature of the suit is not difficult to understand and yet sometimes the line between one and the other is so thin that it becomes difficult to distinguish one from the other. Here is a case where a mere declaratory decree had been prayed for and now it is sought to be made into a suit for possession. Prima facie, as urged, a suit for mere declaration is different from a suit for a declaration with a consequential relief. I venture to think, however, that the conclusion aforesaid, even though prima facie, is arrived at because the true criterion for determining the nature of the suit is not employed.

A suit in respect of one cause of action does not become different in nature unless the cause of action subsequently introduced is itself of a different nature. It may be that on the same set of facts the cause of action arises which may leave scope for more than one relief to be prayed for. Where the suitor has asked for one relief and not the other, and next asks for the other, the cause of action cannot merely on that account be said to become different. Where, however, certain more facts are introduced on the basis of which a new cause of action arises, and if they are sought to be introduced and a fresh relief on their basis is asked for, it would undoubtedly be a new cause of action. In the case of A. K. Gupta and Sons Ltd. v. Damodar Valley Corporation (AIR 1967 SC 96) the learned Judges of the Supreme Court said that the general rule is that a party is not allowed by amendment to set up a new case or a new cause of action, but it is well recognised that where the amendment amounts to no more than a different or an additional approach to the same facts the amendment will be allowed even after the expiry of the statutory period of limitation. The learned Judges further said that the expression "cause of action" does not mean every fact which is material to be proved, to entitle the plaintiff to succeed and that expression means "a new claim made on a new basis constituted by new facts". Their Lordships further said "the words 'new case' have been understood to mean 'new set of ideas', Dornan v. J. R. Ellis and Co. Ltd. (1962) 1 All ER 303. This also seems to us to be a reasonable view to take. No amendment will be allowed to introduce a new set of ideas to the prejudice of any right acquired by any party by lapse of time." In this view of the matter, the question arises whether by virtue of praying for a relief for confirmation or recovery of possession the nature of the suit changes.

14. In my view, it is mere addition of a new relief which was not prayed for on the statement that the plaintiffs were in possession and no such relief was necessary or open to the plaintiffs. In this connection I would refer to the decision in the case of Charan Das v. Amir Khan (AIR 1921 PC 50). The suit in that case was for declaration of a right of pre-emption. No claim for possession of the property was made. With regard to part of the lands the plaintiffs themselves claimed to be in possession on their own account. Objection was taken to the maintainability of the suit on the ground of S. 42 of the Specific Relief Act. Ultimately the prayer for amendment of the plaint was made. Their Lordships of the Judicial Committee held that the court below was right in holding "however defective the frame of the suit may be, the plaintiffs' object was to pre-empt the land; their cause of action was one and the same, whether they sued for possession or not".

The aforesaid decisions lend support to the view which I have taken in the present case. In the case of Sehdev (AIR 1974 Delhi 234) (supra) also the learned Judge held that a claim for possession was not making out a new case but a claim based on the same cause of action, namely, the title of the plaintiff.

15. Considering the matter from all points of view, in the circumstances of the present case it appears that the only fault of the plaintiff was not to ask for a decree for confirmation or recovery of possession on the ground that the plaintiff was in possession. No new facts much less new ideas or a new cause of action, are being sought to be introduced by the amendment. It merely asks for further relief of confirmation of possession in view of the objection raised by the defendants in respect of the suit being hit by S. 34 of the Specific Relief Act. It is, therefore, not a case where the nature of the suit would be changed by the amendment.

16. An additional reason for coming to the conclusion is that it appears from the plaint that the plaintiffs claimed to be in possession. The defendants, on the other hand, as appears from the written statement, denied that and claimed to be in possession on their own account. Obviously the real dispute between the parties centred round possession. If the court were to adjudicate upon the question of possession, it is only fair that the party which succeeds in establishing its possession should get the benefit of a decree in that respect as well. It is well settled that where an amendment is necessary for a decision of the real dispute between the parties, and if that is involved in the plaint as originally framed, the amendment should be allowed. I am tempted to cite the decision in the case of A. K. Gupta and Sons Ltd. (AIR 1967 SC 96) (supra) once again in support of the proposition. Their Lordships there said (at p. 99):

"The amendment sought is necessary for a decision of the real dispute between the parties which is, what are their rights under the contract? That dispute was clearly involved in the plaint as originally framed. All the necessary basic facts had been stated. Only through a misconception a relief which could be asked on those facts had not been asked. It would not have been necessary to ask for it unless the plaintiff had at a late stage taken the point that the suit should fail without more in the absence of that relief. We find the present case indistinguishable from Charan Das's case, 47 Ind App 255 : (AIR 1921 PC 50)."

For this reason also, therefore, I think that in the present case the amendment should have been allowed by the court below.

17. In view of the fact that the court below has misunderstood the nature and scope of the law relating to amendment and thus refused to exercise discretion, the order passed by it in this respect must be set aside. The plaintiffs are allowed to make the amendments prayed for.

18. I am informed, as stated earlier, that the parties have led evidence on the point of possession and no further additional written statement or evidence would be necessary. In any case, I leave the matter open for decision by the court below. In case the defendants so desire, they would be given a chance of filing an additional written statement and the parties may be allowed to lead further evidence, if at all necessary, on the question of possession.

19. In the result, this application is allowed.

Petition allowed.

AIR 1979 PATNA 103

K. B. N. SINGH C. J. AND
LALIT MOHAN SHARMA J.

Haji Syed Mohammad Hussain, Petitioner v. State of Bihar and others, Respondents.

Civil Writ Jur. Case No. 4312 of 1978, D/- 4-1-1979.

Wakf Act (29 of 1954), Ss. 43, 45, 63— Removal of Mutawalli — State Government has no power to order direct removal of mutawalli — Procedure for removal indicated — Board also cannot remove a Mutawalli without inquiry.

The language of Sec. 63 clearly suggests that what the State Government has been authorised to do is to give general or special directions to the Board and the Board would, in that case, be bound to comply with them in the performance of its functions. It is not within the authority of the State to

pass an order directly removing the mutawalli. The distinction between these two kinds of powers is not formal in nature; it is of vital consequence. So far as the authority of the Board is concerned, it has been dealt with in some detail by the Act and S. 43 empowers the Board to remove a Mutawalli from his office but only on specified grounds as detailed in sub-s. (1) and that too only according to the procedure prescribed by Ss. 44 and 46 where they are applicable. S. 45 requires the Board to hold as enquiry in the prescribed manner and the procedure has been detailed in the rules framed under S. 67. An examination of the grounds on which a Mutawalli can be removed by the Board mentioned in S. 43 (1) indicates that there may be some cases in which the Board can pass an order of removal, without holding a full-fledged enquiry as mentioned in S. 45; As for example, there may be a case where the Mutawalli has been convicted of an offence of criminal breach of trust satisfying the condition in Cl. (d). On the other hand, if there is an allegation against the Mutawalli of misappropriating the property of the Wakf, which the Mutawalli does not admit, an enquiry will have to be held before coming to a finding on the disputed question. If that is not done, there will be a serious violation of the principles of natural justice.

In the case of removal of a Mutawalli, the Board would not be justified in removing a Mutawalli on the assumed ground of improper dealing with the property of the Wakf, without holding an enquiry and without giving the Mutawalli reasonable opportunity to meet the allegations. Thus being the scheme of the Act, there does not appear to be any reason to depart from the plain grammatical meaning of Sec. 63 of the Act which indicates that the authority of the State Government is limited to giving directions to the Board and not to pass orders straightly removing a Mutawalli of a Wakf. (Para 4)

Anno : AIR Man. (3rd Edn.) Wakf Act (1954), S. 63 N. 1; S. 43 N. 2; Sec. 45 N. 1.

Cases Referred : Chronological Paras

(1978) CWJC No. 2074 of 1977, D/- 9-3-1978 (Pat) 1

(1978) CWJC No. 2691 of 1978, D/- 17-7-1978 (Pat) 1, 2

S. S. Asghar Hussain and Kumar Bahadur, for Petitioner; Radha Raman, Addl. Advocate General, Maya Nand Singh, Standing Counsel No. 4 and R. C. Sinha, Junior Counsel, for Respondents.

LALIT MOHAN SHARMA, J.:— The petitioner is the Mutawalli of a Public Religious and Charitable Institution known as 'Soghra Wakf Estate.' It is stated in the writ application that one Bibi Soghra had dedicated extensive property by a registered document D/- 30-9-1896 embodying the terms and conditions of the wakf created thereby and laying down the scheme for its management. According to the document, the administration and management of the property vested in the Mutawalli, who has to be assisted by two Naibs and Committee. Subsequently, a new scheme for the management of the wakf was framed by the District Judge, Patna, by his decision in T. S. 12 of 1919. It is, however, not necessary to give the details of the scheme except mentioning that the Mutawalli's right of administration and management was reaffirmed. The Bihar legislature passed an Act for the purpose of general supervision of the wakf within the State of Bihar, which was known as Bihar State Wakf Act, 1947, whereunder a Board known as Bihar Sunni Majlis-e-Awqaf was formed. The Majlis was vested, by the Act, with the authority, supervise the proper function of the Sunni Wakf and the present Soghra Wakf Estate is one of them and it continued to do so till 7th April, 1973 when the Bihar Act was replaced by a Central Act, The Wakf Act, 1954. The petitioner who was earlier the first Naib of the Wakf Estate has been its Mutawalli since 26-12-72. On the death of the earlier Mutawalli. Under the provisions of the Wakf Act, 1954 (The Central Act) a new Bihar State Sunni Wakf Board came into existence and started functioning from 12th April, 1974. Soon thereafter the Committee which had been formed for assisting the petitioner Mutawalli was superseded and an Ad Hoc Committee was constituted by an order of the State Government passed in its Law Department. The Ad Hoc Committee suspended the petitioner. The Special Officer of the Bihar State Sunni Wakf Board, on being moved by the affected parties, set aside the constitution of the Ad Hoc Committee, but maintained the suspension order of the petitioner. The petitioner, thereafter, approached this Court in its writ jurisdiction by filing C. W. J. C. 2074 of 1977, which was al-

lowed on 9-3-1978. The order of the suspension of the petitioner was quashed and he was allowed to join as Mutawalli. The petitioner has imputed bad faith on the part of the Chairman of the Wakf Board and has alleged that subsequently without making any legal enquiry, he got the petitioner dismissed by a resolution of the Board dated 5-6-1978. The petitioner again filed another application in this Court under Art. 226 of the Constitution, which was registered as C.W.J.C. 2691 of 1978 (Pat). By order dated 17-7-1978 passed by us, the order of dismissal of the petitioner was set aside and the petitioner again joined the office of Mutawalli. Thereafter, the impugned order as contained in Annexure '3' dated 31-8-78 was passed by the State Government appointing an Executive Officer for the Wakf Estate for the purpose of management of the property, finance and administration of the Estate. The petitioner was informed through a letter of the Secretary to the Government, Law Department, dated 31-8-1978, a copy whereof has been annexed to the writ application as Annexure 4, that the respondent No. 3 Shri S. M. Shafiuddin had been appointed as the Executive Officer. By the present application, the petitioner has prayed for quashing of the orders mentioned in Annexures 3 and 4.

2. Mr. Ashgar Hussain, learned counsel for the petitioner, has contended that the Chairman of the Wakf Board is prejudiced against the petitioner and had earlier unsuccessfully attempted to remove the petitioner from the office of the Mutawalli without any just cause. The resolution of the Board dated 5-6-1978 referred to above, had been passed without any enquiry in the conduct of the Mutawalli and after the same was quashed in C. W. J. C. 2691 of 1978 (Pat), a fresh attempt is being made by passing the impugned order to the same effect. Additional Advocate General, appearing for the State Government, has rightly contended that the question of mala fides cannot be examined in the present case in absence of the Sunni Waqf Board and its Chairman, who have not been impleaded as parties to the present case. But the second question raised on behalf of the petitioner appears to be well founded. It has been urged that the State Government does not have any authority whatsoever to remove the Mutawalli of a Waqf and for that reason the impugned orders in Annexures 3 and 4 are without jurisdiction. The only provision in the Waqf Act, 1954 which has been relied upon on behalf of the respondents is section 63 of the Act which reads as follows:

"63. Subject to any directions on question of policy issued under S. 62, the State Government may, from time to time give to the Board such general or special directions as the State Government thinks fit and in the performance of its functions, the Board shall comply with any such directions."

3. The question which arises in this case is as to whether Sec. 63 of the Act clothes the State Government with the power to pass orders as contained in Annexure 3 and 4. The learned Additional Advocate General argued that the interpretation by the petitioner of the impugned orders that they amount to removal of the petitioner from Mutawalliship, is erroneous. The learned Counsel states that the petitioner has not been disturbed from his office and by Annexures 3 and 4 the State Government has merely appointed an Executive Officer which cannot be challenged by the Mutawalli. I am afraid, the matter does not appear to be so simple as suggested. The powers of the Executive Officer have been mentioned in six paragraphs at the end of Annexure 3. The first item states that the Executive Officer would be the highest officer with the authority to manage the property, finance and administration of the Wakf Estate. It has been correctly asserted on behalf of the petitioner and not challenged by the learned Additional Advocate General that the Mutawalli was vested with the highest authority in regard to the administration of the Wakf and its property; and so there does not appear to be any manner of doubt that by orders in Annexures 3 and 4, the petioner has been deprived of his rights and the same have been vested in the respondent No. 3. It is, therefore, futile to suggest that the petitioner has not been prejudiced so as to maintain this application. It is clear that the petitioner has been divested of his authorities, although not in express terms, and, in substance he has been removed from the office of Mutawalliship. I, therefore, hold that the petitioner is fully entitled to come to this Court for the redress of his grievance.

4. So far as the interpretation of Section 63 of the Act is concerned, the language clearly suggests that what the State Government has been authorised to do is to give general or special directions to the Board and the Board would, in that case, be bound to comply with them in the performance of its functions. It is not within the authority of the State to pass an order directly removing the Mutawalli. The distinction between these two kinds of powers is not formal in nature; it is of vital consequence. So far as the authority of the Board is concerned, it has been dealt with in some detail by the Act and Section 43 empowers the Board to remove a Mutawalli from his office but only on specified grounds as detailed in sub-section (1) and that too only according to the procedure prescribed by Ss. 44 and 45 where they are applicable. Sec. 45 requires the Board to hold an enquiry in the prescribed manner and the procedure has been detailed in the rules framed under S. 67. An examination of the grounds on which a Mutawalli can be removed by the Board, mentioned in S. 43 (1) indicates that there may be some cases in which the Board can pass an order of removal, without holding a full-fledged enquiry as mentioned in S. 45; as for example, there may be a case where the Mutawalli has been convicted of an offence of criminal breach of trust satisfying the condition in Cl. (d). On the other hand, if there is an allegation against the Mutawalli of misappropriating the property of the Wakf, which the Mutawalli does not admit, an enquiry will have to be held before coming to a finding on the disputed question. If that is not done, there will be a serious violation of the principles of natural justice. In essence, proper guidelines are given for the Board in the matter of its taking any steps for removal of a Mutawalli. No such provisions are available either in the Act or in the Rules for the benefit of the State Government. It goes without saying that the Board would be bound to carry out only such directions of the State Government which may be lawful for the Board to do so. In the case of removal of a Mutawalli, the Board would not be justified in removing a Mutawalli on the assumed ground of improper dealing with the property of the waqf, without holding an enquiry and without giving the Mutawalli reasonable opportunity to meet the allegations. Thus being the scheme of the Act, there does not appear to be any reason to depart from the plain grammatical meaning of S. 63 of the Act which indicates that the authority of the State Government is limited to giving directions to the Board and not to pass orders straightway removing a Mutawalli of a Waqf. The orders in Annexures 3 and 4 must, therefore, be quashed.

5. Even if the State Government were held to be empowered to directly remove a Mutawalli, it could not lawfully do so in a whimsical way. In the facts of the present case, it appears that there was some allegation made against the petitioner which was never enquired into. In the circumstances the petitioner could not be deprived of his powers as Mutawalli on an assumption that he was guilty. Besides, the impugned orders do not indicate the grounds on which such a step was being taken. The orders violate the well established principles of audi alteram partem and are clearly bad.

6. For the reasons mentioned above, the orders mentioned in Annexures 3 and 4 are quashed and the writ application is allowed, but without costs. I would, however, like to clarify that this Judgment does not fetter the rights of the authorities concerned to commence a proceeding against the petitioner in accordance with law and to remove him from the office of the Mutawalli, if grounds are made out.

K. B. N. SINGH, C. J.:— I agree.

Petition allowed.

AIR 1978 PATNA 106

BIRENDRA Pd. SINHA AND VISHWANATH MISHRA, JJ.

Sardamoni Debi, Appellant v. State of Bihar and others, Respondents.

A. F. O. D. No. 934 of 1971, D/- 6-10-1978.*

(A) Transfer of Property Act (4 of 1882), S. 117 — 'Agricultural purpose' — Test to determine — Settlement of tank and its embankment — Lessee using tank for rearing fish and growing

*(Against decision of H. N. Sahay, 3rd Addl. Sub. J., Dhanbad, D/- 19-7-1971).

vegetables on embankment — Held, lease was for agricultural purposes.

The true test as to whether lease is for agricultural purposes or not is to see whether the primary object was the lease of the tank or lease of the land surrounding it for purposes of agriculture with tank within it. In this respect the area of the surrounding land is an important factor to be considered. The subsequent conduct of the plaintiff in cultivating the land would also be an important factor to be considered. AIR 1931 Cal 135, Foll. (Case law discussed). (Paras 15, 16)

It was held on the facts and circumstances of the case that the settlements of the two plots in question, popularly known as Gadai Bandh, a tank and its embankment both the settlements were genuine, that the areas of the embankment and the tank were such that agricultural lease in respect of the embankment could be granted, that the tank appertains to the embankment and that the primary object was settlement of the embankment with the tank as its appurtenance. It was clear from the rights given in the two leases, that the plaintiff was free to cultivate the embankment almost in any manner she liked, by planting trees thereon, by growing vegetables thereon, or by cultivating it in any manner she liked. From the evidence produced on behalf of the plaintiff it was clear that she was in possession of the tank for the last 40 years and she had been appropriating fish of the tank and growing vegetables on the embankment. There was absolutely no evidence on behalf of the defendants to say that vegetables were not grown or that the embankment was never used for the purpose of cultivation. (Paras 19, 20, 22, 26)

Anno : AIR Comm. T. P. Act (4th Edn.), S. 117, N. 3.

(B) Bihar Land Reforms Act (30 of 1950), Ss. 4 (g), (h), 4A, 8 and 38 — Enquiries initiated under Cl. (g) or (h) of S. 4 — Remedy by way of appeal and revision, though provided under the Act, not availed of by State — In absence of any power of review the State Government after once finding the settlement to be genuine cannot review its own order — Enquiry under S. 4 being 'judicial proceeding' the order passed in proceeding can be set aside only in the manner provided in law. 1976 BBCJ (HC) 647, Rel. on. (Para 28)

Cases Referred : Chronological Paras

1976 BBCJ (HC) 647	28
AIR 1974 SC 1791	28
AIR 1957 Pat 278	15
AIR 1931 Cal 135	13, 15 16
(1873) 19 Suth WR 200	13
(1873) 20 Suth WR 341	13

S. K. Sarkar, K. D. De and Kanhaiya Pd. Singh, for Appellant; Jawahardhari Singh, Junior Counsel to Standing Counsel No. 4, for Respondents.

V. MISHRA, J.:— This appeal arises out of a suit for declaration of the plaintiff's title as raiyat and for injunction against the State of Bihar restraining them from interfering with her (Plaintiff's) possession, which has been dismissed by Shri H. N. Sahay, 3rd Additional Subordinate Judge, Dhanbad.

2. One Chandra Kanta Ghosal had three sons, namely, Kali Pada Ghosal, Bhawataran Ghosal and Shyama Pada Ghosal. The wife of Chandra Kanta Ghosal was Thakomoni Debi. Kali Pada was married to Sardamoni Debi, who is the plaintiff here. Chandra Kanta Ghosal was, perhaps, a leper, but he was a man of means. People were reluctant to give their daughters in marriage in his family and so, Chandra Kanta Ghosal by way of inducement promised to give or settle some land with the would-be wife of Kali Pada. With this understanding, Sardamoni Debi was married to Kali Pada. Chandra Kanta Ghosal had a joint Khewat with Ananta Lal Dey in which the share of Chandra Kanta was 12 annas and that of Ananta Lal 4 annas. In the year 1928 B. S. corresponding to 1921, Chandra Kanta as 12 annas tenure-holder, settled with the plaintiff the two plots bearing plots Nos. 5242 and 5243 appertaining to Khata No. 809 measuring 5.46 acres, situate in Mauza Chas, police station Chas, district Dhanbad. The aforesaid plots Nos. 5242 and 5243 are popularly known as Gadai Bandh, a tank and its embankment. At the same time, he also settled his 12 annas share of the tenure in some other lands situated at Mouza Salagidi alias Bhawanipur police station Chas, district Dhanbad. The area of this land was 8 and odd acres. Both the settlements were made simultaneously and a sum of Rs. 11/- was fixed as the rental thereof. Subsequently, on the 13th Shrawana 1332 F. S. (27th of July, 1925), Chandra Kanta executed an unregistered Patta (Ext. 3) in favour of the plaintiff purporting to settle the

aforesaid plots with the plaintiff at a total zama of Rs. 11-. Obviously, this was only with respect to his 12 annas share in the tenure. The plaintiff, it is said, became a raiyat in respect of 12 annas share of the plots mentioned above, right from the time of the oral settlement in 1921.

3. On the 2nd December, 1938, the three sons of Chandra Kanta Ghosal purchased from Ananta Lal Dey his 4 annas share in the tenure in respect of Gadai Bandh (Plots 5242 and 5243) through a registered sale-deed (Ext. 6) for a sum of Rs. 500/-. On the 30th May, 1939, there was a further settlement in favour of the plaintiff with respect to the remaining 4 annas tenure-holder's interest in the aforesaid plots. By this time, Bhawtaran had died unmarried and issueless and so his interest had devolved upon Thakomoni Debi, his mother. Shyama Pada was still a minor. Therefore, this settlement was made by Kali Pada for self and as guardian of Shyama Pada and also by Thakomoni on whom the interest of Bhawataran had devolved. This unregistered Patta is Ext. 3/A.

4. It would thus appear that with respect to the two plots (Plots Nos. 5242 and 5243) of Mouza Chas, settlement was made with the plaintiff by the 12 annas tenure-holder in the years 1921 and 1925 and by the remaining 4 annas tenure-holders in the year 1939 and so, after 1939, according to the case of the plaintiff, she continued as a full-fledged raiyat of the disputed plots of Mouza Chas.

5. The plaintiff claims to have paid rent to the ex-intermediaries with respect to the said plots according to the terms of settlement and also to the State of Bihar after the abolition of Zamindari under the Bihar Land Reforms Act, 1950. Her case is that in the tank i.e. plot No. 5243, she had been rearing fish. Over the embankment in plot No. 5242 she grows vegetables, has planted some trees, and has also exercised other rights of a permanent raiyat. She has also constructed several buildings on the embankment after obtaining due sanction from the authorities under S. 6 of the Bihar Act XXIII of 1948.

6. The State Government has also realised rent from her since the year 1957 till 1966. In 1966, the Anchal Adhikari of Chas (defendant No. 4) initiated a proceeding for settlement of the tank for a period of three years claiming it to be the Sairat of the State Government. The plaintiff filed an objection asserting her raiyati right. The Anchal Adhikari conducted an enquiry into the matter and came to the conclusion that she had acquired raiyati right in the tank on the basis of settlements and that it had not vested in the State of Bihar. This was approved by the land Reforms Deputy Collector, Baghmara at Dhanbad on the 20th January, 1967. Accordingly, the question of settlement was dropped and the plaintiff continued in her possession as a raiyat. Again on instruction of the Addl. Collector, Dhanbad, the Land Reforms Deputy Collector, Baghmara at Dhanbad, started another proceeding in the year 1969, for settling the tank in question as Sairat, as the tank had been recorded in Gairabad Malik Khata and, it had not been settled with the intermediaries as homestead. He, therefore, thought it to be the Sairat of the State Government, which they were entitled to settle. The defendant No. 3, the Land Reforms Deputy Collector also fixed a date for settling it by public auction. The plaintiff again objected and she was asked to produce documents on the 17th April, 1969. But, even before that, defendant No. 3 issued a proclamation for holding auction of the tank on the 15th April, 1969. The plaintiff, having come to know of it, requested defendant No. 3 to stay the settlement, but that prayer was rejected. The plaintiff, therefore, gave notice under S. 80 of the Code of Civil Procedure and instituted a suit for declaration that the tank and the embankment in plots 5243 and 5242 belonged to her in her permanent raiyati right and they had never vested in the State of Bihar and, as such, the proposed settlement of the tank by auction was illegal, invalid and beyond competence; prayer for injunction restraining the defendants from interfering with her possession was also made.

7. On behalf of the defendants, a written statement has been filed telling, inter alia, that the plots Nos. 5242 and 5243 of Mouza Chas are recorded in the record-of-rights as Gairabad Malik and consequently, upon the vesting of the Zamindari, the said plots also vested in the State of Bihar. Since the vesting, it is said the plots in question, locally known as Gadai Band, have been en-

fered in the Sairat register of the Anchal. The right of the ex-intermediaries to settle the tank as also the factum of oral settlement have been challenged. The two pattas are said to be forged, fabricated and ante-dated documents. The rent receipts are also dubbed as collusive and cooked up. The possession of the plaintiff over the plots in question has also been denied. Even the construction of the buildings on the embankment has been denied. The rent receipts granted on behalf of the State are said to have been obtained in collusion with the employees of the State. It has further been said that the Land Reforms Deputy Collector, Baghmara at Dhanbad, had no right to take a final decision regarding the raiyati right acquired by the plaintiff over the plots in suit and, as such, there could be no legal objection in reopening the matter when the mistake came to light. In short, the case of the defendants is that the tank in question vested in the State of Bihar and it is not the raiyati property of the plaintiff and that the State is not bound by the illegal order of the Land Reforms Deputy Collector, Baghmara, passed on 20-1-67.

8. The defendants, no doubt, filed written statement but did not do anything more than cross-examining the witnesses in the trial court. Not a single witness was examined on their behalf nor was any documentary evidence adduced.

9. The learned lower Court, disbelieving the plaintiff's documents and witnesses, came to the conclusion that she had not acquired any raiyati right over the plots in question, as there could be no legal and valid settlement of a tank. It further held that since the possession had vested in the State, she should have not only filed a suit for declaration of title, but also for recovery of possession and that on payment of ad valorem court-fees and not only declaratory court-fee. So far as the declaratory court-fees are concerned, it further held that the plaintiff had sought for three declarations, viz. "(i) plaintiff's raiyati right, (ii) tank not vesting in State, and (iii) the proposed settlement by auction being ultra vires", but only one declaratory court-fee had been paid instead of three. On these findings, it dismissed the suit.

10. In this appeal, the following points have been pressed—

(1) The plots 5242 and 5243 of Mouza Chas could be legally settled with the plaintiff by the ex-intermediaries creating raiyati right in the plaintiff and they were actually settled with her and she had been in possession thereof as raiyat.

(2) The State Government, after once finding the settlement in her favour to be true, could not review its own order under any law whatsoever.

(3) It was not at all necessary for the plaintiff to seek recovery of possession or to pay ad valorem court-fee or for the matter of that even three declaratory court-fees.

11. Before taking up the points, it may be mentioned that at the time of the admission of this appeal ad valorem court-fee was demanded not only for this court, but also for the lower court and the same was deposited by the plaintiff-appellant. Reference may also be made to order No. 7, dated the 14th Sept., 1971 of this court through which the respondents were restrained from taking possession of the suit property during the pendency of this appeal. The plaintiff-appellant was also ordered to go on depositing a sum of Rs. 1500/- from year to year, subject to the condition that if the plaintiff ultimately wins the case, she would withdraw the deposits, but if she loses, the State Government would withdraw the same and appropriate towards their claim of mesne profits and the like against the appellant.

12. I now take up the question whether plots 5242 and 5243 could be the subject-matter of an agricultural lease. I may mention here that both the pattas (Exts. 3 and 3/A) are unregistered ones and they will be in accordance with law only if they are for the agricultural purposes under S. 117 of the Transfer of Property Act. Plot No. 5242 has been described in the lease (Ext. 3) as "bandh ail" which is a local term for embankment, Plot No. 5243 has been described as "bandh", i.e. tank. The area of the tank portion is 3.84 acres and that of the embankment 1.62 acres. Learned counsel for the appellant conceded in the very beginning that a tank cannot be the subject-matter of agricultural lease, but he contended that if the tank appertains to some land which can be the subject-matter of an agricul-

tural lease, and if the tank and the land both have been settled together, then such a settlement would be valid in the eye of law. It has, therefore, to be considered whether the tank portion could be said to appertain to the embankment. An authority has been cited (which will be discussed hereafter) to show that if the embankment is just an embankment, only to contain the tank, then the settlement of that embankment cannot be taken to be a settlement for agricultural purpose; but if the area of the embankment is something more than just the bank, i. e. the area is big enough for cultivation, it can be the subject-matter of an agricultural lease, and in that case, the tank would also come within the ambit of that lease.

13. In order to show the concessions given by the authorities regarding settlement of tank, reference may first be made to the case of Mohamed Munoor Mean v. Sreemutty Jybunee (1873) 19 Suth WR 200) in which it has been said that the provisions of Act X of 1859 which confer a right of occupancy, do not apply to a tank used only for the preservation and rearing of fish, and not forming a part of any grant of land or an appurtenance to any land, even though possession may have been held for more than twelve years. In this case, merely the tank was the subject-matter of dispute. The matter was more clarified in the case of Nidhi Krishna Bose v. Ram Doss Sein (1873) 20 Suth WR 341). In that case, a tank with some portion of the bank also was the subject-matter of a lease. It was held that a right of occupancy in land includes the same right in respect of a tank appurtenant to the land. But a right of occupancy cannot be acquired in a tank with only so much land as is necessary for the bank. Both these cases came to be considered with approval by the Calcutta High Court in the case of Surendra Kumar Sen Chaudhury v. Chandratara Nath (AIR 1931 Cal 135). There the subject-matter was a tank measuring 7 kanis and odd and its banks measuring 4 kanis or so. The settlement was for "rearing fish in the tank and stacking grass for cattle on the bank " and again for "rearing fish and grazing cattle." An argument was made to consider the bank and the tank separately, but their Lordships held that the lease was indivisible one and it was a lease for agricultural purposes. It would be advantageous to refer to the following two paragraphs of the authority for appreciating the logic in it.

"It was next argued on behalf of the appellant that, even if this argument be held to be good so far as the banks are concerned, it cannot apply to the tank itself which was leased solely for the purpose of catching fish. The answer to this contention seems to me to be twofold. In the first place it is to be borne in mind that a supply of water both for drinking purposes and for washing is essential for the keeping of cattle for agricultural purposes, and secondly, that the tank and its banks must be treated as one holding, and that it cannot be split up and the water portion distinguished from the dry portion. The patta itself shows that it is one holding, and it is clear that the defendant appellant himself recognised it as such. Furthermore if a portion of the demised area is used for agricultural purposes, that will determine the character of the lease as a whole. In this connection it may be mentioned that out of a total area of 11 kanis odd the banks cover an area of three and three-fourths kanis, so that the land portion is by no means an insignificant portion of the whole.

The learned advocate for the appellant urged that none of the reported cases covers the present case because in this instance we are dealing with a tank for the rearing of fish. That, however, sounds rather like begging the question. If it were purely and simply a question of a tank the argument would no doubt be sound and the Bengal Tenancy Act would not apply. But, as I have shown, there are the banks of the tank to be considered, and the purpose for which they were intended to be and have in fact been used. These, as it seems to me, determine the character of the holding."

14. On the analogy of this case, learned counsel for the appellant has invited our attention to the areas of the tank and the embankment in the case under consideration. The ratio between the tank (Plot No. 5243 area 3.84 acres) and the embankment (Plot No. 5242 area 1.62 acres) can stand comparison with the areas of the tank and the embankment (roughly $7\frac{1}{4} : 3\frac{3}{4}$) in the reported authority. On this basis, it has been argued that if the bank could be settled for an agricultural pur-

pose, both bank and the tank should be considered as one indivisible holding. The argument is quite appealing.

15. Before examining the documents of lease and the evidence of possession, I may refer to the case of Sobharam Mahato v. Raja Mahato (AIR 1957 Pat 278), which has also been relied upon by the learned Subordinate Judge. I have, however, a feeling that he did not carefully examine the authority and appreciate the reasonings mentioned therein. As would appear from paragraphs 23 to 31 of the authority, what was settled was tank in plot No. 513 and its embankment in plot No. 514, but the purpose for which the tank was settled was not specifically mentioned in the document (Amalnama). The lease, therefore, did not show whether it was granted for agricultural purposes or not. It only mentioned that the settlee could remove the mud of the said tank and remain in possession of it on payment of rent fixed in the lease. From the document, therefore, the purpose of the lease could not be ascertained. In paragraphs 25 and 26 of that authority, it has been observed as follows—

"(25). In my opinion, on the document itself, it is plain that only the tank, which consisted of its embankment, and the ditch or the underground wherein the water was stored, was settled with the plaintiffs' ancestors by the original mokarridars.

(26) The question for determination, therefore, is whether the lease of the tank in question was an agricultural lease for 'agricultural purposes' within the meaning of S. 117 of the Transfer of Property Act."

The controversy therein resolved itself into a narrow compass whether a 'tank' could be called 'land' so as to make the holder of it a 'raiyat' within the meaning of the Bihar Tenancy Act. The Subordinate Judge here has relied on this Patna case only for saying that the land cannot include a tank or reservoir of water. I am afraid, the case under consideration before us is much too different from the said Patna case. Even the authority reported in AIR 1931 Cal 135 has been referred to in the Patna case, and though the ratio has been approved it has been distinguished on facts. It appears to me that the Calcutta authority is on all fours with the case under consideration in this Court. In that very Calcutta authority, Mitter, J. in agreement with Graham, J. in course of a separate but concurrent judgment, has observed that :—

"The true test as to whether lease is for agricultural purposes or not is to see whether the primary object was the lease of the tank or lease of the land surrounding it for purposes of agriculture with tank within it. In this respect the area of the surrounding land is an important factor to be considered."

16. In view of the authorities discussed above, it has now to be examined whether the true object of lease was the lease of embankment for the purposes of cultivation or was the lease of the tank only for the purposes of rearing fish. The area of the embankment would also have to be kept in view. Here itself I may mention that the subsequent conduct of the plaintiff in cultivating the land would also be an important factor to be considered. In AIR 1931 Cal 135, at p. 137, it has been observed as follows:

"Even, however, if it be held that the terms of the lease are not free from ambiguity, it is permissible to take into consideration the conduct of the parties for the purpose of determining its true nature."

With this background, I would now take up the documents of lease and the oral evidence.

17. Exhibit 3 is an unregistered lease of the year 1925. It is in Bengali. Its English translation appears at page 43 of the paper-book. I may repeat to say that this Patta was granted only by 12 annas tenure-holder. There were two schedules in the Patta, one of which is the land in dispute here, namely, plots Nos. 5243 and 5242 of Mouza Chas having a total area of 5.46 acres. The other schedule relates to Salagidi lands having a total area of 8 acres and odd covered by about 28 plots. The plots of Salagidi have been settled for the purpose of cultivation. That is not in dispute here. So far the purpose of the entire lease is concerned, it has been translated in English as follows :

"You shall, by rearing fish in the said tank and catching the same and by planting trees as in parh (embankment thereof) possess the same in various ways and the lands by growing paddy etc. therein."

18. Patta (Ext. 3/A) is also in Bengali and its English translation ap-

pears at p. 48 of the paper-book. This was executed to confer raiyati right in respect of the remaining 4 annas tenure-holder's interest. The purpose of lease mentioned therein runs as follows:—

".....You together with your sons, son's sons etc. in succession shall continue to possess in great happiness, according to your sweet will, by reclaiming silt from the said beds at your own cost by rearing small and big fish therein and catching and selling the same and by planting trees etc., on the embankment (of the bandh), and growing vegetables etc. on the embankment..."

19. Exhibit 3/A was executed in 1939 and Exhibit 3 had been executed in 1925. Between 1925 and 1939, the plaintiff was, therefore, a raiyat of only 12 annas tenure-holder, but after 1939, the plaintiff became the raiyat of 16 annas tenure-holder. As would appear from the rights given in the two leases, the plaintiff was free to cultivate the embankment almost in any manner she liked, by planting trees thereon by growing vegetables thereon, or by cultivating it in any manner she liked. It has, therefore, to be examined now if actually she cultivated the embankment or not. That will indicate whether the lease was taken for agricultural purposes or not.

20. Plaintiff's witness No. 3 in the case is Pashupati Mishra, a Postmaster. He has taken oath to say that the plaintiff is in possession of the tank for the last 40 years and she has been appropriating fish of the tank and growing vegetables on the embankment. According to him, there was also a hut on the embankment in which a guard for guarding fish and vegetables used to live. He also had his own lands nearabout which he had sold to the plaintiff. In the cross examination, further detail about the growing of vegetables was taken, when it was said that the vegetables were grown in the north in one corner and in the south in one corner.

21. Plaintiff's witness No. 7 is Kunjo Behari, a cultivator. He has grown vegetables on the ridge of the tank at the instance of the plaintiff. He has also said that there was a mud hut on the bank in which he used to live. He is also a bataidar of Salagidi land of the plaintiff. On the point of vegetable growing, he has said in his cross-examination that the vegetables were meant for personal consumption of the plaintiff and of himself (witness). He has given details about his cultivation of other lands as well.

22. Plaintiff's witness No. 11 is Dharu Acharjee. He is a Karpardaz of the plaintiff and looks after her affairs. He says that in the suit tank fish is reared and the produce is divided. Part of the fish is also sold. He also testifies to the growing of vegetables on the ridge by Kunjo Behari (P.W. 7) about 20 years ago. In cross examination, he says that the vegetables were grown on the southern and northern ridges. The plaintiff was examined on commission in this case and her evidence appears at pages 22 to 25 of the paper-books. She has also taken oath to say that on the ridge of the tank vegetables are grown. She has reiterated it in her cross-examination as well. These witnesses have fully stood the test of cross-examination and there is hardly anything to disbelieve them. Our attention has not been invited by the respondent State to any statement which may be said to be contradictory. I may repeat to say that there is absolutely no evidence on behalf of the defendants to say that vegetables were not grown or that the embankment was never used for the purpose of cultivation.

23. On the point of possession, a doubt was cast at the time of argument as to how the plaintiff could be in possession as a tenant of only 12 annas tenure-holder between 1925 to 1938. I do not see any absurdity in it. After all Chandra Kant Ghosal and Ananta Lal Dey were in possession as tenure-holders to the extent of 12 annas and 4 annas shares respectively. After settlement of 12 annas interest, the settlee or the raiyat could possess the tank and embankment just in the same way as Chandra Kant Ghosal used to possess. All that the lessee had to do was that she had to pay rent to Chandra Kant Ghosal in lieu of her possession. So far the possession after 1938 is concerned, she became the 16 annas raiyat and there was no difficulty at all in her exclusive possession.

24. The oral evidence of possession and cultivation is also supported by a large number of rent receipts (Exts. 2 to 2/V) which were granted by the State of Bihar and Exts. 2/W to 2/Z-35 granted by the ex-landlord. Nothing has been shown why they should be discredited. They all bear the look of genuineness. There is absolutely no evidence

on behalf of the State to prove that anyone of them was collusive or forged or ante-dated. There is also nothing to show that the employees of the State were in collusion with the plaintiff and so the rent receipts were obtained from the State collusively. Merely, the fact that the rent receipts of the State were issued 'without prejudice', it does not mean that the State is not bound by them. Mere argument that the leases and the rent receipts are forged and fabricated can be of no avail.

25. It would not be out of place to mention here itself that she has built a number of houses on the embankment. With the passage of time, the place came to assume importance on account of the development of Chas Bazar and the Purulia road passing just by its side. Buildings were erected round about 1969 with due permission of the Government. This is an admitted position. The site plan has also been filed in this case which is marked Ext. 4. It would not be out of place to mention that if the plaintiff acquired a permanent raiyati right in 1938 as lessee from the 16 annas tenure-holders, there could be no impediment in erecting buildings on the site.

26. In the circumstances disagreeing with the learned lower court, I hold that both the settlements were genuine, that the areas of the embankment (Plot No. 5242) and the tank (Plot No. 5243) are such that agricultural lease in respect of the embankment could be granted, that the tank appertains to the embankment and that the primary object was settlement of the embankment with the tank as its appurtenance. Having held her possession as tenant since the settlements were taken, the first point is answered in affirmative.

27. Coming to the second point, it has to be considered if the State Government after once finding the settlement to be genuine can review the said finding or not. Exhibit 5 is copy of Sairat case No. 63 (III) 66-67 of Chas. On 17-5-66, the Anchal Adhikari started a proceeding for settling the tank (Plots Nos. 5242 and 5243) for three years, as he took it as a Khas tank of the Government. 27-5-66 was fixed as the date of auction. The order dated 27-5-66 shows that Sardamoni Debi raised the objection to the auction on the ground that it was her raiyati tank. She was asked to produce her documents in support thereof on 27-6-66 and the auction was stayed. Thereafter, for some reason or the other, the matter was again taken up on 15-9-66. The Anchal Adhikari examined the documents and came to the conclusion that 'it cannot be presumed that the property has vested in the State' and so he referred the matter to the Land Reforms Deputy Collector, Baghmara at Dhanbad, for approval. Exhibit 5/A is the order-sheet of the Land Reforms Deputy Collector where it came to be numbered as Sairat Suit No. 12 of 1966-67. He examined the matter on 20-1-1967. He took into consideration the two documents of lease, the rent receipts granted by the ex-intermediaries and also by the Government (from 1958 onwards) and also the peaceful possession of the tank for such a long time. He further took into consideration the fact that the tank had never been settled before by the State Government. He also looked into the precedence of a similar tank, which was available in his office. On consideration of all aspects he recorded the following order on 20-1-1967—

"As such the Anchal Padadhikari, has rightly observed that the property cannot be presumed to have vested in the State.

Inform the Anchal Padadhikari, Chas, and return record."

In view of this order, the settlement of the tank by the Government by public auction was stopped. There was no trouble for about a couple of years thereafter, but in April, 1969, yet another case was started by the then Land Reforms Deputy Collector. The Additional Collector had, perhaps, inspected the records and had entertained some doubts, in respect of the Godai Bandh. On basis of that inspection note, the Land Reforms Deputy Collector took up the matter for consideration as to how the tank had not vested in the State under the Bihar Land Reforms Act. He referred the matter to the Additional Collector, who besides passing other orders passed the following order also on 3-4-69:—

"If the tank is situated in Gair-abad Malik and it has not been settled with the ex-intermediaries as homestead, immediate action for the settlement as Sairat after pre-fixing reserve jama should be taken."

The question is whether the Additional Collector or Land Reforms Deputy Collector is competent to reopen the matter

and review the previous order of 20-1-1967.

28. It is not clear from the order-sheets as to under what provision of the Bihar Land Reforms Act, 1950, the aforesaid two enquiries were initiated. At the time of argument, it was submitted that it could be either under cl. (g) or cl. (h) of Sec. 4 of the Bihar Land Reforms Act. It is important to note that the effect of settlement of tank by public auction would mean ouster or dispossession of the appellant. As would appear, the effect of enquiry under cl. (g) or (h) would also be the same as dispossession of the appellant. Section 4 gives the consequences after the publication of the notification under sub-sec. (1) of Section 3 of the Act. The substance of clause (g) is that after vesting of the estate if the Collector is of opinion that the State is entitled to the direct possession of any property he shall, by an order in writing served in the prescribed manner on the person in possession of such property, require him to deliver possession thereof to the State or show cause if any, against it. Obviously, in this case no show cause notice has been given to the appellant. Clause (h) empowers the Collector to enquire in respect of any transfer including the settlement or lease and, it gives him certain powers if he finds the settlement to have been effected any time after the 1st January 1946. In that case also, he has to give a notice to the party concerned as to why the transfer should not be annulled and then decide the matter. Whether the enquiry be under clause (g) or clause (h), an appeal has been provided for in both the clauses. Obviously, no appeal has been filed by the State Government in this case. I may mention that on behalf of the State, it could not be pointed out as to under which provision the first enquiry was made and the second enquiry is being made. It was also pointed out that whatever enquiry the Land Reforms Deputy Collector may initiate, either under clause (g) or clause (h) of Section 4, it was in the capacity of his being a Collector and if the State was not satisfied with the order, an appeal should have been preferred against the same. There is also provision of revision under Section 4A of the same Act giving revision powers to the Commissioner, but even that was not availed of. Now, if the order of 1966-67 case is set aside, it would mean only reviewing that order. The learned counsel for the State has not been able to show under which authority, the State Government or for the matter of that, the Collector could review the previous order. It is important to note that under Section 38 of the said Act, any enquiry under Section 4 is a 'judicial proceeding' and, as such, an order passed in the proceeding can be set aside only in the manner provided in law. The mere desire of any higher officer can be of no avail. In Thakur Ram Chandra Ji v. The State of Bihar, (1976 BBCJ (HC) 647), a Division Bench of this Court relying upon the authority reported in AIR 1974 SC 1791 has held that unless there is a power of review specifically given by the statute, no such power can be exercised. In the Patna case, the Land Reforms Deputy Collector had once found that the petitioners had no land beyond the ceiling area. It was held that the same matter could not be re-opened because there was no power of review in the statute. If there were no such curb on the exercise of powers, the position would always remain uncertain. Any Land Reforms Deputy Collector can at any time issue notice for making the settlement by auction and harass the raiyat indefinitely. I, therefore, find that the matter could not be re-opened or reviewed in the way it has been done in the instant case, and the order passed by the Additional Collector on 3-4-69 quoted above is without jurisdiction.

29. Coming to the third point i.e. the court-fees, I may only mention that since the possession was with the plaintiff herself, there could have been no necessity of seeking recovery of possession, as found by the learned Subordinate Judge. It is, however not at all necessary for me to assess at this stage the court-fees that the plaintiff was liable to pay. She has already deposited in this Court, the ad valorem court-fee for this Court as also the court below. Since the suit is going to be decreed, obviously with costs, she will get back the same. No further finding is, therefore, called upon on this point.

30. Needless to repeat that in view of order No. 7, dated 14th September, 1971 of this Court, the plaintiff will also be entitled to get back the entire amount deposited by her in pursuance of that order.

31. In the result, the appeal is allowed on contest with costs and hearing fee

Rs. 100. The judgment and decree of the lower court are hereby set aside and the suit is decreed on contest with costs and pleader's fee including pleader's clerk fee at the minimum - contested scale. The title of the plaintiff-appellant to the suit land as permanent raiyat thereof is declared. The defendants are hereby permanently injuncted from interfering with the possession of the plaintiff-appellant.

BIRENDRA PRASAD SINHA, J.:— I agree.

Appeal allowed.

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LALIT MOHAN SHARMA, J.

Mt. Rulia Devi and others, Appellants v. Raghunath Prasad, Respondent.

A. F. O. D. No. 302 of 1969, D/- 5-10-1978.*

(A) Letters Patent (Patna), Clause 28 — Civil P. C. (5 of 1908), S. 98 (3) — Reference under Letters Patent not restricted to question of law unlike S. 98, C.P.C.

The Letters Patent does not confine the point of difference to a question of law and since it is not subject to any limitation mentioned in S. 98 of C.P.C., a difference between the Judges constituting a Division Bench, for the purposes of reference to a third Judge, can be on a question of fact also. (Para 6)

Anno: AIR Comm. C.P.C. (9th Edn.), S. 98 N. 7; AIR Manual (3rd Edn.), Letters Patent (Cal), Cl. 36 N. 1.

(B) Letters Patent (Patna), Clause 28 — Joint order on point of difference — Not necessary.

It is nowhere peremptorily prescribed that the difference of opinion has to be formulated by a joint order. Besides, the irregularity in not doing so, if at all, is of formal nature and does not vitiate the proceeding including the reference. (Para 7)

Anno: AIR Manual (3rd Edn.), Letters Patent (Cal), Cl. 36 N. 1.

(C) Contract Act (9 of 1872), S. 60 — Appropriation — Interest on debt — Payment must be first appropriated towards interest.

On the question whether the part-payment should be treated towards principal or interest, the general principle subject to any contract to the contrary, must be held that the payment should first be applied to the interest and after the interest is fully paid off and there be any remainder, the same would go to satisfy the principal specially where simple interest is payable (and not compound). This is consistent with common justice. To apply the part-payment to the principal, in the first instance, would be to deprive the creditor of the benefit to which he is entitled under the contract. AIR 1970 SC 161; AIR 1922 PC 233 and (1898) 2 QBD 460, Rel. on. (Para 9)

Anno: AIR Manual (3rd Edn.), Contract Act, S. 60 N. 2.

(D) Debt Laws — Interest — 'Makfula dues' — Meaning of — Not confined to principal.

The question is as to whether the expression 'Makfula dues' includes only the principal amount or interest also. The amount which is payable by way of interest is clearly payable under the mortgage document and the term should not be confined to the principal amount only. If it were not so, the decree for interest would not be recoverable as a mortgage decree. AIR 1929 All 411, Rel. on. (Para 10)

(E) Bihar Money Lenders Act (22 of 1975), S. 11 (2) — Scope — Does not apply to future interest.

Sub-sec. (2) refers to the period preceding the institution of the suit only and cannot be held to put any restriction on the Court to pass a decree for interest for a period after the institution of the suit. Therefore future interest for the period after the preliminary decree cannot be subject to the limitation mentioned in the sub-section. (Para 11)

(F) Bihar Money Lenders Act (22 of 1975), S. 11 (1) — Civil P. C. (1908), S. 34 — Scope — S. 11 (1) does not apply to suit — Power of court not limited.

Sub-sec. (1) does not apply to a suit and does not limit the power of a Court to pass a decree with respect to interest which is dealt with in S. 34 and O. 34 of Civil P. C. The Money Lenders Act is dealing with such interest only which may be accruing on the loan under the agreement between the debtor and the creditor or under mercantile usage. Future interest is awarded by Court

*(From decision of D. K. Sinha, Sub J. Muzaffarpur, D/- 2-4-1969.)

under S. 34, C.P.C. and is really in the nature of damages granted on account of the plaintiff being kept out of the money due to him under the decree, and is not, strictly speaking, interest on loan. The award of future interest is purely a matter of statutory power under Civil P. C. and so is the case of pendente lite interest, and they are not controlled by S. 11 (1) of the Money Lenders Act. (Para 12)

Anno: AIR Comm. Civil P. C. (9th Edn.), S. 34 N. 1.

(G) Interpretation of Statutes — Rule of harmonious construction — No provision should be rendered totally ineffective. (1857) 11 Moo PC 324, Rel. on. (Para 12)

Cases Referred: Chronological	Paras
AIR 1970 SC 161	9
AIR 1949 Mad 596	7
AIR 1929 All 411	10
AIR 1922 PC 233	9
(1898) 2 QBD 460: 79 LT 321, Parr's Banking Co. Ltd. v. Yates	9
(1857) 11 Moo PC 324: 14 ER 718, Ditcher v. Denison	12

Tara Kant Jha and Bishwanath Agrawal, for Appellants; S. P. Srivastava and Yogendra Mishra, for Respondent.

JUDGMENT:— This appeal by the appellants arises out of a suit filed by the plaintiff for a mortgage decree for a sum of Rs. 11,478 with pendente lite and future interest. The plaintiff Raghunath Prasad and the defendant No. 1 Ram Chandra Prasad are brothers. By a registered partition deed dated 2-4-1950 there was a final partition between them. There were certain transactions between the parties, the details whereof are not necessary to state here in view of the scope of the present appeal at this stage and the arguments. Ultimately, the defendant No. 1 as the karta of his family executed a mortgage document (Ext. 2) in respect of a house in Sitamarhi town for a sum of Rs. 6,500 on 5-12-1951. A sum of Rs. 4,250 was received by him in cash and there was an adjustment of the balance amount. The plaintiff claimed to be a registered money lender and filed the suit for realisation of the dues under Ext. 2. The account mentioned at the bottom of the plaint indicates that besides the principal amount of Rs. 6,500, interest at the rate of 6 per cent per annum was claimed from the date of execution till the date of the filing of the suit. The other defendants impleaded in the suit were sons and grandson of defendant No. 1.

2. The defendants admitted the transaction but pleaded payment of a sum o Rs. 4,700. It has further been said tha if the accounting is done, nothing would be found due from the defendants. The payments, however, were denied by the plaintiff.

3. The trial court disbelieved the defence story of part-payment and decreed the suit for the full amount along with pendente lite interest at the rate of 6 per cent per annum with a direction that the total interest would not exceed the principal amount of Rs. 6,500 in any case.

4. The defendants appealed praying for dismissal of the suit and the plaintiff-respondent filed a cross-objection under Order 41 Rule 22 of the Civil P. C. claiming future interest at the rate of 9 per cent per annum. During the pendency of the appeal, the appellant No. 1 died and those of his heirs who were not already on record were substituted.

5. The appeal was placed for hearing before a Division Bench constituted by Mr. Justice B. D. Singh and Mr. Justice B. P. Jha. By separate judgments, they have held that defendant No. 1 had paid a total sum of Rs. 4,000 towards the dues, but their plea of payment of additional amount of Rs. 700 was not correct. Rejecting the argument addressed on behalf of the appellants that a sum of Rs. 4,000 should have been treated as payment towards the principal amount and not towards the interest. Mr. Justice B. D. Singh held that the plaintiff was entitled to apply the said amount towards interest at the rate of 6 per cent per annum. He also directed pendente lite interest to be calculated till the date of the decree of this court. Mr. Justice B. P. Jha, on the other hand, held that the amount must be adjusted towards the principal. On the question of future interest, both the Hon'ble Judges held that the plaintiff was entitled to the same at the rate of 6 per cent per annum. They also agreed with the direction of the trial court that the past and pendente lite interest should not exceed the principal amount, but differed on this question with respect to the future interest. Mr. Justice B. P. Jha held that the aggregate of the entire interest including the future interest would not exceed the principal amount, but Mr. Justice B. D. Singh did not

subject the future interest to such a condition. Since the Hon'ble Judges differed on some of the questions, they directed that the case should be placed before the Hon'ble the Chief Justice for placing it before a third Judge. Accordingly, the appeal was placed before me for further hearing.

6. The proviso to S. 98 (2) of the Civil P. C. states that if the Judges composing a Division Bench differ in opinion on a point of law, they may state the point of law upon which they differ and the appeal shall then be heard upon that point by one or more of the other Judges of the Court. The sub-sec. (3) declares that the section shall not be deemed to alter or otherwise affect any provision of the Letters Patent. The relevant portion of clause 28 of the Letters Patent is in the following terms:

"..... and if such Division Court is composed of two or more Judges and the Judges are divided in opinion as to the decision to be given on any point, such point shall be decided according to the opinion of the majority of the Judges, if there be a majority, but, if the Judges be equally divided, they shall state the point upon which they differ and the case shall then be heard upon that point by one or more of the other Judges and the point shall be decided according to the opinion of the majority of the Judges who have heard the case including those who first heard it."

It will be observed that the Letters Patent does not confine the point of difference to a question of law and since it is not subject to any limitation mentioned in Section 98 of the Civil P. C., it must be held that a difference between the Judges constituting a Division Bench, for the purpose of reference to a third Judge, can be on a question of fact also. However, in the present case, the learned Judges did not jointly formulate the points of difference, after delivering their separate judgments. They have in the order-sheet merely stated that as they differed the case should be placed before the Hon'ble the Chief Justice for placing it before a third Judge.

7. Mr. Yogendra Mishra, appearing for the plaintiff-respondent raised a preliminary objection that since the points were not stated by the Bench, the reference to the third Judge was illegal. I do not see any merit in this argument inasmuch as the points, although not expressly enumerated by a joint order, are apparent from the judgments. It is nowhere peremptorily prescribed that the difference of opinion has to be formulated by a joint order. Besides, the irregularity in not doing so, if at all, is of formal nature and does not vitiate the proceeding including the reference. On examining the observations contained in para 23 of the judgment of the Madras High Court in A. K. Gopalan v. District Magistrate, Malabar (AIR 1949 Mad 596), Mr. Mishra stated that he withdrew his objection and the reference may be treated as good and be decided on merits.

8. The learned Judges have differed on the following points:—

(i) Whether the payment of Rs. 4,000 made by the defendant to the plaintiff should be treated towards the principal amount or towards the interest; and

(ii) Whether the future interest for the period from the date of the decree till realisation would be, along with the past and pendente lite interest, subject to the maximum limit of Rs. 6,500, that is, the principal amount.

Both the learned Judges have subjected the past and pendente lite interest to the aforementioned limitation; Mr. Justice B. P. Jha on an interpretation of S. 11 of the Bihar Money Lenders Act, 1974 and Mr. Justice B. D. Singh on the ground that the trial court had given such a direction which has not been challenged before this Court either by filing a cross-objection or an independent appeal. Anyway, as there is no difference on this question, the pendente lite interest must be subject to the limitation mentioned in the judgment of the trial court, as affirmed by the Division Bench.

9. On the question whether the part-payment should be treated towards principal or interest, the general principle subject to any contract to the contrary, must be held that the payment should first be applied to the interest and after the interest is fully paid off and there be any remainder, the same would go to satisfy the principal specially where simple interest is payable (and not compound). This is consistent with common justice. To apply the part-payment to the principal, in the first instance, would be to deprive the creditor of the benefit to which he is entitled under the contract. This rule was recognised in England in the last century

in the case of Parr's Banking Co. v. Yates, (1898) 2 QBD 460, which was followed by the Privy Council in M. V. Appa Rao v. R. P. Appa Rao (AIR 1922 PC 233). The point arose before the Supreme Court in Meghraj v. Mst. Bayabai (AIR 1970 SC 161) where deposits were made by the judgment-debtor under Order 21 Rule 1 of the Civil P. C. towards a mortgage decree and while so doing they had stated that payments were made towards the principal due. There was, however, no evidence on the record that the decree-holders were informed that the amounts were deposited towards the principal due nor was there evidence that the mortgagee accepted the amount towards the principal. The Court held that the amount so paid could be appropriated first towards interest and then towards the principal. It was observed that "the normal rule that the amounts deposited in Court should first be applied towards satisfaction of the interest and costs and thereafter towards the principal would apply." It was further said that it was for the mortgagor to prove an agreement contrary to the normal rule. I am, therefore, of the view that in absence of an agreement to the contrary, the sum of Rs. 4,000 paid by the defendant must be first applied towards the interest and the burden to prove such an agreement is on the defendant.

10. The defendants relied upon paragraph 7 of the written statement of the defendant No. 1 before the Division Bench in support of their argument that an agreement regarding application of part-payment towards the principal first has been pleaded. It is well settled that pleading does not amount to proof and it was the duty of the defence to have proved the plea. The only evidence on which reliance was placed before the Division Bench appears to be the deposition of the defendant No. 1 (D.W. 8). Mr. Bishwanath Agrawal who appears for the appellants did not make any further argument when the case was listed before me. The defendant No. 1 stated that he had paid Rs. 4,000 towards Makfula dues. The question is as to whether the expression 'Makfula dues' includes only the principal amount or interest also. The amount which is payable by way of interest is clearly payable under the mortgage document and I do not agree with the defence case that the term should be confined to the principal amount only. If it were not so, the decree for interest would not be recoverable as a mortgage decree. The Allahabad High Court in Faqir Pasi v. Behari Kundigar (AIR 1929 All 411) also took a similar view. I do not find any other evidence in this case which could be held to establish the defence plea. It must, therefore, be held that the sum of Rs. 4,000 must be deemed to have been paid in the first instance towards the interest and if on an accounting it is found that the amounts exceeded the interest due on the date of payment, the balance would be applied against the principal due.

11. The other question, that is, whether future interest along with other interest should be subject to the limitation that they should not in any case exceed the principal amount is dependant on an interpretation of S. 7 of the Bihar Money Lenders (Regulation of Transaction) Act 1939 and Section 11 of the Bihar Money Lenders Act, 1974. Section 7 of the 1939 Act said that notwithstanding any law or agreement to the contrary, no Court should in any suit brought by a money lender pass a decree for an amount of interest 'for the period preceding the institution of the suit' which together with any amount already realised as interest is greater than the principal. The restriction applies only to the past interest which is apparent from the words mentioned in the preceding sentence. The difficulty, however, arises on account of Section 11 of the 1974 Act which is quoted below:

"11. Maximum amount which a money lender may realise from the debtor on account of principal and interest. (1) Notwithstanding anything to the contrary contained in any other law or in anything having the force of law or in any agreement, it shall not be lawful for a money lender to realise from a debtor on account of principal and interest, in case of a loan in cash more than double of the amount of the loan advanced by him, or in case of a loan in kind, one and half times the amount of the loan advanced by him.

(2) No Court shall in any suit brought by a money lender before or after the commencement of this Act or in any appeal or proceedings in revision arising out of such suit pass a decree for an amount which together with interest for the period preceding the institution of the suit, including any amount already paid towards principal or interest,

either through the Court or otherwise, is in case of loan in cash more than double the amount of the loan advanced, or in case of a loan in kind, more than one and a half times the amount of the loan advanced, or if the loan is based on a document, in case of a loan in money, more than double the amount of the loan mentioned in or evidenced by such document or, in case of a loan in kind more than one and a half times the amount of the loan mentioned in or evidenced by such document (emphasis is mine)."

The sub-sec. (2) has made it clear that it applies to a suit brought by a money lender either before or after the commencement of the new Act, whether pending in the trial court or in appeal, and it cannot, therefore, be suggested that this sub-section which came into existence during the pendency of the present appeal is inapplicable. But this sub-section refers to the period preceding the institution of the suit only and cannot, therefore, be held to put any restriction on the Court to pass a decree for interest for a period after the institution of the suit. It must, therefore, be held that future interest for the period after the preliminary decree cannot be subject to the limitation mentioned in the sub-section.

12. The only point which remains to be considered is the effect of sub-sec. (1). It is suggested that since a money lender is not permitted by this sub-section to realise from a debtor on account of principal as well as interest more than double of the cash amount of the loan, a decree cannot be passed in excess of this amount. The term 'interest' is not limited to past interest only and it is therefore argued that the future interest also must be subject to the restriction. The difficulty in accepting this contention is that on such an interpretation of sub-sec. (1), the sub-sec. (2) shall be rendered entirely unnecessary and mere surplusage. It is fairly established that a statute should be so construed as not to render any provision thereof totally ineffective. It is a sound principle of interpretation that, in the language of the Privy Council in Ditcher v. Denison (1857) 11 Moo PC 324 at p. 337, one 'should not, without necessity or some sound reason impute to the language of a statute tautology or superfluity and should be rather inclined to suppose every word intended to have some effect or be of some use.' There is a presumption that the legislature has intended to give effect to every part of a section without militating against each other and to reach the desired effect, a harmonious construction has to be adopted. Maxwell has said that it is an elementary rule that construction is to be made of all the parts together, and not of one part only by itself. A survey of the entire section is essential, "even when the words are the plainest; for the true meaning of any passage is that which best harmonises with the subject and with every other passage of the statute." The sub-sec. (1) does not deal with the duty of the Court at all and speaks only of what the money lender himself ought to do. Since the question as to the amount of decree which can be passed in a suit has been dealt with separately in sub-sec. (2), the intention of the legislature appears not to apply the sub-sec. (1) to the powers of a Court in a suit. The callous treatment the money lenders of this State were giving to the debtors in the past is notorious and this they did even without going to Court. The object of the sub-sec. (1) appears to forbid them from so doing. Naturally, the 'interest' referred to in this sub-section could not be put in further divisions as past, pendente lite and future interest, which terms can be understood only with reference to a suit. If a money lender contravenes the provisions of the first sub-section, he may be penalised under S. 34 of the Act. He cannot extort interest beyond the limit prescribed by sub-sec. (1) and escape the consequence by merely avoiding to go to Court. I am, therefore, of the view that the sub-sec. (1) does not apply to a suit and does not limit the power of a Court to pass a decree with respect to interest which is dealt with in S. 34 and O. 34 of the Civil P. C. The Money Lenders Act is dealing with such interest only which may be accruing on the loan under the agreement between the debtor and the creditor or under mercantile usage. Future interest is awarded by Court under S. 34, Civil P. C. and is really in the nature of damages granted on account of the plaintiff being kept out of the money due to him under the decree, and is not, strictly speaking, interest on loan. The award of future interest is purely a matter of statutory power under the Code of Civil Procedure and so is the case of pendente lite interest, and they are not controlled by

S. 11 (1) of the Money Lenders Act. This interpretation, besides being a reasonable one, does not render the sub-sec. (2) ineffective or meaningless. It follows that the second question also must be decided in favour of the plaintiff. I accordingly agree with the judgment of Mr. Justice B. D. Singh on both the questions and I regret to have taken a view different from Mr. Justice B. P. Jha for whom I have great respect.

13. In the result, the appeal is allowed in part and the cross-objection is also allowed as indicated in the judgment of Mr. Justice B. D. Singh. Mr. Justice B. P. Jha did not differ with the direction given by Mr. Justice B. D. Singh in para. 26 of his judgment that the appellants would not have to pay future interest if they pay the decretal amount within six months. This period of six months will have, in the circumstances, to be computed from today. Parties will bear their own costs throughout.

Reference answered.

AIR 1979 PATNA 120

S. K. CHOUDHURI, J.

M/s. Lakhpat Rai Hukum Chand, Petitioner v. M/s. Chhedi Ram Rajkumar, Opposite Party.

Civil Revn. No. 461 of 1977, D/- 25-9-1978.*

Civil P. C. (5 of 1908), Sec. 20 (c) — Contract for supply of goods — Breach — Jurisdiction of Court to try suit — Court at place where money is payable has jurisdiction.

A suit for recovery of money for breach of a contract can be filed where the part of the cause of action arises within the meaning of Sec. 20 (c) of the C. P. C. It is well settled that cause of action means every fact which it is material for the plaintiff to prove in order to obtain a judgment in his favour. It also cannot be disputed that in relation to a contract, cause of action arises at a place where the contract was made or place where the contract was to be performed or the performance thereof completed or at a place where, in performance of the contract any money to which the suit relates was expressly or impliedly payable. (Para 7)

In the instant case the hundis and R/Rs were to be sent to the Punjab National Bank at Waini within the jurisdiction of Samastipur court under the contract and the plaintiff was to take delivery of the goods only after honouring them after payment to the bank. The amount of advance of Rs. 15,000/- which was paid by the plaintiff had been deducted by the defendant while drawing the latter hundis but they were not retired nor the consignment delivered due to the breach of contract committed by the defendant. Therefore, it is clear that if there would not have been any omission on the part of the defendant in sending the Hundis and the R/R to the Bank contracted upon, the plaintiff would have got adjustment of the same by honouring the hundis and the R/R at the bank at Waini. Therefore, the omission gave rise to a cause of action as it would amount to a breach of the part of the contract and consequently the Court at Samastipur had jurisdiction to try the suit. (Case law discussed). (Para 7)

Anno : AIR Comm. C. P. C. (9th Edition), S. 20 N. 19.

Cases Referred : Chronological	Paras
AIR 1962 Raj 122	6
AIR 1954 Pat 147	7
AIR 1953 Raj 134	6
AIR 1952 Mys 111	8
AIR 1949 Mad 858	8
AIR 1947 Mad 83	8
AIR 1947 Pat 134	7
AIR 1935 Mad 663 (FB)	8
AIR 1920 All 6	8

S. C. Ghose and N. K. Agrawal, for Petitioner; Rajeswar Dayal, for Opposite Party.

ORDER :— The defendant has filed this revision against the order dated 9-4-1977 passed by the Subordinate Judge, Samastipur in money suit No. 137 of 1974 holding that the court has got territorial jurisdiction to try the suit.

2. In order to appreciate the point it is necessary to state the relevant facts from the plaint. The plaintiff opposite party is a registered firm dealing in wholesale grain business at Siliguri in the district of Darjeeling. The defendant is also a registered firm dealing in similar business at Sona Mandi in the district of Sangrur in the State of Punjab. A contract between the plaintiff

*(From order of S. D. Sharma Sub J. Samastipur, D/- 9-4-1977).

and the defendant was entered into in October, 1974, through a middle man of Siliguri whereby the defendant contracted to supply about 1400 bags of maize, by local purchase to the plaintiff. It is also the plaintiff's case that under the terms of contract after making purchase the defendant would despatch "goods to Barauni railway station on the North Eastern Railway and the relative R/R and hundi were to be sent to the Punjab National Bank, Waini drawn against M/s. Malik Singh Amrik Singh of Waini who had been appointed as a commission agent of the plaintiff for getting the supply of the said goods on behalf of the plaintiff after honouring the hundis drawn by the defendant against the goods and relative R/Rs and hundis were to be taken delivery of from the said Bank on payment of the bill." It is also stated that M/s. Malik Singh Amrik Singh as commission agent of the plaintiff had to retire the hundi as settled between the plaintiff and the said firm and after sale of the goods in Waini they were to submit accounts to the plaintiff. These facts were fully known to the defendant who had agreed to carry out the same.

According to the case of the plaintiff the defendant purchased 394 bags of maize and despatched from Dhuri railway station to Barouni under two consignments and further despatched 1030 bags of maize from Nova to Barouni junction under four consignments. It is said that the aforesaid consignments covering 500 bags despatched from Nova along with two hundis were sent to Waini Punjab National Bank which were honoured and there is no dispute in relation to these two transactions. Two wagons covering 394 bags despatched from Dhuri reached the destination station, namely Barouni junction on 29-10-1974 and 30-10-1974 and the remaining two wagons carrying 530 bags of maize booked from Nova reached Barouni junction on 4-11-1974 and 5-11-1974 for which the plaintiff had already received a bijak but the relative hundi and the R/Rs were not sent to the Punjab National Bank, Waini as per contractual term. Accordingly the defendant was requested to send the indemnity bond for taking delivery as the consignments were lying at Barouni junction as heavy demurrage was to be paid due to the fault of the defendant and directed the defendant's representative to take a draft for the amount under the hundi. It is stated that the plaintiff did not get any response. Thereafter the plaintiff sent one Foujdar Sah an agent and representative of M/s. Malik Singh Amrik Singh but the defendant did not take any step. In other words they sent a telegram that the hundis have been sent to the State Bank of India, Barouni by mistake instead of sending to the Punjab National Bank, Waini and the plaintiff was directed to take delivery of the hundis and R/R from the State Bank of India at Barouni. According to the case of the plaintiff on receipt of the telegram by the plaintiff on 8-11-1974 at 7 p. m. at Siliguri the plaintiff enquired at Barouni and learnt that the hundis and R/R have already been returned to the defendant on 7-11-1974.

The further case of the plaintiff is that in connection with the consignments of the two wagons containing 530 bags despatched from Nova reached Barouni junction on 5-11-1974 and the relative R/R and hundis were sent to the State Bank of India, Darbhanga against the term of the contract under which they should have been sent to the Punjab National Bank at Waini.

Under the aforesaid circumstances the remaining goods under the contract were not delivered to the plaintiff or his agent due to wilful mistake and default on the part of the defendant inasmuch as hundi and R/R were not sent to the Punjab National Bank at Waini and failure to do so was a clear violation of the terms of contract. According to the case of the plaintiff a sum of Rupees 15,000/- was paid by the plaintiff as advance which finds mention in the bijak supplied to the plaintiff and the said amount was to be deducted while drawing the hundi and it is learnt that the said amount had been deducted by the defendant while drawing the latter hundis but the hundis were not retired nor the consignments delivered due to breach of contract committed by the defendant. Hence the plaintiff is liable for recovery of the aforesaid amount of Rs. 15,000/- from the defendant besides interest by way of damages from 15-10-1974. The cause of action arose when the contract was entered into and the same is mentioned in para. 15 of the plaint which is in these terms."

"That the cause of action arose to the plaintiff in the month of Oct., 1974 when the contract was entered into and from Oct. to Nov., 1974 by the breach of con-

tract by the defendants and on 30-11-1974 the date of notice and as the amount was payable by retiring the Hundi at Waini P. S. Tejpur, a part of the cause of action arose within the jurisdiction of the court and hence the suit is being filed."

The plaintiff claimed a sum of Rupees 15,390 payable by the defendant as principal with interest by way of damages as also the cost incurred in correspondence, telegram and notice, on account of which has been shown under the heading 'Accounts'. With the aforesaid allegations the plaintiff has filed the present suit in the court of the Subordinate Judge, Samastipur.

3. After notice of the suit the defendant appeared but before any written statement was filed, the defendant challenged the territorial jurisdiction of the court by filing a petition. In that petition it has been stated that the suit is beyond pecuniary jurisdiction of the court. In that petition it has been alleged that on perusal of the plaint it is clear that the suit is beyond the territorial jurisdiction of the court and the plaintiff should have filed the suit in the Punjab court. The plaintiff filed a rejoinder to the aforesaid application asserting that the suit could be tried where it has been filed.

4. The court below after hearing the parties on this preliminary point held by the impugned order that the Court has got territorial jurisdiction to try the suit and accordingly rejected the defendant's petition. It has taken the view that cause of action also arose at a place where in performance of the contract any money was payable. According to the court below therefore, as the cause of action arose at Waini the suit is triable by Samastipur court.

5. Mr. S. C. Ghose, learned counsel appearing in support of this application contended that the view taken by the court below to the effect that part of the cause of action arose at Waini within the jurisdiction of Samstipur court is erroneous as nothing was done at Waini. According to the learned counsel if the hundis and R/Rs would have been sent to the Punjab National Bank, Waini and taken delivery of by the plaintiff then only it could be said that a part of the contract was performed at Waini and therefore Samastipur court has jurisdiction. Mr. Rajeswar Dayal, learned counsel, appearing for the plaintiff-opposite party on the other hand supported the impugned order by contending that a part of the cause of action arose at Waini as in pursuance of the contract, hundis and the railway receipts were to be taken delivery from the Punjab National Bank at Waini. According to the learned counsel if there was any omission on the part of the defendant in sending the hundis and the R/Rs to the place agreed upon under the contract it would amount to a breach of a part of the contract giving rise to a cause of action.

6. Mr. Ghose in support of his contention relied upon a single Judge decision of the Rajasthan High Court in the case of Firm Shah Chandanmal Fatehraj v. Hazari Lal (AIR 1962 Raj 122). He did not in fact rely upon the main decision in the case but referred to para. 21 only where one aspect of the case was considered. In that paragraph it has been stated that the said suit was primarily for recovery of Rs. 1500/- as advance in respect of some transactions which did not take place. It has been held that such advance being a debt could be recovered at the suitor's place and in support of this proposition several decisions have been referred to in that paragraph. In this reported case the plaintiff was a resident of Baran and the defendant was carrying on business at Merta. The plaintiff placed orders with the defendant for one wagon of wheat to be booked at Bangalore and accordingly hundi was drawn by the defendant for advance of Rupees 1500/-. The said hundi was honoured through the bank by the plaintiff at Baran. The defendant sent the goods from Banglore and sent the bilti and hundi through the bank at Baran without adjusting the advance. It appears that this advance was not refunded to the plaintiff in spite of demands. Hence the suit for its realisation was filed at Baran. The trial court held that it had no jurisdiction to try the suit as no part of the cause of action arose at Baran. This decision was reversed by the lower appellate court. In revision before the High Court reliance was placed upon a decision in Charanji Lal v. Sumer Oil Mills (AIR 1953 Raj 134) for the proposition that a part of the cause of action arose where payment was to be made for obtaining R/R. I would better quote from para. 9 at p. 125 where this decision has been referred.

".....a contract was entered into between the parties at Udaipur for the

supply of Til seeds to the plaintiff who resided at Kishungarh within the jurisdiction of the Jaipur court. The defendant carried on business at Ratlam. The defendant was to load the Til in a wagon at Ratlam and was to obtain a railway receipt which was to be sent to the plaintiff at Kishungarh through a bank and was to be delivered to him upon payment of the price of the Til as well as other charges. It was held that a part of the cause of action arose at Kishungarh inasmuch as the railway receipt which alone would have entitled the plaintiff to take delivery of the goods was to be delivered at Kishungarh."

After considering the argument and the decision relied upon in that case it has been held that court at Baran had jurisdiction to try the suit. I fail to understand as to how this case helps the argument of Mr. Ghose. Para 21 relied upon by Mr. Ghose only shows that the advance should also be considered as paid and therefore the suit could be filed at the place of the plaintiff where he resided. In the case under consideration the plaintiff was also resident of Baran where R/R was to be sent through the Bank and therefore from that angle also it has been held that the court at Baran had jurisdiction to try the suit.

7. It cannot be disputed that the suit like the present one could be filed where the part of the cause of action arose within the meaning of Sec. 20 (c) of the C. P. C. It is well settled that cause of action means every fact which it is material for the plaintiff to prove in order to obtain a judgment in his favour. It also cannot be disputed that in relation to a contract cause of action arises at a place where the contract was made or place where the contract was to be performed or the performance thereof completed or at a place where, in performance of the contract any money to which the suit relates was expressly or impliedly payable. It has been pointed out in a Bench decision of this Court in Kodo Minerals Steatite Mine and Mill Owners v. Rohtas Industries Ltd. (AIR 1954 Pat 147) relying upon a previous Bench decision of this Court in Arthur Butler & Co. Ltd. v. District Board of Gaya (AIR 1947 Pat 134) that explanation 3 of S. 20, C. P. C. incorporated the aforesaid tests to find out as to where the cause of action arose in relation to contract. It has further been pointed out that though the said explanation stood deleted by the amendment those tests are still good tests in relation to the contract to find out where the cause of action arose.

In the present case under consideration I have stated the allegations made in the plaint which clearly show that the hundis and R/Rs were to be sent to the Punjab National Bank at Waini within the jurisdiction of Samastipur court under the contract and the plaintiff was to take delivery of the goods only after honouring them after payment to the aforesaid bank. I have also pointed out above that the amount of advance of Rs. 15,000/- which was paid by the plaintiff had been deducted by the defendant while drawing the latter hundis but they were not retired nor the consignment delivered due to the breach of contract committed by the defendant.

Therefore, it is clear that if there would not have been any omission on the part of the defendant in sending the Hundis and the R/R to the Bank contracted upon, the plaintiff would have got adjustment of the same by honouring the hundis and the R/R at the bank at Waini. In my opinion, therefore, the aforesaid omission gave rise to a cause of action as it would amount to a breach of the part of the contract.

8. I may discuss here a Bench decision of the Mysore High Court in Shimoga Oil Mills v. Radhakrishna Oil Mills Kadiri (AIR 1952 Mys 111). In that case the defendant (of that case) agreed to supply certain bags of ground nut seeds for which the plaintiff of that suit paid an advance of Rs. 3000/- but the defendant did not supply the goods in spite of repeated demands. The plaintiff therefore cancelled the order and asked for refund of the advance with interest reserving his right to sue for damages later on. The suit was accordingly filed at Shimoga court. One of the defence that was taken was that Shimoga court had no jurisdiction as no part of the cause of action arose within its jurisdiction. The Trial Court held that the said court had no jurisdiction. In appeal before Mysore High Court it was pointed out that the R/R had to be delivered at Shimoga after despatch of the goods to that place. It has, therefore, been held that it can be said that, the performance could not be completed until R/R was tendered at Shimoga. It

has also been said that he could validly complain that he had not received such R/R and therefore treat the omission as a breach of a part of the contract and infringement of right affording him a cause of action. Notice was also taken of a case in Hanuman Pd. Pragdas v. Nanjappa Chetty and Sons (AIR 1949 Mad 858). In relation to that case I will do better if I read what has been stated by the Mysore High Court which runs thus:

"There is another case reported in the same volume at page 858 which fully supports the plaintiff and whose facts are almost identical with the present case. In that case the plaintiff, a firm at Madras, booked orders for some goods from the defendants who were the manufacturers at Mirzapore. The contract was for despatch of goods F. O. R. Mirzapore at earliest booking day and the railway receipt to be negotiated through the Bharat Bank Limited. The defendants failed to despatch the goods and the plaintiffs cancelled the contract and sued for damages in Madras. It was held on an objection regarding jurisdiction that as the parties had agreed that the railway receipt should be sent to the Bharat Bank, which in the context could only mean the Bharat Bank at Madras, against payment by the defendant the court at Madras had undoubted jurisdiction to try the suit. To a similar effect are cases in Venkatachalam v. Rajaballi, AIR 1935 Mad 663 (FB), Lakshmipathi v. Mahomed Ghani, AIR 1947 Mad 83 and Ramlal v. Bhola Nath, ILR 42 All 619: AIR 1920 All 6 where it has been held that the Court of the place where payment of the price is to be made has also jurisdiction to try a suit arising out of a contract".

It has therefore been held in the Mysore case that Shimoga court had jurisdiction to try the suit.

9. Thus it is clear that the view I have taken above is supported by the decisions I have discussed above. No decision taking a contrary view was placed before me either of our own High Court or of any other High Court. It has been contended by the learned counsel for opposite party that the petitioner not having filed a written statement and having been allowed to raise objection as to the territorial jurisdiction before such written statement could be filed now cannot be allowed to file written statement as the provision of O. VIII R. 1 (1) stands amended by the amending Act No. 104 of 1976. He pointed out that under the amended Act a mandatory duty has been cast upon the defendant to file a written statement at or before the first hearing or within such time as the court may permit. It is not for me to say one way or the other. If this objection is tenable and the opposite party is advised he may take up this point at the proper stage in the court below.

10. In view of the discussion made above I hold that there is no merit in this application and it is accordingly dismissed with costs. Hearing fee is assessed at Rs. 100/-.

Revision application dismissed.

AIR 1979 PATNA 124

B. P. JHA AND
LALIT MOHAN SHARMA JJ.

Life Insurance Corporation of India, Bombay, Appellant v. Ramdas Agarwal and another, Respondents.

A. F. O. D. No. 521 of 1972, D/- 4-5-1978.*

Contract Act (9 of 1872), Section 63 — Evidence Act (1 of 1872), S. 115 — 'Waiver', meaning of — Insurance — Conditions of policy — Breach of conditions— Waiver of interest by insurer — Effect.

Waiver signifies nothing more than an intention not to insist upon the right. Waiver must be an intentional act with knowledge. (Para 10)

The Corporation accepted the proposal and issued life insurance policy D/-28-8-1963. The assured was required to pay premium each year on 18th April. The grace period prescribed in the policy was thirty days. If the premium was not paid within the grace period, the policy would lapse. A further condition in the policy was that the assured can revive the policy during his lifetime, provided he submits the health certificate within a period of five years from the due date of the first unpaid premium as well as pays interest as mentioned in the policy. The first condition he satisfied by getting himself examined by a medical officer of the Insurance Company. So far as the pay-

*(From decision of R. P. Tandon, Sub J. Chaibasa, D/- 14-2-1972.)

ment of interest by the assured is concerned, it was never demanded by the insurer. The assured died on 11th September 1967. Before his death he paid five premiums. The second premium was paid on 18th July, 1964 that is, after the grace period. The case of the corporation was that the assured did not pay the premium within thiry days of the grace period, that is, on 18th May, 1964, and, as such, the policy of the assured had lapsed. The further case of the defendants, the Corporation, was that in view of the fact that the policy which had lapsed was not revived by the assured, the plaintiff, the son of the assured was not entitled to the sum assured.

Held that if the policy had lapsed, the policy was duly revived by the assured during his lifetime within five years from the due date of the unpaid premium amount by getting himself examined by a doctor of the Corporation and the interest amount was waived by the Corporation. (Paras 10, 20)

The Corporation had abandoned the right to realise the interest from the assured, and, as such, it never issued any notice for the realisation of the interest amount. The Corporation had knowledge about the condition in the policy, and it had also knowledge that such amount is due as interest with the assured, and, in spite of this knowledge the Corporation never intended to realise the interest and never informed the assured to that effect. In this circumstance, the waiver on the part of the Corporation was an intentional act with knowledge. If it is so, the Corporation is precluded from realising the interest. (Para 10)

Held, further, that the policy had not lapsed for the simple reason that the Corporation went on accepting the premium even after 1964. The premium amount was received and accepted by the Corporation in the years 1964, 1965 and 1967. The Corporation kept the premium amount in deposit. The Corporation never refused to accept the amount. If it is so, the Corporation is precluded from saying that it had received it otherwise than for the purpose of the premium. By accepting the premium, the Corporation cannot take the plea that the policy had lapsed. By accepting the premium, the Corporation kept the policy alive and it never lapsed. (Case law discussed). (Para 12)

Anno: AIR Manual (3rd Edn.) (1) Contract Act, S. 63, N. 5; (2) Evidence Act, S. 115, N. 54.

Cases Referred : Chronological Paras

(1922) 2 AC 541 : 128 LT 77 (PC), Yorkshire Insurance Co. Ltd. v. Craine 16

(1854) 5 De GM & G 265 : 43 ER 872, Wing v. Harvey 12

S. Mustafi and Bhupendra Nath Sinha, for Appellant; S. C. Ghosh and Sukumar Sinha, for Respondent No. 1.

B. P. JHA, J.:— The Life Insurance Corporation of India (hereinafter referred to as 'the Corporation') preferred an appeal against the judgment dated 14th Feb., 1972 in Money Suit No. 40 of 1969.

2. Ramdas Agrawal, being the son of Babulal Agrawal, instituted a suit for recovery of Rs. 12,980/- from the Corporation. Babulal Agrawal, the father of the plaintiff, submitted a proposal for insurance of his life. The sum assured in the policy was Rs. 11,000/-. The Corporation accepted the proposal of Babulal Agrawal and issued life insurance policy no. 10402073 dated 28th August, 1963. Babulal was required to pay premium each year on 18th April. The grace period prescribed in the policy (Ext. 1) was thirty days. If the premium was not paid within the grace period, the policy would lapse. A condition in the policy was that the policy could be revived during the lifetime of the Life Assured within a period of five years from the due date of the first unpaid premium and before the date of maturity. It is said that the assured died on 11th Sept. 1967. Before his death, he paid five premiums. It is for this reason the plaintiff filed the suit for recovery of the sum assured, that is, Rs. 11,000/- plus interest thereon.

3. The suit was resisted by the Corporation on the ground that the plaintiff was not entitled to a decree for the assured sum for the simple reason that the policy of the assured had lapsed. The condition of the policy (Ext. 1) was that the assured shall pay the premium in each year on or before 18th April. It was also the condition in the policy that if premium was not paid on 18th April or thirty days thereafter, the policy shall lapse. In the present case, the second premium was paid on 18th July, 1964 (Ext. B/1), that is, after the grace period. On the basis of Ext. B/1, the case of the Corporation was that the assured did not pay the premium within thirty days of the grace period,

that is, on 18th May, 1964, and, as such, the policy of the assured had lapsed. The further case of the defendants was that in view of the fact that the policy which had lapsed was not revived by the assured, the plaintiff was not entitled to the sum assured.

4. On these facts, the trial court decreed the suit.

5. Learned counsel for the appellant contends that the court below erred in granting the decree for the assured sum.

6. In this connection, learned counsel for the appellant refers to the deposit memos dated 18th July 1964 (Ext. B/1), dated 6th Aug., 1965 (Ext. B), dated 31st Jan., 1967 (Ext. 3) and dated 8th June, 1967 (Ext. B/2). These memos suggest that the Corporation accepted the premium amount sent by the assured. The Corporation did not issue any official receipt but issued deposit memos certifying that the premium amounts sent by the assured were received in the office of the Corporation. On a perusal of these memos, it is clear that the assured sent the premium amounts in 1964, 1965 and 1967. The premium amount for 1966 was sent in January, 1967 and the premium amount for 1967 was sent in June, 1967.

7. The main case of the defendants was that as the assured did not pay the premium amount in May 1965 within thirty days of the grace period, the policy of the assured had lapsed. If it is so, learned counsel for the appellant contends that unless the policy is revived, the plaintiff is not entitled to the assured sum. In the insurance policy (Ext. 1), there is a condition that the policy can be revived either within six months or within five years from the date of the first unpaid premium. The first upheld (unpaid?) premium was in 1964 and as such the policy could be revived either within six months or within five years commencing from 18-5-1964. In case, the policy is revived within six months, then no medical certificate is required to be filed in the Corporation. If the policy is revived within five years from the due date of the first unpaid premium, then the assured is required to produce the evidence of his health as well as to pay interest on the premium due. In the present case, the policy was revived by the assured within five years from the due date of the first unpaid premium. It is for this reason that the assured got himself examined by a medical officer of the Insurance Company, namely, Dr. Shridhar Sikdar on 30th July, 1967. To this effect, Dr. Shridhar Sikdar submitted a confidential report directly to the Corporation. According to the report of Dr. Shridhar Sikdar, the assured had good health (Ext. C). On 30th October, 1967 (Ext. 4), Sri K. Gopalan, Administrative Officer (D. W. 1) asked the assured to be examined either by Dr. Niranjan Sinha or by Dr. J. K. Majumdar. Thereafter, the Assistant Branch Manager of the Corporation of Chakradharpur sent a reply on 15th November, 1967 (Ext. D/1) that the assured expired in the month of Sept., 1967. It was for this reason, the assured could not be examined by the doctors mentioned in the letter dated 30th October, 1967 (Ext. 4).

8. The simple point in this case is : Whether the policy of the assured was revived or not?

9. In my opinion, the policy of the assured was revived as he fulfilled the conditions laid down in the life insurance policy (Ext. 1). The condition in the policy is that the assured can revive the policy during his life time, provided he submits the health certificate within a period of five years from the due date of the first unpaid premium as well as pays interest as mentioned in the policy. The first condition he satisfied by getting himself examined by Dr. Shridhar Sikdar on 30th July, 1967 (see Ext. C). So far as the payment of interest by the assured is concerned, the Corporation waived the right by its conduct. In only two letters dated 18th July, 1964 and 25th September, 1965 (Exts. B/1 and D/2), the Corporation directed the assured to pay the interest. In Ext. B/1, the Corporation directed the assured to pay Rs. 10.09 paise and in Ext. D/2, the Corporation asked the assured to pay a sum of Rs. 23.56 paise towards interest. Learned counsel for the appellant concedes that the amounts mentioned in these two memos have been paid by the assured towards interest as is clear from the memo dated 31st Jan., 1967 (Ext. 3). Ext. 3 suggests that the assured paid Rs. 700/- including the interest.

10. Learned counsel for the appellant contends that the interest in respect of other periods has not been paid by the assured. Learned counsel for

the plaintiff-respondent replied that interest was never demanded in respect of other periods, and, as such, the amount was not paid. In other words, learned counsel for the respondent No. 1 contends that the Corporation has waived the right to realise the interest from the assured. In my opinion, there is substance in the contention of the learned counsel for the respondent. In this connection, a reference was made to the Indian Contract Act by Pollock and Mulla, 1972 Edition, at p. 451 where in commenting on 'Waiver', the learned authors have said as follows :

"Waiver— Waiver is the abandonment of a right which normally everybody is at liberty to waive. A waiver is nothing unless it amounts to a release. It signifies nothing more than an intention not to insist upon the right. Waiver must be an intentional act with knowledge. Firstly some distinct act ought to be done to constitute a waiver; next it must be intentional, and lastly it must be with knowledge".

Relying on the abovementioned principle, I hold that, the Corporation had abandoned the right to realise the interest from the assured, and, as such, it never issued any notice for the realisation of the interest amount. It is clear from paragraph No. 5 of the evidence of the Administrative Officer (D. W. 1) that on 31st Jan., 1967, the interest due was Rs. 102.95 paise, and on 8th June, 1967, the interest amount due was Rupees 132.56 paise only. It is, therefore, clear that the Corporation had knowledge about the condition in the policy, and it had also knowledge that such amount is due as interest with the assured, and, in spite of this knowledge the Corporation never intended to realise the interest and never informed the assured to that effect. In this circumstance, I hold that the waiver on the part of the Corporation was an intentional act with knowledge. If it is so, the Corporation is precluded from realising the interest. In this circumstance, I hold that if the policy had lapsed, the policy was duly revived by the assured during his life time within five years from the due date of the unpaid premium amount by getting himself examined by a doctor of the Corporation, namely, Dr. Shridhar Sikdar and the interest amount was waived by the Corporation.

11. In the present case, the plaintiff has examined himself as P. W. 1. He proved that he was entitled to the assured amount. The defence has examined four witnesses. D. W. 1 is the Administrative Officer of the Corporation. In his evidence in paragraph No. 16, he stated that Dr. Shridhar had sent the short medical report to the Corporation and the report (Ext. C) was a confidential document. He has further stated that the party cannot have access to it. To this effect, the evidence of D. W. 1 is corroborated by D. W. 3 Dr. Niranjan Sinha who medically examined the assured at the time of submitting the proposal for the insurance by the assured. He has stated that the medical report is a confidential report and this is sent directly to the Corporation. D. W. 2 is the receiving clerk. He has proved the entries in the receiving register. D. W. 4 has proved the deposit memos (Exts. B, B/1 and B/2). D. W. 1 is an important witness as he was a responsible officer of the Corporation being its Administrative Officer. In his evidence, he did not state that the policy of the assured had lapsed on account of non-payment of the premium within the grace period. The other D. Ws. have also not stated so.

12. Learned counsel for the appellant relies on the conditions mentioned in the policy. He submits that the policy of the assured had lapsed as he had not paid the second premium within thirty days of the grace period. In other words, he means to say that the assured was required to pay the premium amount on 18th April or by 18th May, that is, within thirty days from the due date of the premium required to be paid. In my opinion, the policy had not lapsed for the simple reason that the Corporation went on accepting the premium even after 1964. It is clear from Exts. B, B/1, B/2 and 3 that the premium amount was received and accepted by the Corporation in the years 1964, 1965 and 1967. The Corporation kept the premium amount in deposit. The Corporation never refused to accept the amount. If it is so in my opinion the Corporation is precluded from saying that it had received it otherwise than for the purpose of the premium. In this connection, the decision in Wing v. Harvey ((1854) 5 De G M and G 265) may be referred to. In that case, the condition of the policy was that if the assured went beyond the limits of Europe without licence, then the policy would become void. In fact, the assur-

ed went outside Europe, but he went on sending the premium to the agent and the agent accepted the premium on behalf of the Assurance Society. The case of the Assurance Society was that in view of the fact that the assured had gone outside Europe, the policy became void. It was not accepted by their Lordships who held as follows :

"The directors, taking the money, were and are precluded from saying that they received it otherwise than for the purpose and in the faith, for which, and in which Mr. Wing expressly paid it."

Relying on this decision, I hold that by accepting the premiums even after the policy had lapsed, the Corporation is precluded from saying that it accepted the money not as premium but otherwise. I also hold that by accepting the premium, the Corporation cannot take the plea that the policy had lapsed. By accepting the premium, the Corporation kept the policy alive and it never lapsed. In these circumstances, I affirm the findings and hold that the plaintiff is entitled to a decree for the assured amount.

13. In the result, the appeal, is dismissed but without costs.

LALIT MOHAN SHARMA, J.:— 14. I agree but wish to add a few words.

15. Mr. Mustafi contended that since the plea of waiver or of estoppel by conduct was not included in the plaint, the plaintiff was not entitled to rely upon it. An examination of the plaint will show that it has been drafted in a simple form basing the claim on the policy. In the written statement filed by the Corporation, a question as to whether the policy itself lapsed or not was raised and in reply thereto, the question of waiver arose. In that view, I do not see any point raised on behalf of the appellant.

16. Mr. Mustafi next urged that the onus in regard to the plea of waiver has been wrongly placed by the court below on the defendants. He referred to paragraph No. 13 of the judgment. The learned counsel has misappreciated the judgment on this point. What the court below has said is that the onus to show that the policy stood lapsed lies on the defendants. The observation is not in regard to the plea of waiver. In the present case, since the parties have led evidence which we have considered in the appeal being a first appeal, the question of onus is academic. The decision of the court below on the plea of waiver is founded on the evidence led on behalf of the defendants themselves, and the judgment of the High Court is also on the same basis. The second point urged on behalf of the appellants, therefore, also does not have any merit. Mr. Mustafi relied upon a decision in Yorkshire Insurance Co. Ltd. v. Craine, (1922) 2 AC 541. In that case, the claim was founded on a policy taken in regard to certain properties against fire which were burnt down on September 30, 1917. Under a condition of the policy, the claim should have been made on or before the 15th October, 1917. In spite of this period having been extended, the claim was actually filed still later and the agent of the company, on receiving it, made an express endorsement that he was doing so without setting up any waiver of any of the provisions or requirements of the policy conditions. The Company, however, in accordance with certain other conditions of the policy took possession of the property and remained so for some time. The Privy Council, while upholding the decision of the courts below in favour of the claimant, held as follows:—

"Under these circumstances their Lordships think it is more desirable to dispose of the appeal on the ground of estoppel by conduct in going into possession, if that course be under the circumstances permissible, which they think it is."

This decision, to my mind, appears to assist the plaintiff more than it can lend any support to the appellant's case. Reliance was placed by Mr. Mustafi on this decision for the proposition that the estoppel by conduct can apply only by an act which is intentional on the part of the person with knowledge of this right against whom the plea is raised. As has been pointed out by my learned brother, all the facts were known to the Corporation and its officers and it cannot be legitimately suggested that the acceptance of one premium after another premium was in ignorance of the rights which the Corporation could claim under the conditions of the policy.

17. Mr. S. C. Ghosh appearing for the plaintiff-respondent, argued that it should be assumed in the circumstances of the case that nothing remained due from the plaintiff on account of interest payable due to the late deposit of the premiums. He referred to the different

notices sent by the Corporation and rightly argued that in only the first letter sent on the 18th July, 1964, there was a claim of a specific amount of money by way of interest. The second letter sent in August, 1965 mentioned the payment of interest in vague terms. On the 31st January, 1967, a sum of Rs. 700 was sent by the policy holder and accepted by the Corporation although the premium was less than Rupees 674. The court below has referred to the evidence of D.W. 1 who is the Administrative Officer of the appellant-Corporation stating that the money which is received in similar circumstances as the money received from the plaintiff is generally put in a Bank earning interest. He further said that at the time of charging interest from the party concerned, allowance is given to the extent of the interest earned in the meantime. If this statement is correct and if it be further assumed that the Corporation was insisting upon its right of claiming the policy as having lapsed, the amounts which were received from the plaintiff's father in 1964 and 1965 must have been put in the Bank and were earning interest. The policy holder sent a larger amount on the 31st January, 1967, which was accepted by the Corporation. The other facts which have been mentioned in some detail by my learned brother happened in this background. The Corporation completely omitted to mention anything about the payment of interest in their later letters and were only concerned with the medical certificate. In these circumstances, it can legitimately be argued that either there were no outstanding dues against the plaintiff's father on account of interest and alternatively if a small amount of money could be shown to be still payable by him, the right to such an account must be deemed to have been waived.

18. On the question of waiver, Mr. Ghosh relied upon several circumstances which appear to be relevant and are as follows:—

(i) The appellant received one premium after another for several years instead of refusing the amount on the ground that the policy had lapsed and no premium was payable;

(ii) The money was deposited in a Bank earning interest;

(iii) Even later on, the amount of premiums so deposited was never returned to the assured, nor was such an offer made;

(iv) No demand of payment of any interest or any other amount was made in the year 1967; instead the appellants entered into a correspondence on the question of furnishing a medical certificate; and,

(v) The letter (Ext. 4), although sent after the death of the assured, furnishes evidence suggesting that the Corporation was not exercising its right or treating the policy as lapsed.

19. There appears to be considerable substance in the argument of Mr. Ghosh on the basis of the above circumstances.

20. Mr. Mustafi lastly contended that since the policy was issued in the year 1963 and a question of its revival was under consideration in the year 1967 and acceptable medical report was essential in the case and since no such report was received by the Corporation before the death of the policy holder, it must be held that the conditions for revival as envisaged by the contract between the parties were not fulfilled. In this regard, it will have to be seen that the medical report (Ext. C) is dated the 30th July, 1967, that is, more than a month before the death of the policy holder. It has been pointed out by my learned brother that the doctor who had examined the assured was on the panel of the Corporation and, according to the evidence of the Corporation itself, the report had to be sent direct by the doctor to the Corporation. It was confidential in nature and was not available to the assured at all. It is, therefore, futile to suggest that since the doctor who was obviously an agent of the Corporation did not promptly send the report, the assured had to suffer. Besides, the court below has considered the evidence and the circumstances suggesting that the report must have been received in the office of the Corporation long before the death of the assured and as such the case in this regard attempted to be made out by the appellants is false. I entirely agree with the consideration of the evidence by the court below and although the same has not been placed in detail before us, I have gone through the entire oral evidence on the point as also the other documents and I am in agreement with the finding of the court below. It must, therefore, be held that the medical report must have been received by the Corporation during the lifetime of the assured and that the Corporation did

not raise any objection thereto within reasonable time. The belated suggestion in the letter (Ext. D) dated the 30th October 1967, is of no avail whatsoever, since the assured was dead by then. It follows that the deceased had complied with the condition about the submission of a medical report in time. This, however, may be considered to be a circumstance, in addition to the other arguments of Mr. Ghosh which have been accepted.

21. In the result, the appeal has to be dismissed but without costs.

Appeal dismissed.

AIR 1979 PATNA 130

FULL BENCH

SHIVESHWAR PRASAD SINHA, NAGENDRA PRASAD SINGH AND B. S. SINHA, JJ.*

Ram Naresh Rai and another, Petitioners v. State of Bihar and others, Respondents.

Civil Writ Jur. Cases Nos. 2023, 2121 2173 and 2583 of 1978, D/- 28-9-1978.

(A) Constitution of India, Arts. 254 (2); 246; 326; Sch. 7, List II, Item 5 — Repugnancy between State Act and Central Act — Bihar Panchayat Raj Act (7 of 1948), S. 4 — As amended by Bihar Panchayat (Amendment) Ordinance (5 of 1975) — Validity — Not invalid on ground of repugnancy to Representation of the People Act (43 of 1951) or Art. 326 of the Constitution.

The Representation of the People Act and the Act in question cannot be held to be repugnant to each other because they are operating in different fields: one prescribes about the preparation of the electoral rolls for the Parliamentary and Assembly Constituencies and the other for a much smaller elective body, the Gram Panchayat. The present Act has been framed not under any item of the concurrent list, but under Item 5 of State List (List II). (Para 6)

It is well settled that whenever a question arises as to under which of the entries of a particular list the relevant Act has been framed, it has to be judged on the principle of pith and substance. Applying the principle of pith and substance, it has to be held that the impugned Act has been enacted under entry No. 5 of the State List. AIR 1947 PC 60; AIR 1947 PC 72; AIR 1976 SC 1031 and AIR 1961 SC 232, Rel. on; AIR 1954 All 655, Dist. (Para 6)

Section 4 of the Act as amended is also not against the basic structure of Article 326 of the Constitution and is not ultra vires. Article 326 on its own terms applies only to the House of People and Legislative Assembly of every State. It does not lay down a general bar of adult suffrage on the voting right of citizens of India to different elected bodies, other than the House of People and legislative Assemblies of the States. A Gram Panchayat is a much smaller body. If persons below 21 years, but above 18 years, have also been permitted to be registered as voters, it cannot be held to be irrational or in conflict with any provision of the Constitution.

(Paras 8, 29, 31, 34, 38)

Anno: AIR Comm., Const. of India (2nd Edn.), Art. 246, N. 9; Art. 254, N. 6 and Art. 326, N. 2.

(B) Constitution of India, Art. 246 — Doctrine of colourable Legislation — Section 4 of Bihar Act (7 of 1948), cannot be attacked on ground of colourable exercise of power of Legislation.

It is well known that motive for making an Act or issuing an ordinance is not justiceable before a court of law. Whenever the expressions colourable exercise of power or fraud on Constitution are used in connection with any enactment, it only means that the particular Legislature had no legislative competence although it purports to have exercised that power.

(Paras 9, 29, 38)

It was within the legislative competence of the Legislature to enact a provision like the amended S. 4; it is not offending to any provision of the Constitution including the Articles relating to fundamental rights; as such, there is no question of its being a colourable legislation. (Paras 9, 29, 38)

Anno: AIR Comm., Const. of India (2nd Edn.), Art. 246, N. 11.

(C) Constitution of India, Art. 245 — Power of Legislature to enact retroactive Laws and Rules — Bihar Panchayat Election Rules and Supplementary Electoral Rolls (Validating) Ordinance (57 of

*(The judgments in the case are printed in the order in which they are given in the certified copy. The first judgment is not, therefore, necessarily the judgment expressing the majority view.—Ed.)

1978), S. 2 — Validity — Deeming provision in S. 2 is valid.

It is well established that Legislature in exercise of its plenary power can legislate prospectively as well as retrospectively. It can introduce a legal fiction for the purpose of bringing any provision of the Act or the Rules in force from a day, even before the promulgation of Ordinance or the Act in question. 1952 AC 109; AIR 1953 SC 244; AIR 1951 Bom 440 and AIR 1963 Pat 401, Rel. on. (Para 10)

When S. 2 of the Ordinance No. 57 of 1978 says that it will be deemed that the Electors Rules shall be deemed to have come into force on 1-2-1978, it will be deemed that it had come in force. This could not have been done by the State Government in exercise of its rule making authority, but certainly it can be done by an Ordinance. This could have been done either by amending S. 80 retrospectively, or by an independent provision like Section 2. (Para 10)

The contention that the Rule being void ab initio, it could not have been ante-dated by Section 2 cannot be accepted. Merely because Rule 1 (2) of the Electors Rules says that the Rules shall be deemed to have come into force on 1st February, 1978, all the rules shall not be void. Only that part shall be ultra vires being beyond power of the rule-making authority. The remaining rules shall be valid and deemed to have come in force on their own strength with effect from 21-3-1978. In such a situation, if Section 2 of Ordinance No. 57 of 1978 provided that these rules shall be deemed to have come in force with effect from 1-2-1978, it cannot be held that the said section purports to ante-date rules which were void ab initio. (Para 11)

Per S. P. Sinha, J.:— If in validating an invalid legislation, the invalidity is allowed to remain sticking, either the legislature was unconscious of the invalidity or was abdicating its competence to cure the defect. In the latter case the validation would be bad and inoperative, (vide: Shama Rao v. Union Territory of Pondicherry, AIR 1967 SC 1480) but in the former case, if the invalidity is separable, it has to be separated from the valid part of the legislation. Instant case is not one of abdication of its function by the legislature, because had that been so, it would not have felt the necessity of promulgating the said ordinance, it is a case of omission to cure the invalidity in the said Rules. (Paras 45, 46)

Now so far as the invalidity in the Rules is concerned, it is clearly severable from the valid parts. The part which is invalid, if struck down, the valid part remains operative. The invalid part has been rightly struck down on grounds of legislative incompetence of the Rule-making authority. The valid part, therefore, remains operative from the 1st February, 1978 as per the Ordinance. (Para 47)

Anno: AIR Comm. Const. of India (2nd Edn.), Art, 245 N. 12.

(D) Constitution of India, Art. 245 — Power of Legislature to enact validating provisions — Bihar Panchayat Rules and Supplementary Electoral Rolls (Validating) Ordinance (57 of 1978), Ss. 3 and 4 — Not ultra vires.

Ss. 3 and 4 of the Ordinance cannot be said to be ultra vires on the ground of an attempt to exercise judicial power when admittedly there is no judgment or order of any court in existence as referred to in S. 3. That apart there is a distinction when a Legislature purports to nullify judgment or order passed by Court of competent jurisdiction and when after having removed the lacuna pointed out in those judgments, it says that notwithstanding those judgments a particular legal position shall emerge. It is only in the former case — that it is beyond the competence of legislature. (Para 13)

While examining the scope of a validating Act it should always be borne in mind that the purpose of such acts on their face is to validate certain invalid actions which had no authority in law. But, it has its own limitations as well. If an action by the State Government has been taken under an Act which infringes any constitutional provision, including any fundamental right guaranteed by the Constitution or which is invalid because of the legislative incompetence, then such actions or provisions cannot be validated by Validating Act. On the other hand, if any action has been taken in absence of an authority in law, it is always open to the Legislature, to vest authority in such persons by validating Acts. Case law reviewed. (Para 14)

Sections 3 and 4 of the ordinance validate the preparation of the supplementary electoral rolls saying that notwithstanding any irregularity or infirmity in relation to the preparation and publication thereof they shall be deemed to have been validly prepared and publish-

ed and no election held under the Act and the Rules framed thereunder be questioned on the ground of any purported irregularity or infirmity in the preparation and publication of such supplementary electoral rolls. As the aforesaid sections do not purport to validate any executive action or provision of any Rule or Act which either suffered from any legislative incompetence or infringed any Articles of the Constitution, relating to fundamental right, it is difficult to hold that it was beyond the scope of a validating Act. AIR 1970 SC 1436, Rel. on. (Paras 24, 29, 38)

Anno: AIR Comm. Const. of India (2nd Edn.), Art. 245 N. 15.

(E) Constitution of India, Art. 14 — Violation of — Denial of right to vote — If amounts to discrimination.

Merely because the name of a person has not been registered as a voter, it will not amount to discrimination within the meaning of Article 14. This may be the result of carelessness on the part of the authorities concerned, but shall not necessarily amount to discrimination. (Paras 25, 29, 38)

Anno: AIR Comm. Const. of India (2nd Edn.), Art. 14 N. 42.

(F) Bihar Panchayat Election Rules and Supplementary Electoral Rolls (Validating) Ordinance (57 of 1978), Pre. and Ss. 3 and 4 — Ordinance validates elections held on basis of existing rules and not future rules.

On the basis of preamble as well as Sections 3 and 4 it can be held that the Ordinance purports to validate the supplementary electoral rolls which have already been prepared and published. The preamble says, "It is necessary for him to take immediate action to validate the supplementary electoral rolls prepared and published." Even in Sections 3 and 4 the words used are 'prepared and finally published'. Once this position is conceded then in view of the mandate contained in Sections 3 and 4 of the Ordinance in question it has to be held that the elections in question cannot be challenged on the ground of any irregularity or infirmity in relation to the preparation and publication of the supplementary electoral rolls. (Paras 26, 29, 38)

(G) Constitution of India, Art. 226 (3) — Scope and applicability — Election disputes — Statutory remedy open — Operates as a bar to writ under Article 226 (3).

In cases where there is no question of challenging the elections on the ground of infringement of any of the fundamental rights, but when it amounts only to redress of any injury by reason of contravention of the provisions of the Act and the Rules framed thereunder sub-clause (3) of Article 226 is a bar, there being an alternative statutory remedy. AIR 1964 Pat 500; AIR 1971 Pat 65 (FB) and AIR 1977 SC 1703, Ref. (Paras 27, 29, 37)

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Prabha Shankar Mishra and Yaduvansh Giri (in C.W.J.C. No. 2023 of 1978); Shyama Prasad Mukherjee, Rameshwar Prasad Narain Singh, Kripa Nath Yadav and Ramjee Prasad (in C.W.J.C. No. 2121 of 1978); Bindeshwari Choudhary (in C.W.J.C. No. 2173 of 1978) and Basudeva Prasad, Rana Pratap Singh No. 2 and Radha Mohan Prasad (in C.W.J.C. No. 2583 of 1978), for Petitioners; K. D. Chatterji (Advocate General) in all the Petitions; R. B. Mahto (Govt. Pleader No. 4) (in C.W.J.C. Nos. 2023, 2121 and 2173 of 1978); Ramesh Chandra Sinha (Jr. Counsel) for the State; Shyam Nandan Pra-

sad Sharma and Birendra Singh (in C.W.J.C. No. 2023 of 1978); A. P. Singh (Jr. Counsel to Govt. Pleader No. 4), for the State (in C.W.J.C. No. 2121 of 1978); Narendra Prasad (Jr. Counsel to Govt. Pleader No. 4), for the State; Mani Lall, Ramchandra Jha and Birendra Mohan Singh (in C.W.J.C. No. 2173 of 1978); S. B. N. Singh (Govt. Pleader No. 2) and Narbadeshwar Prasad Singh (Jr. Counsel to Govt. Pleader No. 2) for the State; Yadunath Saran Singh and Markandey Singh (in C.W.J.C. No. 2583 of 1978), for Respondents.

NAGENDRA PRASAD SINGH, J.:— The elections of the office-bearers of different Gram Panchayats have been challenged in these writ applications. The validity of the elections has been questioned primarily on the ground that the electoral rolls for such elections were prepared under such provisions of the Bihar Panchayat Raj Act, 1947 and the Rules framed thereunder, which are ultra vires. The petitioners in different writ applications have also challenged the respective elections on the ground that they have been held in contravention of the different rules of the Bihar Panchayat Election Rules, 1959. As common questions of law are involved in these writ applications, they were heard together and are being disposed of by a common judgment.

2. The Bihar Panchayat Raj Act, 1947 (hereinafter to be referred to as the Act), came in force in the year 1948. The object, as mentioned in the preamble of the said Act was to establish and develop Local Self-Government in the village communities of the province of Bihar, Section 4 of the Act contained the provision regarding membership of a Gram Panchayat who could vote at the election. It was amended in the year 1963. In view of this amendment, persons of the locality, who were voters of the Assembly constituency, were deemed to be the voters for the Gram Panchayat election. In the year 1978, however, the aforesaid Section 4 was again amended by the Bihar Panchayat Raj Amendment Ordinance, 1978 (herinafter to be referred to as Ordinance No. 5 of 1978), which came in force on and from 25th February, 1978. The amending section runs as follows:—

"For Section 4 of the said Act the following section shall be substituted and shall always be deemed to have been substituted namely:—

4. Membership of the Gram Panchayat.— All those persons who are enrolled as electors in so much of the elctoral roll or rolls of an Assembly Constituency of the State of Bihar for the time being in force, as relates to the local areas comprised within the limits of the Gram Panchayat shall be members of the Gram Panchayat and as also those persons ordinarily residing in the Gram Panyat who have attained the age of eighteen years or more on the qualifying date and who are not enrolled in the Assembly Constituency and for whom supplementary electoral roll shall be prepared in the prescribed manner under the Act.

Explanation:— 'Qualifying date' means the first of January of that year in which the supplementary roll is prepared or revised. Section 16 of the Representation of the People Act, 1950 shall apply mutatis mutandis for preparing the supplementary electoral roll of the Gram Panchayat."

As the amended Section 4 of the Act provided that a supplementary electoral roll shall be prepared in the prescribed manner, the Bihar Panchayat (Registration of Supplementary Electors) Rules, 1978 (hereinafter to be referred to as the Electors Rules) were framed. This Rule was published in the Bihar (Extraordinary) Gazette on 21st March, 1978. It contained the procedure for preparation of supplementary electoral roll containing the names of such persons who are above 18 years of age and whose names have not been included in the Assembly electoral roll. Rule 1 (2) of this Rule provided "They shall be deemed to have come into force on the 1st day of Feb. 1978." Rule 5 of the Bihar Panchayat Election Rules, 1959 (hereinafter referred to as the Election Rules) was also amended on 22-3-1978. Sub-rule (1a) was added to Rule 5, saying that supplementary electoral roll prepared under the aforesaid Electors Rules shall form supplement to the electoral roll mentioned in sub-rule (1) of Rule 5.

3. A direction had already been issued by the State Government on 4th February, 1978 to different Commissioners of the Divisions and the District Magistrates requesting them to take steps for preparation of the supplementary electoral roll containing names of persons above 18 years of age. A programme for the same was also forwarded. The draft of that supplementary electoral roll, according to the programme, was to be

published between 3-3-1978 to 8-3-1978, objection thereto was to be filed between 9-3-1978 to 13-3-1978, hearing on the objection was to be made between 14-3-1978 to 18-3-1978. After corrections on the basis of the objection supplementary voters' list was to be finally published between 3-4-1978 to 7-4-1978. A copy of this communication is Annexure-3 to the writ application of C.W.J.C. No. 2583 of 1978. The election programme was published on 11th April, 1978. Date for filing nomination papers was fixed for 19-4-1978 and elections were held on 24-5-1978.

4. On 25-5-1978 another Ordinance, the Bihar Panchayat Election Rules and Supplementary Electoral Rolls (Validating) Ordinance, 1978 (hereinafter referred to as Ordinance No. 57 of 1978) was promulgated. The preamble of that Ordinance is as follows:—

"To validate supplementary electoral rolls prepared and published under Section 4 of the Bihar Panchayat Raj Act, 1947 and Rules framed thereunder and to provide for certain other matters incidential thereto."

It contains three sections, which are as follows:—

"2. Application of sub-rule (1a) of Rule 5 of the Bihar Panchayat Election Rules, 1959 and the Bihar Panchayat (Registration of Supplementary Electors) Rules, 1978 — Sub-rule (1A) of Rule 5 of the Bihar Panchayat Election Rules, 1959 and the Bihar Panchayat (Registration of Supplementary Electors) Rules, 1978 shall be deemed to have come into force on the 1st February 1978.

3. Validation of Supplementary Electoral Rolls— Notwithstanding any judgment, or order of any court or authority or any irregularity or infirmity in relation to the preparation and publication of the Supplementary Electoral Rolls for Gram Panchayats in Bihar prepared and finally published under Rule 18 of the Bihar Panchayat (Registration of Supplementary Electors) Rules 1978, the said Rolls shall be deemed to have been validly prepared and published.

4. Election not to be questioned on the ground of any infirmity or irregularity in preparing and publishing the Supplementary Electoral Rolls. No election held under the Bihar Panchayat Raj Act, 1947 and the rules framed thereunder nor any action taken in relation to such election, shall be questioned on the ground of any purported irregularity or infirmity in the preparation and publication of the Supplementary Electoral Rolls finally published under Rule 18 of the Bihar Panchayat (Registration of Supplementary Electors) Rules, 1978."

The vires of this Ordinance has also been strongly challenged on behalf of the petitioners.

5. A valid electoral roll is the basis of a valid election, and it is the duty of the authorities concerned to prepare the voters' list in accordance with the provisions of the Act and the Rules. If either the provisions of the Act or the Rules are found to be invalid, then it shall vitiate the action taken thereunder, keeping the question of validation of those actions by the Legislature, for the time being apart. Now it has to be seen as to whether the amendments in the Act by the Ordinances and the Electors Rules aforesaid are ultra vires, so as to nullify the actions taken for the preparation of the supplementary voters' list.

6. Learned counsel appearing in different writ applications on behalf of the petitioners attacked the validity of amended Section 4 of the Act on ground of it being repugnant to the provisions of the Representation of the People Act, 1950 (hereinatfer referred to as the Representation Act) as well on the ground that it is against the basic structure of the Constitution of India. Foundation of this argument is that the Representation Act as well as the Constitution has prescribed 21 years as the lower limit of the age for the voters of the Parliamentary and Assembly constituencies and they conceive the election on the basis of adult suffrage, i.e., by persons above 21 years of age. For finding out as to whether a provision of the State Act is repugnant to another provision of the Central Act so as to attract Article 254 of the Constitution, it must be established that the State Act as well as the Central Act have been framed under any item of the concurrent list (List III of Schedule VII of the Constitution). Only in such a situation, the State Act to the extent of repugnancy shall be void in absence of the President's assent, as contemplated by Article 254 (2) of the Constitution. In my opinion, the Representation Act and the Act in question cannot be held to be repugnant to each other because they are operating in different fields, one prescribed about the preparation of the electoral rolls for the Parliamentary and Assembly Constituen-

cies and the other for a much smaller elective body, the Gram Panchayat. The present Act has been framed not under any item of concurrent list, but under item 5 of State List (List II), which contains the following entry:

"5. Local Government,..... other local authorities for the purpose of local self-government or village administration."

The preamble of the Act clearly says that it is "to establish and develop Local Self-Government in the village communities of the province of Bihar and to organise and improve their social and economic life." From a bare reference to the different provisions of the Act it will be seen that they provide for the establishment of a Gram Panchayat and have vested powers to it to take care of the village administration. Merely because some of the provisions of the Act relate to establishment, power and duties of Gram Cutcherry, will not be the basis for holding that the Act has been framed under item No. 1 or item 11A of the Concurrent List. Item Nos. 1 and 11A of the Concurrent List speak about criminal law, including matters relating to the Indian Penal Code, and about the administration of justice; constitution and organisation of all courts except Supreme Court and the High Courts. It is well settled that whenever question arises as to under which of the entries of a particular list the relevant Act has been framed, it has to be judged on the principle of pith and substance. It was pointed out in Prafulla Kumar Mukherjee v. Bank of Commerce Ltd., Khulna (AIR 1947 PC 60) and Megh Raj v. Allah Rakhia (AIR 1947 PC 72) that it was impossible to make a clean cut between the powers of a Federal and Provincial Legislature; sometimes they are found to overlap and the legislative competence has to be decided on the principle of pith and substance of the impugned enactment. The same view was expressed in the case of Atiabari Tea Co. Ltd. v. State of Assam (AIR 1961 SC 232).

7. Learned counsel appearing for the petitioners placed reliance on a Bench decision of the Allahabad High Court in the case of Tej Bahadur Singh v. State (AIR 1954 All 655) in support of their contention that the U. P. Panchayat Raj Act having similar provision was held to have been framed under the relevant items of the Concurrent List (List III) of the Government of India Act, 1935. From a bare reference to that judgment it will appear that not much argument was advanced on this point because that Act had received the assent of the Governor General in accordance with Section 107 (2) of the Government of India Act, 1935. As such, the argument about legislative incompetence was repelled by giving a short answer. It may be pointed out that even the present Act also received the assent of the Governor General of India before it came in force. But, that will not mean that the State Legislature had no legislative competence. In my opinion, applying the principle of pith and substance, it has to be held that the Act has been enacted under entry No. 5 of the State List. Once it is held that the State Legislature had competence to introduce the amendments in the Act under one of the items of the State List, there is no question of testing whether it is repugnant to any of the provisions of the Central Act. It was pointed out in the aforesaid case of Megh Raj (AIR 1947 PC 72) that Section 107 (corresponding provision to Article 254) has no application to a case where the province could show that it was acting wholly within its power under the provincial list and has not relied on any power conferred to it by the Concurrent List and in such cases questions of repugnancy do not arise. The same view has been expressed in the case of A. S. Krishna v. State of Madras (AIR 1957 SC 297), Kerala State Electricity Board v. The Indian Aluminium Co. Ltd., (1976) 1 SCC 466: (AIR 1976 SC 1031).

8. For the question as to whether the amended Section 4 is against the basic structure of the Constitution, reference was made to Article 326 of the Constitution which provides that election to the House of People and to the Legislative Assembly of every State shall be on the basis of adult suffrage. In that very Article it has been stated that adult suffrage means persons who are not less than 21 years of age on the relevant date. Reference has also been made to Halsbury's Laws of England as to what is meant by full age. According to Mr. Basudeva Prasad, learned counsel appearing in one of the writ applications, on behalf of the petitioner, it is also one of the basic features of the Constitution that elections to different posts should be held on the basis of adult suffrage. In this connection, reference was made to the well known case of His Holiness Kesavananda Bharati Sripadagalvaru v. State of Kerala (AIR 1973 SC

1461). It is difficult to hold that the Constitution places any such general bar on the voting right of citizens of India to different elected bodies, other than the House of People asd Legislative Assemblies of the States. Article 326 on its own terms applies only to the House of People and Legislative Assembly of every State. A Gram Panchayat is a much smaller body. If persons below 21 years, but above 18 years, have also been permitted to be registered as voters, it cannot be held to be irrational or in conflict with any provision of the Constitution. At the age of 18 a person becomes major and his acts and omissions have full legal implications. In my considered view, the amended Section 4 of the Act cannot be held to be ultra vires.

9. In respect of Section 4, it was also suggested that it amounted to colourable exercise of power and fraud on the Constitution. According to learned counsel in one of the writ applications, this amendment had been introduced with an ulterior motive. It is well known that motive for making an Act or issuing an ordinance is not justiciable before a court of law. Whenever the expressions colourable exercise of power or fraud on Constitution are used in connection with any enactment, it only means that the particular legislature had no legislative competence although it purports to have exercised that power. Reference in this connection may be made to the cases of K. C. Gajapati Narayan Deo v. State of Orissa (AIR 1953 SC 375), Bhairabendra Narayan Bhup v. State of Assam (AIR 1956 SC 503), Gullapalli Nageswara Rao v. Andhra Pradesh State Road Transport Corpn. (AIR 1959 SC 308) and R. S. Joshi etc. v. Ajit Mills Ltd. (AIR 1977 SC 2279). In the case of K. C. Gajapati Narayan Deo (AIR 1953 SC 375), it was observed (at p. 379):

"It may be made clear at the outset that the doctrine of colourable legislation does not involve any question of 'bona fides' or 'mala fides' on the part of the legislature. The whole doctrine resolves itself into the question of competency of a particular legislature to enact a particular law. If the legislature is competent to pass a particular law, the motives which impelled it to act are really irrelevant. On the other hand, if the legislature lacks competency, the question of motive does not arise at all.....If the Constitution of a State distributes the legislative powers amongst different bodies, which have to act within their respective spheres marked out by specific legislative entries, or if there are limitations on the legislative authority in the shape of fundamental rights, questions do arise as to whether the legislature in a particular case has or has not, in respect to the subject-matter of the statute or in the method of enacting it, transgressed the limits of its constitutional powers. Such transgression may be patent, manifest or direct, but it may also be disguised, covert and indirect and it is to this latter class of cases that the expression 'colourable legislation' has been applied in certain judicial pronouncements."

I have already held that it was within the legislative competence of the Legislature to enact a provision like the amended Section 4; it is not offending to any provision of the constitution including the Articles relating to fundamental rights; as such, there is no question of its being a colourable legislation.

10. It was then submitted that the State Government in exercise of its rule-making power could not have made the Electors Rules retrospective with effect from 1-2-1978; as such the said Rules are void. According to the petitioners, in such a situation, the preparation of the supplementary electoral rolls was without any authority in law, elections held on basis of such electoral rolls were no elections in eyes of Law. I have already pointed out that the Electoral Rolls were published in the Bihar (Extraordinary) Gazette dated 21-3-1978. Sub-rule (2) of Rule 1 says that "they shall be deemed to have come into force on the 1st day of Feb. 1978". Section 80 of the Act does not vest any such power in the State Government to make Rules retrospectively; as such, it has to be held that sub-rule (2) of Rule 1 is ultra vires and on its own the said Rules would have come in force only with effect from 21-3-1978. This position was not seriously challenged even by the learned Advocate-General who appeared for the respondent-State. He, however, contended that in view of Section 2 of Ordinance No. 57 of 1978, referred to above, the Rules will be deemed to have come in force on and from 1st February, 1978. Section 2 of the Ordinance aforesaid prescribes that the aforesaid Electors Rules as well as sub-rule (1a) of Rule 5 of the Election Rules "shall be deemed to have come into force on 1st February, 1978". It is well established that Legislature in

exercise of its plenary power can legislate prospectively as well as retrospectively. It can introduce a legal fiction for the purpose of bringing any provision of the Act or the Rules in force from a day, even before the promulgation of Ordinance or the Act in question. It has been pointed out on many occasions by different Courts that when legislature by a legal fiction bids to imagine an unreal state of affairs as real, then it has to be so imagined including about the existence of circumstances and consequences. Reference in this connection may be made to the oft-quoted passage from the judgment in the case of East End Dwellings Co. Ltd. v. Finsbury Borough Council (1952 AC 109) where Lord Asquith observed that if one is bidden to treat an imaginary state of affairs as real then one has to imagine as real even the consequences and incidents thereto and in such a situation, one cannot, after having imagined upto a certain stage, allow his imagination to boggle when it comes to the inevitable corollaries. Reference can be made to the case of State of Bombay v. Pandurang Vinayak (AIR 1953 SC 244). In the case of Abdul Majid Haji Mahomed v. P. R. Nayak (AIR 1951 Bom 440), Chagla, C. J. while dealing with an Ordinance, which was brought in force retrospectively observed that in such a situation, the object of such sections is "as it were, to ante-date the Act so as to bring it into force on the day on which a particular order was passed which was being challenged". In the case of Bishwanath Prasad v. National Coal Development Corpn. (Private Ltd.), 1964 BLJR 498: (AIR 1963 Pat 401), Justice Untwalia (as he then was) while relying on the aforesaid decision in the aforesaid case of Abdul Majid Haji Mahommed (AIR 1951 Bom 440) observed that the purpose of the legal fiction in the section in question was to ante-date the Act so as to bring it into force on the day on which an earlier rule had been made. In my opinion similar is the situation here. When Ordinance No. 57 of 1978 says that it will be deemed that the Electors Rules shall be deemed to have come into force on 1-2-1978, it will be deemed that it had come in force. This could not have been done by the State Government in exercise of its rule-making authority, but certainly it can be done by an Ordinance. Learned counsel appearing for the petitioners while admitting that it is within the power of Legislature to enact a law retrospectively challenged the exercise of that power, in the instant case, on the ground that it could have been done only by amending Section 80 vesting power in the rule-making authority to make Rules retrospectively. It is difficult to accept this contention. In my view, this could have been done either by amending Section 80 retrospectively, or by an independent provision like Sec. 2.

11. It was also submitted that the Rule being void ab initio, it could not have been ante-dated by Section 2. It is difficult to accept this contention as well. Merely because Rule 1 (2) of the Electors Rules says that the Rules shall be deemed to have come into force on 1st February, 1978, all the rules shall not be void. Only that part shall be ultra vires being beyond power of the rule-making authority. The remaining rules shall be valid and deemed to have come in force on their own strength with effect from 21-3-1978. In such a situation, if Section 2 of Ordinance No. 57 of 1978 provided that these rules shall be deemed to have come in force with effect from 1-2-1978, it cannot be held that the said section purports to ante-date rules which were void ab initio.

12. It was then urged that even if it is assumed that because of the legal fiction introduced by Section 2 of Ordinance No. 57 of 1978 the Electors Rules would be deemed to be in force with effect from 1-2-1978, even then the elections shall be vitiated because the supplementary electoral rolls were factually not prepared in accordance with the provisions of the said Rule. In this connection, our attention was drawn to the aforesaid circular dated 4th February, 1978 issued by the State Government to different Commissioners and District Magistrates (Annexure-3 to C.W.J.C. No. 2583 of 1978) in which the date for publication of the draft supplementary electoral roll was fixed between 3-3-1978 to 8-3-1978, time for filing objection was fixed between 9-3-1978 to 13-3-1978 and objections were to be heard between 14-3-1978 to 18-3-1978. It was pointed out that as factually the Electors Rules were not in force, many persons who were qualified to be enrolled as voters had no knowledge about the preparation of the supplementary electoral roll and they could not file objection. In the counter-affidavit filed on behalf of the State this has been controverted saying that in the Gram Panchayat it was duly

informed that such supplementary electoral roll was to be prepared and dates for filing objections were also notified. During course of the hearing of the writ applications, a copy of the Bihar Gazette dated 28-2-1978 was produced to show that the draft Electors Rules had been published as required by Section 80 of the Act. On that basis it was urged that members of the Gram Panchayat will be deemed to have notice of the Electors Rules which had been framed. However, I shall proceed to examine this aspect of the matter primarily on the basis of the aforesaid validating sections.

13. According to learned counsel appearing for the petitioners, Sections 3 and 4 of the Validating Ordinance No. 57 of 1978 are ultra vires because an attempt has been made to exercise judicial power which could not have been exercised by the Legislature. The grievance about the exercise of judicial power has been made because Section 3 of the said Ordinance says "Notwithstanding any judgment or order of any court or authority, or any irregularity or infirmity in relation to the preparation and publication of the supplementary electoral rolls" the said rolls shall be deemed to have been validly prepared and published. I may, however, point out that it is an admitted position that there is no judgment or order of any court invalidating any such electoral roll. That apart, there is a distinction when a Legislature purports to nullify judgment or order passed by Court of competent jurisdiction and when after having removed the lacuna pointed out in those judgments, it says that notwithstanding those judgments a particular legal position shall emerge. It is only in the former case that it is beyond the competence of legislature.

14. Learned counsel appearing for the petitioners also submitted that these validating provisions purport to validate illegal and void electoral rolls, which is beyond the scope of a validating Act. In support of this contention reliance was placed on the following judgments of the Supreme Court in the cases of Mahendra Lal Jaini v. State of Uttar Pradesh (AIR 1963 SC 1019), B. Shama Rao v. Union Territory of Pandicherry (AIR 1967 SC 1480) and the Dy. Commr. and Collector, Kamrup v. Durga Nath Sharma (AIR 1968 SC 394). While examining the scope of a validating Act it should always be borne in mind that the purpose of such Acts on their face is to validate certain invalid actions which had no authority in law. But, it has its own limitations as well. If an action by the State Government has been taken under an Act which infringes any constitutional provision, including any fundamental right guaranteed by the Constitution or which is invalid because of the legislative incompetence, then such actions or provisions cannot be validated by Validating Act. On the other hand, if any action has been taken in absence of an authority in law, it is always open to the Legislature, to vest authority in such persons by Validating Acts. I shall immediately indicate that the cases which have been referred to on behalf of the petitioners fall in the first category.

15. In the case of Mahendra Lal Jaini v. State of Uttar Pradesh (AIR 1963 SC 1019), the U. P. Land Tenures (Regulations of Transfer) Act, 1952 was held to be unconstitutional, as it did not comply with Article 31 (2) of the Constitution, as it stood at the time the Act was passed. After the Constitution (Fourth Amendment) Act, which came in force later, a stand was taken on behalf of the State that the Act which had been held to be unconstitutional will be deemed to have been revived after the Constitution (Fourth Amendment) Act. It was held that the Act in question being a post Constitution Act will be governed by Article 13 (2) of the Constitution and it shall not revive on the principle of doctrine of eclipse. So far, the case of B. Shama Rao v. Union Territory of Pondicherry (AIR 1967 SC 1480) is concerned, the Pondicherry General Sales Tax Act, 1965 had extended the Madras General Sales Tax Act as it stood immediately before the date on which the Pondicherry Act was to be brought in force in the territory of Pondicherry, by a notification. The petitioner of that case filed a writ application challenging the Pondicherry Act. During the pendency of the writ application, Pondicherry General Sales Tax (Amendment) Act, 1966 was passed by the Pondicherry Legislature purporting to resuscitate the earlier Act. It was held that there was an abdication or effacement on the part of the Pondicherry Legislature while extending the Madras Act to its territory by the earlier Act without applying its independent mind. This was contrary to the instrument which constituted it. As such, the ear-

lier Statute in question was void and still-born. In that context it was observed, "the Principal Act being stillborn, the attempt to revive that which was void ab initio was frustrated and such an Act could have no efficacy". In the case of the Dy. Commr. and Collector, Kamrup v. Durga Nath Sarma (AIR 1968 SC 394) the Act (Act 6 of 1955) passed by the Assam Legislature in respect of acquisition of land was declared to be invalid by the Assam High Court. A Validating Act No. 21 of 1960 was passed saying that notwithstanding anything contained in the earlier Act any land which had been taken over for the purpose of construction of embankment shall be deemed to have been validly acquired under the provisions of the said Act. It was held that as Act No. 6 of 1955 was violative of Articles 14 and 31 (2) of the Constitution, it was ultra vires. It was further held that any action taken under such constitutionally invalid Act could not be validated by Act No. 21 of 1960, because the Validating Act itself will be invalid on that very ground.

16. All the aforesaid cases on which reliance has been placed on behalf of the petitioner, the Acts which were purported to be validated, had been held to be constitutionally invalid, and, as such, it was beyond the power of the State Legislature to validate the actions taken under those Acts by merely passing the Validating Act.

17. Learned Advocate-General has referred to some of the cases where this aspect of the matter has been considered. In the case of United Provinces v. Mt. Atiqua Begum (AIR 1941 FC 16) rents had been collected from the tenant without any authority in law. Faced with the situation, the U. P. Regularization of Remissions Act of 1938 was passed validating the actions of the collection of rents. The Allahabad High Court held it to be ultra vires. It was held by the Federal Court that such actions were within the scope of Validating Act, and, as such, not ultra vires.

18. In the case of Piare Dusadh v. Emperor (AIR 1944 FC 1), the appellants had been convicted by courts functioning under the special Criminal Court Ordinance (Ordinance 2 of 1943). Federal Court held that the courts constituted under the aforesaid Ordinance had not been duly invested with the jurisdiction. Next day, the Governor General made and promulgated another Ordinance, Ordinance No. 19 of 1943, by which the earlier Ordinance was repealed and certain provisions were made one of the sections provided that any sentence passed by the Special Judge constituted under the earlier Ordinance shall continue to have effect as if the trial had been held in accordance with the Code of Criminal Procedure. It was held that the validity given to the sentence that had been passed by the special courts, were only meant to limit such validity up to the time the sentences appealed against and it did not amount to the exercise of a judicial power and that provision not ultra vires.

19. Reference was also made in this connection to the case of West Ramnad Electric Distribution Co. Ltd. v. State of Madras (AIR 1962 SC 1753) in which a question had arisen as to whether the notifications issued under the Madras Electricity Supply Undertakings (Acquisition) Act, 1949, which had been declared invalid by the Supreme Court having been legislated beyond their legislative competence, could be validated by a subsequent Act, i.e. Madras Electricity Supply Undertakings (Acquisition) Act, 1954, it was held that the subsequent Act could have validated the actions taken under the earlier Act which was held to be invalid, because by the time the second Act was passed the legislature was clothed with the necessary legislative power.

20. Reliance has been also placed on behalf of the State on the case of Jaora Sugar Mills (P.) Ltd. v. State of Madhya Pradesh (AIR 1966 SC 416). In this case, under an enactment the State Legislature had purported to collect cess. The validity of that Act was challenged and it was held to be unconstitutional because there was no legislative competence in the State Legislature. Later, the Parliament passed U. P. Sugarcane Cess (Validation) Act, 1961 validating the imposition and collection of cess made under the State Act which had been held to be invalid. In that connection, repelling the argument that it will not validate actions already taken, it was observed (at p. 421):—

"What Parliament has done by enacting the said section is not to validate the invalid State statutes, but to make a law concerning the cess covered by the said statutes and to provide that the said law shall come into operation retrospectively."

21. In the case of Udai Ram v. Union of India (AIR 1968 SC 1138) certain notifications issued under the Land Acquisition Act had been challenged before the High Court on the ground that there could not be successive notifications under Section 6 of the Act. In the meantime, an ordinance was promulgated by the President of India. Section 4 of the Ordinance purported to amend Section 6 of the Principal Act by enabling different declarations to be made from time to time, made in respect of different parcels of land. Section 5 of the Ordinance purported to validate all acquisitions of lands which had been made or purported to have been made under the principal Act before the commencement of the Ordinance, notwithstanding any judgment, decree or order of any court to the contrary. After referring to the aforesaid judgments of the Federal Court, it was observed (at pp. 1151, 1152):—

"All these decisions lay down that the power to legislate for validating actions taken under statute which were not sufficiently comprehensive for the purpose, is only ancillary or subsidiary to legislate on any subject within the competence of the legislature and such validating Acts cannot be struck down merely because courts of law have declared actions taken earlier to be invalid for want of jurisdiction. Nor is there any reason to hold that in order to validate action without legislative support, the validating Act must enact provisions to cure the defect for the future and also provide that all actions taken or notifications issued must be deemed to be taken or issued under the new provisions so as to give them full retrospective effect. No doubt legislatures often resort to such practice but it is not absolutely necessary that they should do so, so as to give full scope and effect to the validating Acts."

22. In the case of Shri Prithvi Cotton Mills Ltd. v. Broach Borough Municipality (AIR 1970 SC 192) also a validating Act, validating the tax collected, which had been declared to be invalid by the court, was upheld by the Supreme Court. In that connection it was pointed out (at p. 195):

"If the legislature has the power over the subject-matter and competence to make a valid law, it can at any time make such a valid law and make it retrospectively so as to bind even past transactions. The validity of a validating law, therefore, depends upon whether the legislature possesses the competence which it claims over the subject-matter and whether in making the validation it removes the defect which the courts had found in the existing law."

23. In the case of Tirath Ram Rajindra Nath v. State of U. P. (AIR 1973 SC 405), the Allahabad High Court had held that the amendment effected in the U. P. Sales Tax (Amendment and Validation) Act, 1970 was unconstitutional by vice of excessive delegation. Thereafter, U. P. Sales Tax (Amendment and Validation) Act, 1971 was passed saying "notwithstanding any judgment, decree or order of any court" any tax imposed, assessed or collected before the commencement of that Act under any of the notifications specified in the second Schedule shall be deemed to have been validly imposed, assessed and collected. It was pointed out by the Supreme Court, that by the Act in question, the legislature had amended the law retrospectively and thereby removed the basis of the decision of the High Court; such actions cannot be considered as encroachment on the judicial power.

24. In this connection reference can be made to another decision of the Supreme Court in the case of Krishna Chandra Gangopadhyaya v. Union of India (AIR 1975 SC 1389). A second proviso had been added to sub-section (2) of Section 10 of the Bihar Land Reforms Act, 1950 saying that the terms and conditions of the lease in respect of minor minerals in so far they are inconsistent with the rules framed under the Mines and Minerals (Regulation and Development) Act, 1957 (hereinafter referred to as the Central Act) shall stand substituted by corresponding terms and conditions by those rules. Under Sec. 15 of the Central Act the State Government had also framed the Bihar Minor Minerals Concession Rules, 1964. R. 20 (2) of that Rule authorised the State Government to modify the leases granted earlier. The Supreme Court in the case of Baij Nath Kedia v. State of Bihar (AIR 1970 SC 1436) held that the whole subject of legislation regarding minor minerals was covered by the Central Act and to that extent the powers of the State Legislature stood excluded; as such the proviso to Section 10 (2) and Rule 20 (2) were ultra vires. Faced with this situation, Bihar Land Reforms Laws (Regulating Mines and Minerals) Validation

Act, 1969 was passed by the Parliament. The preamble of that validating Act said that it was to validate certain provisions contained in the Bihar Land Reforms Act and the Bihar Minor Mineral Concession Rules "and action taken and things done connected therewith." Subsection (2) of Section 2 of that Act said, "Notwithstanding any judgment, decree or order of any court, all actions taken, things done, rules made, notifications issued or purported to have been taken, done, made or issued and rents or royalties realised under any such laws shall be deemed to have been validly taken, done, made, issued or realised, as the case may be as if this section had been in force at all material times — and no suit or other proceeding shall be maintained or continued in any court for the refund of rents or royalties realised under any such laws."
It was held:

".....We are fully satisfied that Parliament desired to validate retrospectively what the Bihar legislation had ineffectually attempted. It has used words plain enough to implement its object and therefore the validating Act as well as the consequential levy are good."
About Rule 20 (2) aforesaid it was observed:—

"This sub-rule is made by the Bihar Government purely as a delegate of Parliament, though beyond the scope of the delegation. Therefore Parliament could validate it and has done so. The source of the authority for rule-making being Parliament, it is indubitable that the power to give it life retrospectively exists. Thus the impugned legislation, levy and other actions are good."
In my opinion, in this case the provisions of the Validating Act were similar to the provisions of the Validating Act in question. The Electors Rules could not have been made retrospective by the State while exercising the rule-making power. Certainly that can be done by the legislature in exercise of its plenary power. That is the purpose of Section 2 of the Ordinance. Having removed that defect, Sections 3 and 4 of the Ordinance validate the preparation of the supplementary electoral rolls saying that notwithstanding any irregularity or infirmity in relation to the preparation and publication thereof they shall be deemed to have been validly prepared and published and no election held under the Act and the Rules framed thereunder be questioned on the ground of any purported irregularity or infirmity in the preparation and publication of such supplementary electoral rolls. As the aforesaid sections do not purport to validate any executive action or provision of any Rule or Act which either suffered from any legislative incompetence or infringed any Articles of the Constitution, relating to fundamental right, it is difficult to hold that it was beyond the scope of a validating Act.

25. Mr. Prabha Shankar Mishra, learned counsel appearing in one of the writ applications, submitted that the right to get himself enrolled as a voter has been denied so as to attract the provisions of Article 14 of the Constitution. He also urged that by an executive action, Article 14 can be violated. Reference was made to the case of Smt. Maneka Gandhi v. Union of India (AIR 1978 SC 597). It is difficult to accept this contention. Merely because the name of a person has not been registered as a voter, it will not amount to discrimination within the meaning of Article 14. This may be the result of carelessness on the part of the authorities concerned, but shall not necessarily amount to discrimination.

26. Learned counsel also submitted that Sections 3 and 4 of the Ordinance not only purport to validate the supplementary electoral rolls on the basis of which the elections have been held, but also the electoral rolls which are to be prepared in future. This argument has been advanced on the basis that there is no specific mention in the Ordinance in question that the electoral rolls prepared in the year 1978 were being validated. In my opinion, on the basis of preamble as well as Sections 3 and 4 it can be held that the Ordinance purports to validate the supplementary electoral rolls which have already been prepared and published. The preamble says, "It is necessary for him to take immediate action to validate the supplementary electoral rolls prepared and published." Even in Sections 3 and 4 the words used are "prepared and finally published". Learned Advocate General also conceded this position that those sections do not contemplate to validate any supplementary electoral roll to be prepared in future. In my opinion, in view of the mandate contained in Sections 3 and 4 of the Ordinance in question it has to be held that the elections in question can-

not be challenged on the ground of any irregularity or infirmity in relation to the preparation and publication of the supplementary electoral rolls.

27. It was then submitted on behalf of the petitioners that while conducting the elections the mandatory provisions of the Election Rules have not been followed, and, as such, those elections are vitiated. In support of this contention reliance was placed on a Bench decision of this court in the case of Bharosa Singh v. Sheo Baran Singh, 1964 BLJR 455 : (AIR 1964 Pat 500). It was also urged that when the whole election is challenged by petitioner on the ground of contravention of the mandatory provisions of the Rules, this court can quash such elections in exercise of its writ jurisdiction. This aspect of the matter was examined by a Full Bench of this court in the case of Dilip Kumar Singh v. State of Bihar (AIR 1971 Pat 65). The Full Bench noticed most of the earlier decisions of this court where in exercise of the writ jurisdiction, Gram Panchayat elections had been quashed. Having noticed those decisions after taking into account Section 84-B of the Act and Rule 70 of the Election Rules which provide that no election held under the Act or the Rules made thereunder shall be called in question in any court except by an election petition, it was held (at p. 79):—

"..... that after a Gram Panchayat election has been held, if the petitioner does not avail of the alternative remedy of filing the election petition before the Election Tribunal, this court ought not to interfere merely on the ground that there has been some illegality or irregularity in conducting the election."

It was also pointed out that the expression "any sufficient cause" used in R. 82 was wide enough to include even the grounds which have not been specifically mentioned in Rule 74. In the case of K. K. Srivastava v. Bhupendra Kumar Jain (AIR 1977 SC 1703) it was observed (at p. 1704):—

"It is well settled law that while Article 226 of the Constitution confers a wide power on the High Court there are equally well settled limitations which this court has repeatedly pointed out on the exercise of such power. One of them which is relevant for the present case is that where there is an appropriate or equally efficacious remedy the court should keep its hands off. This is more particularly so where the dispute relates to an election. Still more so where there is a statutorily prescribed remedy which almost reads in mandatory terms..... There is no foundation whatever for thinking that where the challenge is to an 'entire election' then the writ jurisdiction springs into action. On the other hand the circumstances of this case convince us that exercise of the power under Art. 226 may be described as misexercise."

In my opinion, the position has become all the more difficult in view of sub-clause (3) of Article 226 which was introduced by the Constitution (Forty-second Amendment) Act, 1976, I have already held that there is no question of challenging the elections on the ground of infringement of any of the fundamental rights; as such, it amounts only to redress of an injury by reason of contravention of the provisions of the Act and the Rules framed thereunder. To such cases sub-clause (3) of Article 226 is a bar, there being an alternative remedy. In this view of the matter, I do not consider it necessary to examine the individual writ application to find out whether there are merits in the allegation regarding contravention of the different rules while conducting the elections. Such allegations could have been looked into and examined only by the Election Tribunal constituted under the provisions of the Act and the Rules. We are informed that R. 70 of the Election Rules has been recently amended and an appeal has been provided to the District Judge against any order passed on the election petition challenging the election of the office-bearers of the Gram Panchayat.

28. In the result, all these writ applications are dismissed. In the circumstances of the case, however, there will be no order as to costs.

B. S. SINHA, J.:— 29. I agree but in deference to learned counsel who argued the writ petitions I wish to make certain observations.

30. Section 4 of the Bihar Panchayat Raj Act, 1947 as amended by Ordinance 5 of 1978, has been quoted in the judgment of my learned brother. This amended section has been attacked on various grounds. It has been submitted that the amended Section 4 is in conflict with Section 2 (a) of the Bihar Panchayat Raj Act which defines an adult to mean a person, male or female, who has com-

pleted his or her 21st year of age. It has been said that in view of the definition of adult, as prescribed, persons below 21 years of age could not have been given the right to vote in the Gram Panchayat Elections. Section 4 of the Bihar Panchayat Raj Act as made in 1947 read as follows:

"Membership of Gram Panchayat:— Every Gram Panchayat shall consist of all adults ordinarily residing in the village or villages or part of a village for which the Gram Panchayat has been established, and they shall continue to be members of the Gram Panchayat, until they die or cease to reside in such village or villages or incur any one of the following disqualifications, that is, if he or she....."

I have not quoted the remaining provisions of this section as they are not relevant for our purposes. By going as they are through it, it will be seen that every Gram Panchayat consisted of all adults ordinarily residing in the village or part of a village of which the Gram Panchayat has been established and it was in that background that the definition for adult was provided in Section 2 (a). However, as pointed out by my learned brother, the aforesaid section was substantially amended in 1963 itself by Section 2 of Act XVI and the word adult was excluded. As such the definition as given in S. 2 (a) has become redundant and it is no longer permissible to circumscribe or interpret the meaning of the amended Section 4 of the Bihar Panchayat Raj Act by reference to a definition.

31. The validity of amended Section 4 was also challenged on the ground that it destroyed the basic concept of the Constitution. It is said that the source of power for making the law on the subject, is to be found in items 5 of list 2 of the 7th Schedule of the Constitution and, therefore, by necessary implication, is "for the purposes of local self-Government". Local Self-Government is a Government by the people elected by adult suffrage and the concept of adult suffrage is itself provided in Art. 326 of the Constitution and, therefore, when a provision is made for people below 21 to vote it is beyond the legislative competence of the legislature as provided in item 5 of list 2 of the 7th Schedule. The basic concept of the Constitution was stated in the very well known case of His Holiness Keshavananda Bharti (AIR 1973 SC 1461) where Chief Justice Sikri formulated the basic structure to be the following features: (1) Supremacy of the Constitution, (2) Republican and democratic forms of Government, (3) Secular character of the Constitution, (4) Separation of power between the Legislature, the Executive and the Judiciary and (5) the Federal character of the Constitution. It cannot be said that by widening the franchise by Ordinance 5 of 1978, the legislature has infringed any of these basic features of the Constitution. Article 326 cannot be of any assistance in determining the scope of Section 4 of the Bihar Panchayat Raj Act inasmuch as provision is made there for those who will be entitled to vote for the appropriate legislatures, namely, the State Legislature and the Union Parliament. If the law making authority has considered it desirable to further broaden the franchise and give voting rights to persons who have attained the age of 18 for elections at the village level, no exception can be taken to it. Reliance placed for the definition of infant as found under the laws of England is misplaced inasmuch as the extent of franchise is a matter for the competent law making authority to decide. Therefore, in my opinion, it cannot be said that amended Section 4 is ultra vires of item 5 of list 2 of the 2nd Schedule read with Article 246 (2) of the Constitution as it offends the basic structure of the Constitution.

32. The submission that the aforesaid provision is ultra vires of Article 254 read with items 1, 2, 3, 11 (a) and 13 of list 3 of the 7th Schedule inasmuch as it is in conflict with existing law is also not tenable. For the meaning of 'existing law' reliance was placed on Article 366 (10). However Section 6 of Ordinance 5 of 1978 which has amended Section 4 of the Bihar Panchayat Raj Act reads as follows:—

"For Section 4 of the said Act the following section shall be substituted and shall always be deemed to have been substituted, namely, thereafter the amended Section 4 has been engrafted."

By the use of the word shall 'always be deemed to have been substituted' it is clear that the effect of this amendment is that Section 4, as it stands now, will be deemed to have been in existence since its very inception.

33. It cannot be said that this amendment is repugnant to any union law.

The question of repugnancy as provided under Article 254 of the Constitution only arises when two conflicting laws operate in the same field — one made by the Union Parliament and the other made by the State Legislature with regard to a subject which is to be found in the concurrent list. Section 4 of the Bihar Panchayat Raj Act, therefore cannot be repugnant to the provisions of the Representation of the People Act, 1950 inasmuch as neither of them operate in the same field nor do they deal with a subject enumerated in the concurrent list. The Representation of the People Act deals with election to the Union Parliament and the State Legislature and the Bihar Panchayat Raj Act relates to elections of Gram Panchayat.

34. This leads me to another argument advanced on behalf of some of the petitioners which was that the amended Section 4 is ultra vires inasmuch as the sanction of the President has not been obtained. It is true that the Bihar Panchayat Raj Act, 1947 was assented to by the Governor General of India. For the purposes of the case before us it is not necessary to consider whether the Bihar Panchayat Raj Act is completely covered by entry 5 of list 2 of the Constitution or by entry 13 of list 2 of 7th Schedule of the Government of India Act, 1935. Even if it is assumed that the aforesaid enactment partly deals with other entries in the concurrent list, for example, entries 1, 2, 3, 11 (a) and 13 of list 3 of the 7th Schedule of the Constitution and other entries 1, 2, 4 etc. of list 3 of the 7th Schedule of the Government of India Act, 1935 it cannot be disputed that Section 4 of the Bihar Panchayat Raj Act is completely covered by entry 5 of list 2 of the 7th Schedule of the Constitution. In that view it was not necessary to obtain the consent of the President of India when that section was amended. In this context it may also be pointed out that when Section 4 of the Bihar Panchayat Raj Act was substantially amended by Section 2 of Act XVI of 1963 the sanction of the President was not obtained. Hence the amendment cannot be challenged on the ground that the President has not assented to it.

35. The validity of Ordinance 57 of 1978 which has been quoted, in extenso, in the judgment by my learned brother, has been challenged on the ground that the validation was beyond the legislative competence of the law making authority. A validating law by its very nature validates something which needs validation. In other words, the validation relates to something which was invalid and not in accordance with law. Validation is either of a statutory law or it can be even of executive action which was not warranted by law. In the cases before us the validation relates to the Bihar Panchayat (Registration of Supplementary Electors) Rules, 1978 which was published on 21st March, 1978. R. 1 (2) of the said Rules has been declared to be ultra vires in the judgment of my learned brother which, however, as pointed out by him, is academic inasmuch as the aforesaid Rules have been validated by Section 2 of Ordinance 57 of 1978. The effect of the aforesaid provision is that by the process of antedating the legislature has validated the aforesaid Rules from 1st February 1978.

36. Sections 3 and 4 of Ordinance 57 of 1978 prohibit an enquiry by any court or authority with regard to the preparation of the supplementary electoral rolls as prepared in 1978 on account of any irregularity or infirmity. It cannot be said that prohibiting any enquiry with regard to any purported irregularity or infirmity in the preparation and publication of the supplement to the electoral rolls for the year 1978 was beyond the legislative competence of the law making authority.

37. Lastly in some of the writ petitions the elections have been challenged on the ground that the postponement of the date of poll and the consequential fixation of another date was beyond the power of the Dist. Magistrate under Rule 91 of the Bihar Panchayat Rules, 1959 and in any case the dates for the postponed polls were not fixed by the Election Officer. It was also urged that the power of postponement did not include the power to hold the elections before the date of poll as announced in the election programme. It was further argued that because of the violation of the rules the whole election was being challenged and hence the petitioners were entitled to seek redress in this court in the exercise of its writ jurisdiction. It is settled law that while the powers of the High Court under Article 226 are wide, still there are well settled limitations, one of which is that where there is an appropriate or equally efficacious remedy, the High Court will not act under Article 226. This limita-

tion, which has been usually followed by this court, is now engrafted in Article 226 clause (3) of the Constitution. Therefore, the aforesaid grievance made by some of the petitioners are matters which can be looked into by the Election Tribunal. No relief can be given to the petitioners merely because the whole election is challenged as in the words of Mr. Justice Iyer, in the case of K. K. Shrivastava v. Bhupendra Kumar Jain (AIR 1977 SC 1703) "..... it is perfectly clear that merely because there is a challenge to a plurality of returns of elections, therefore a writ petition will lie, is a fallacious argument." His Lordship further emphasised "There is no foundation whatever for thinking that where the challenge is to an 'entire election then the writ jurisdiction springs into action."

S. P. SINHA, J.:— 38. I agree.

39. Sometimes a legislation is so intriguing and harassing that given the choice, the subject will opt out of it. But all laws demand obedience on pain of sanctions and none, within its purview, dare defy it.

40. During the course of arguments, the legislations in question, besides being attacked on grounds of invalidity, were also attacked on the ground of having been enacted in such huff and hurry that the object which was sought to be achieved by them had remained a mystery; they merely intrigued and harassed the people concerned.

41. I think, it is not necessary nor practicable for a court to analyse the intents of the legislature. All that a court can do is to test the validity of the legislations on the touchstone of legislative competence.

42. I have had the benefit of reading the observations of my learned brothers on this aspect of the matter and I agree with them. There is one aspect on which I may add some observations of my own. This is regarding the effect of Section 2 of Bihar Ordinance No. 57 of 1978 (shortly referred to as the Ordinance) on the Bihar Panchayat (Registration of Supplementary Electors) Rules, 1978 (shortly referred to as the Rules). By Sec. 2 of the Ordinance the said Rules "shall be deemed to have come into force on the 1st February, 1978."

43. It may be stated that by sub-rule (2) of Rule 1, the delegate, without any authority to do so, had made the said Rules applicable with retrospective effect. The Rules were published on the 21st March, 1978, but according to sub-rule (2) of Rule 1 it "shall be deemed to have come into force on the 1st February, 1978". Then came the Bihar Ordinance 57 of 1978, Section 2 whereof laid that "..... and the Bihar Panchayat (Registration of Supplementary Electors) Rules, 1978 shall be deemed to have come into force on the 1st February, 1978." The Ordinance did not rectify the mistake committed in the Subordinate Legislation of giving retrospective operation to the said Rules, for which admittedly the delegate had no authority.

44. Now, therefore, the argument is that although the legislature had competence to validate an invalid legislation, it could not validate an invalid legislation with the invalidity sticking to it. In such a case, notwithstanding the validation, the legislation would continue to be invalid and any action taken thereunder would be illegal.

45. I must confess, the question raised poses difficulty. If in validating an invalid legislation, the invalidity is allowed to remain sticking, either the legislature was unconscious of the invalidity or was abdicating its competence to cure the defect. In the latter case the validation would be bad and inoperative, (Vide Shama Rao v. Union Territory of Pondicherry, AIR 1967 SC 1480) but in the former case, if the invalidity is separable, it has to be separated from the valid part of the legislation.

46. I think, the instant case is not one of abdication of its function by the legislature, because had that been so, it would not have felt the necessity of promulgating the said Ordinance. In my view, it is a case of omission to cure the invalidity in the said Rules.

47. Now so far as the invalidity in the Rules is concerned, it is clearly severable from the valid parts. The part which is invalid, if struck down, the valid part remains operative. The invalid part has been rightly struck down on grounds of legislative incompetence of the Rule-making authority. The valid part, therefore, remains operative from the 1st February, 1978 as per the Ordinance.

48. Before I part, I must confess that although I have not let my imagination 'boggle' with the 'inevitable corollaries' of the retrospective legislation, but when I think of the present day propensity of rush and hurry to do something, my imagination certainly shudders at the propensities which may not leave the legislature immune. An ancient saying is that instead of doing today and repenting tomorrow; first conceive, then think, then analyse, then act.

Petitions dismissed.

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B. P. JHA AND S. K. JHA, JJ.

Hindustan Malleables and Forgings Ltd., Appellant v. Indian Furnace Co. Ltd., Respondent.

A. F. O. O. No. 153 of 1975, D/- 10-7-1978.*

(A) Sale of Goods Act (3 of 1930), S. 39 (1) — Delivery of goods to carrier — Amounts to delivery to promisee — Breach of contract — Cause of action would arise at the place of delivery. (Para 8)

Anno: AIR Manual (3rd Edn.) Sale of Goods Act, S. 39 N. 2.

(B) Civil P. C. (5 of 1908), S. 20 — Cause of action — Meaning of — Means action for which the defendant is answerable to Court. (Para 11)

Anno: AIR Comm. C.P.C. (9th Edn.), S. 20 N. 14.

(C) Sale of Goods Act (3 of 1930), Sections 19 and 23 — Passing of property from seller to buyer — Inference about — No specific provision in contract — Inference to be drawn from conduct of parties.

S. 19 (1) of the Sale of Goods Act, 1930 lays down when the property passes or should be deemed to be intended to pass. In the present case, one thing which is quite clear is that there is no express stipulation between the parties which can compel to hold that the goods were to be delivered at the place of buyer. In such cases, as enjoined in S. 19 (2) of the Act, the intention of the parties shall have to be ascertained with reference to the conduct of the parties and the circumstances of the case. S. 23 (1) of the Act lays down that where there is a contract for the sale of goods in a deliverable state and such goods are appropriated to the contract either by the seller with the assent of the buyer or by the buyer with the assent of the seller, the property in the goods thereupon passes to the buyer and S. 23 (2) lays down that where the seller delivers the goods to the buyer or to a carrier or other bailee (whether named by the buyer or not) for the purpose of transmission to the buyer, and does not reserve the right of disposal he is deemed to have unconditionally appropriated the goods to the contract. (Para 15)

Anno: AIR Manual (3rd Edn.) Sale of Goods Act, S. 19 N. 2; S. 23 N. 4.

Cases Referred: Chronological Paras

AIR 1960 SC 1309 5
AIR 1954 Mad 594 (FB) 5
(1888) 22 QBD 128: 60 LT 250, Read v. Brown 5
(1873) 8 CP 107: 28 LT 32, Cooke v. Gill 5

Shreenath Singh and Bishwanath Agrawal, for Appellant; H. K. Banerjee, for Respondent.

B. P. JHA, J.:— The plaintiff-company preferred an appeal under Order XLIII, R. 1 (a) of the Civil P. C., against an order passed under O. VII, R. 10 of the Civil P. C. returning a plaint to be presented to the proper Court. By virtue of an order dated 28th June, 1975, the Subordinate Judge I, Dhanbad, returned the plaint on the ground that the Dhanbad Civil Court had no territorial jurisdiction to try the suit of the plaintiff as no part of the cause of action arose within the district of Dhanbad. In the opinion of the Court below, the entire cause of action arose in Bombay.

2. The plaintiff-company filed a suit for recovery of Rs. 1,50,000 as damages on account of non-supply of the parts of furnace to the plaintiff. The plaintiff-company is a public limited company duly incorporated under the Companies Act, 1956, having its registered office at Jalan Nagar, P.O. Bhuli, district Dhanbad. The defendant-company is also a public limited company having its registered office in Lotus Cinema Building, 12-A, Annie Besant Road, Bombay. Ac-

*(Against order of Gopi Nath Chandra, Sub-J. I, Dhanbad, D/- 28-6-1975.)

cording to the plaint, the plaintiff was in need of an Induction Melting Furnace (model ZTS-20/500) for melting of special steel. M/s. A. L. Chopra of 6/3, Madan Street, Calcutta had already issued an order on 19-2-71 upon the defendant-company for purchasing model ZTS-20/500 (Induction Melting Furnace) for melting special steel. The defendant-company made an acknowledgment (Exhibit 8) of the order placed by M/s. A. L. Chopra. By virtue of the agreement between M/s. A. L. Chopra and the defendant-company, the "Induction Melting Furnace" was to be delivered at Bombay and M/s. A. L. Chopra had to make payment by cheque at Bombay (see Exhibit A). Thereafter the plaintiff requested M/s. A. L. Chopra to transfer the order of the Induction Melting Furnace (model ZTS-20/500) in favour of the plaintiff-company. By virtue of Exhibit A/1, dated 3rd August, 1971, M/s. A. L. Chopra agreed that the Furnace ordered by M/s. A. L. Chopra be delivered to M/s. Hindustan Malleables and Forgings Ltd., Jalan Nagar, P.O. Bhuli, district Dhanbad. In Exhibit A/1, it was also mentioned that the plaintiff had agreed to take over the order on the same terms and conditions of the order as placed by M/s. A. L. Chopra. In view of Exhibit A/1, the defendant-company has agreed to send the Induction Melting Furnace (model ZTS-20/500) to the plaintiff-company.

3. On these facts, the Court below returned the plaint under O. VII, R. 10 of the Civil P. C., and held that the Dhanbad Civil Court had no territorial jurisdiction to try the suit as no part of the cause of action arose in the district of Dhanbad.

4. Learned counsel for the appellant contends that the cause of action arose in Dhanbad for not supplying parts of the Furnace to the plaintiff at Dhanbad.

5. The short question for decision in this appeal is:

1. What is the meaning of cause of action?

2. Whether the cause of action arose in Dhanbad or not?

The expression 'cause of action' has been defined by Brett, J., in Cooke v. Gill, (1873) 8 CP 107, as follows:

" 'Cause of action' has been held from the earliest time to mean every fact which is material to be proved to entitle the plaintiff to succeed, every fact which the defendant would have a right to traverse."

Lord Esher, M. R. has also defined the 'cause of action' in Read v. Brown, (1888) 22 QBD 128, as follows:

"Every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the Court. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved."

The Supreme Court in the State of Madras v. C. P. Agencies (AIR 1960 SC 1309) followed the decisions of Brett, J., in Cooke v. Gill and Lord Esher in Read v. Brown (supra). In re D. Lakshminarayana Chettiar (AIR 1954 Mad 594), a Full Bench of the Madras High Court held that 'cause of action' means the bundle of essential facts which is necessary for the plaintiff to prove before he can succeed in the suit.

6. The next question for decision is: Where the cause of action arose? In the present case, it is conceded by counsel of the appellant that by virtue of the agreement between M/s. A. L. Chopra and the defendant-company each part of the cause of action arose at Bombay. It was also agreed between M/s. A. L. Chopra and the defendant-company that A. L. Chopra would take delivery of goods at Bombay and he would also make payment by cheque at Bombay (see Exhibit A). Exhibit A is a letter dated 24th July, 1971, written by the defendant-company to M/s. A. L. Chopra. In that letter, the Company suggested to M/s. A. L. Chopra to take delivery of the goods at Bombay and to make payment by cheque at Bombay. It is also conceded by the counsel of the appellant that the contract between M/s. A. L. Chopra and the defendant-company took place at Bombay. In this circumstance, the admitted position is that the contract between M/s. A. L. Chopra and the defendant-company took place at Bombay.

7. By virtue of Exhibit A/1, dated 3-8-71, M/s. A. L. Chopra transferred their order dated 19th Feb., 1971, in favour of the plaintiff-appellant with a request that the goods be transferred to the plaintiff-company at Dhanbad. In Exhibit A/1, it was also mentioned that the plaintiff had agreed to take over the order placed by M/s. A. L. Chopra on the same terms and conditions of the order placed by M/s. A. L. Chopra. If it is so, in my opinion, the plaintiff-company stepped into the shoes of M/s. A. L. Chopra. It is, therefore, clear that the

whole cause of action between the plaintiff and the defendant-company arose at Bombay. In this view of the matter, it is the Civil Court at Bombay which has jurisdiction to try the present suit between the parties.

8. There is another aspect of the matter and that is this: By virtue of Exhibit 2, dated 4-8-71, the plaintiff-company requested the defendant-company to deliver the equipment at Dhanbad through road transport (see paragraph 5 of Exhibit 2). It is relevant to quote para 5 of Exhibit 2, which runs as follows:

"5. Since the delivery of the equipment will be made at Dhanbad, through road transport, the documents are to be negotiated through our bankers, United Commercial Bank, Dhanbad, for delivery against the payment of the balance value of the equipment, in terms of pro forma invoice referred to above."

It is, therefore, clear that the plaintiff-company requested the defendant-company to deliver the goods to a carrier at Bombay. It is also conceded by counsel for the appellant that while sending the Induction Melting Furnace (model ZTS-20/500) to Dhanbad, the Induction Melting Furnace was delivered to a carrier (truck) at Bombay which brought the goods to Dhanbad. If it is so, the goods delivered to a carrier (truck) at Bombay will be deemed to be a delivery of the goods to the plaintiff-company at Bombay. In this connection, S. 39 (1) of the Sale of Goods Act, 1930 (Act 3 of 1930) was referred to, which runs as follows:

"39. (1) Where, in pursuance of a contract of sale, the seller is authorised or required to send the goods to the buyer, delivery of the goods to a carrier, whether named by the buyer or not, for the purpose of transmission to the buyer, or delivery of the goods to a wharfinger for safe custody, is prima facie deemed to be a delivery of the goods to the buyer."

Relying on S. 39 (1) of the Sale of Goods Act, I hold that the delivery of the goods to a carrier at Bombay will be deemed to be a delivery of the goods to the plaintiff at Bombay. In the present case, it is conceded by the counsel of the appellant that the plaintiff made payment of the goods at Bombay. If it is so, in my opinion the whole cause of action arose at Bombay and not at Dhanbad. No part of the cause of action arose at Dhanbad as goods were not delivered at Dhanbad in view of S. 39 (1) of the Sale of Goods Act. This view is also being supported by S. 23 (2) of the Sale of Goods Act.

9. Learned counsel for the appellant contends, relying upon Exhibit 2 (b), that the defendant-company agreed to supply the balance of materials to the plaintiff at Dhanbad. It is on the basis of this letter that learned counsel for the appellant contends that the defendant-company agreed to supply the parts of the Furnace at Dhanbad. It is for this reason, learned counsel for the appellant contends, the cause of action arose at Dhanbad. In this connection, he also relies on Exhibit 5, dated 30-7-71. This is a letter written by the defendant-company. In this letter the defendant-company stated as follows:

"Please receive the undermentioned goods and return the original of this note duly receipted."

It is on the basis of this letter that learned counsel for the appellant contends that the goods delivered by the defendant-company shall be received at Dhanbad and, therefore, the cause of action arose at Dhanbad for not supplying the parts of the Furnace. It is conceded by the counsel of the appellant that the Induction Melting Furnace (model ZTS-20/500) was delivered to a carrier at Bombay at the request of the plaintiff-company (see para 5 of Exhibit 2 quoted at para 8 of this judgment). The balance part of the Furnace could not be delivered by the defendant-company and this suit has been filed by the plaintiff for delivery of the balance part of the Furnace. According to the request of the plaintiff in Exhibit 2, the defendant shall deliver the goods to a carrier at Bombay. If it is so, the delivery of the goods to the carrier at Bombay shall be deemed to be a delivery of the goods to the plaintiff at Bombay. If Exhibit 2 (b) is read along with Exhibit 2, the irresistible conclusion is that the balance parts of the Furnace shall be delivered to a carrier at Bombay and as such the cause of action shall arise at Bombay and not at Dhanbad. In view of the interpretation of S. 39 (1) of the Sale of Goods Act, I am unable to accept the contention of learned counsel for the appellant. S. 39 (1) clearly provides that if goods are delivered to a carrier for the purpose of transmission to the buyer, then, prima facie, the delivery of the

goods shall be deemed to be made to the buyer.

In this view of the matter, I hold that the plaintiff-company stepped into the shoes of M/s. A. L. Chopra. The original contract entered into by M/s. A. L. Chopra was, admittedly, at Bombay. M/s. A. L. Chopra was required to take delivery of the goods at Bombay and to make payment by cheque at Bombay. Over and above, the plaintiff-company also agreed, as is clear from Exhibit A, to place themselves in the same position as if they were in the position of M/s. A. L. Chopra. If it is so, in my opinion the contract was made at Bombay. In view of the fact that goods were delivered to a carrier at Bombay for sending the same to Dhanbad, it will be concluded that the goods were delivered to the plaintiff-company at Bombay. The plaintiff made the payment of goods at Bombay. In these circumstances, I hold that no part of the cause of action arose at Dhanbad and as such the Dhanbad Civil Court had no jurisdiction to try the suit.

10. Learned counsel for the appellant, relying on Exhibit 1 (a), contended that a fresh agreement took place between the plaintiff-company and the defendant-company. Exhibit 1 (a) is an invoice dated 25-8-71 issued by the defendant-company. In this invoice, it was mentioned about the order placed by the plaintiff-company upon defendant-company for purchase of the Induction Melting Furnace. In this connection, Exhibit 1 was also referred to. Exhibit 1 is an invoice dated 31-7-71 issued by the defendant-company. In this invoice the description of the order is dated 19th February 1971, i.e., Chopra's order. On a perusal of Exhibit 1, it is clear that the defendant-company treated the plaintiff in place of M/s. A. L. Chopra. If Exhibit 1 is read along with Exhibit 1 (a), it is clear that the plaintiff-company was put in place of M/s. A. L. Chopra and no fresh agreement took place between the defendant-company and the plaintiff. There is no document on the record to suggest that a fresh contract was entered into between the plaintiff and the defendant-company. In view of the letter written by M/s. A. L. Chopra to the defendant-company, dated 3-8-71 (Exhibit A/1), it is clear that the plaintiff had agreed to place itself in the same position in which M/s. A. L. Chopra was. On a perusal of Exhibit 1, dated 3-8-71, it is clear that the plaintiff-company shall be bound by the same terms and conditions of the order placed by M/s. A. L. Chopra. On the basis of these documents, I hold that the plaintiff-company stepped into the shoes of M/s. A. L. Chopra and no fresh agreement took place between the plaintiff and the defendant-company. If it is so, the earlier contract entered into between M/s. A. L. Chopra and the defendant-company was made at Bombay. M/s. A. L. Chopra had agreed to take delivery of the goods at Bombay and to make payment at Bombay. The plaintiff also made payment at Bombay and took delivery of goods at Bombay by virtue of S. 39 (1) of the Sale of Goods Act. Hence, I hold that the whole cause of action arose at Bombay and no part of the cause of action arose at Dhanbad. The Court below was justified in returning the plaint to the plaintiff.

11. The point of law raised in this appeal be summarised thus:

Cause of action means an action for which the defendant is answerable to the Court. In the present case the defendant is answerable in respect of cause of action which arose at Bombay and not at Dhanbad. It is settled law that a suit can be filed at a place where a part of the cause of action arises. In the present case the whole cause of action arose at Bombay and no part of the cause of action arose at Dhanbad.

In view of S. 39 (1) of the Sale of Goods Act, 1930 (Act 3 of 1930), it is clear that where in pursuance of a contract of sale, if goods are delivered to a carrier, it will be deemed in law to be a delivery of the goods to the buyer. In the present case, goods were delivered to a carrier at Bombay and as such by virtue of S. 39 (1) of the Sale of Goods Act, the delivery will be deemed to be made to the buyer (plaintiff) at Bombay. In the present case, the plaintiff made payment at Bombay and the goods were taken delivery at Bombay and as such the whole cause of action arose at Bombay and not at Dhanbad.

12. In the result, the appeal is dismissed. Parties will bear their own costs.

S. K. JHA, J.:— 13. With respect, I agree that the appeal be dismissed but without costs. I, however, feel obliged to give reasons of my own.

14. I proceed upon the assumption, for which there may be some justification, that there was a fresh contract between the plaintiff-appellant and the defendant-respondent through a series

of correspondence after the contractual obligations between M/s. A. L. Chopra and the defendant-company inter se came to an end. It is well settled that in suits arising out of contract the cause of action arises at any of the following places: (1) the place where the contract was made; (2) the place where the contract was to be performed or performance thereof completed; (3) the place where in performance of the contract any money to which the suit relates was expressly or impliedly payable. A suit on a contract for sale of goods may be filed at the place where goods are deliverable or the price payable. The crux of the matter in the present appeal, therefore, is as to whether the goods in question were to be deliverable or the price thereof was payable at Dhanbad. So far as the price payable is concerned, there is no controversy that there was an express stipulation between the parties that the price was to be payable and was actually paid by the plaintiff-vendee to the defendant-vendor at Bombay. The only question that remains to be considered is as to whether the goods were deliverable at Bombay or at Dhanbad. I am in respectful agreement with my learned brother that the goods which are the subject-matter of the breach of contract were to be delivered at Bombay. This, I say for the following reasons.

15. S. 19 (1) of the Sale of Goods Act, 1930, lays down when the property passes or should be deemed to be intended to pass. In the present case, one thing which is quite clear to me is that there is no express stipulation between the parties which can compel me to hold that the goods were to be delivered at Dhanbad. In such cases, as enjoined in S. 19 (2) of the Act, the intention of the parties shall have to be ascertained with reference to the conduct of the parties and the circumstances of the case. Section 23 (1) of the Act lays down that where there is a contract for the sale of goods in a deliverable state and such goods are appropriated to the contract, either by the seller with the assent of the buyer or by the buyer with the assent of the seller, the property in the goods thereupon passes to the buyer; and S. 23 (2) lays down that where the seller delivers the goods to the buyer or to a carrier or other bailee (whether named by the buyer or not) for the purpose of transmission to the buyer, and does not reserve the right of disposal, he is deemed to have unconditionally appropriated the goods to the contract. Learned counsel for the appellant pointed out to us the provision of Section 19 (3) which lays down that unless a different intention appears, the rules contained in Sections 20 to 24 are rules for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer. He, therefore, argued that if on the basis of the correspondence referred to by him it could be called that there was an express or implied stipulation between the parties that the goods were to be delivered at Dhanbad, then the provisions of Section 23 (1) would be ruled out, on account of the statutory injunction incorporated in Section 19 (3).

I have already observed earlier that there is no such document which can lead to a reasonable inference that the goods in question were to be delivered at Dhanbad and not to a public carrier at Bombay. In the instant case, as a matter of fact, the major components of the furnace to be supplied were actually delivered to the common carrier at Bombay as desired by the plaintiff-appellant. Therefore, the exception laid down in S. 19 (3) cannot be pressed into service.

16. There is yet another aspect of the matter to which my learned brother has also made reference; but in order to complete the sequence, I think it worthwhile, even at the cost of repetition, to refer to the provision of Section 39 (1). Section 39 (1) clearly says that where, in pursuance of a contract of sale, the seller is authorised or required to send the goods to the buyer, delivery of the goods to a carrier, whether named by the buyer or not, for the purpose of transmission to the buyer, or delivery of the goods to a wharfinger for safe custody, is prima facie deemed to be a delivery of the goods to the buyer. It will be seen that sub-sec. (2) of Sec. 23 gives statutory recognition to the rule that where goods are delivered to a carrier for transmission to the buyer, the carrier is presumed to be the buyer's agent. If goods are ordered by a person to be delivered through a common carrier to the person by whom they have been ordered, then the moment the goods are delivered to the carrier, the carrier becomes the agent of the vendee and such delivery means delivery to the

vendee. If there is a binding contract between the vendor and the vendee, then there is no doubt that the property passes by such delivery to the carrier. Although S. 39 (1) creates a fiction for the purpose of sub-sec. (2) of S. 39 to fix on whom the loss is to fall, it merely reinforces the legal principle incorporated in S. 23 (2). Learned counsel argued, and rightly so, that the rule incorporated in S. 39 (1) is merely a prima facie rule and may be modified by an express contract, but as has been noticed in the instant case, there is no express contract between the plaintiff and the defendant requiring the defendant to deliver the goods in question to the plaintiff at Dhanbad. What the parties had agreed upon was, and that at the instance of the plaintiff appellant, that the goods were to be sent to the plaintiff through a public carrier at the cost of the plaintiff and at the risk of the vendee-plaintiff. In order to obviate that risk, the agent of the plaintiff, viz., Shri S. K. Jain, was sent to Bombay who, after inspection of the component parts which were being despatched to the plaintiff, did actually get the goods insured and paid the premium on behalf of the plaintiff to the insurance company.

17. These being the salient principles of law, the conduct of the parties in the instant case can be summed up like this. The price was to be paid and was actually paid by the plaintiff at Bombay. Goods were to be sent to the plaintiff through a common carrier. The transport cost was paid by the plaintiff at Bombay. Packing charges were paid by the plaintiff at Bombay. Goods were insured by the insurance company at the instance of the plaintiff and premium was paid by the plaintiff to the insurance company at Bombay. The Furnace was delivered (but some components thereof, which are the subject-matter of the suit, were said to have been not despatched at all) to the public carrier for delivery to the plaintiff. The carrier in such a case must be presumed to be a bailee for the plaintiff. This being the conduct of the parties, there can be no doubt that the intention of the parties was that the goods in question were to be delivered to the plaintiff through a common carrier acting as a bailee on behalf of the plaintiff at Bombay. No part of the cause of action, therefore, can be said to arise within the territorial jurisdiction of the Courts at Dhanbad. The Dhanbad Court has thus rightly held that it had no territorial jurisdiction.

Appeal dismissed.

AIR 1979 PATNA 151

HARI LAL AGRAWAL AND P. S. SAHAY, JJ.

Prasanjit Mahtha, Appellant v. The United Commercial Bank Ltd., Respondent.

A. F. O. D. No. 562 of 1967, D/- 4-9-1978.*

(A) Contract Act (9 of 1872), S. 126 — Contract of guarantee — Request by principal debtor to surety to undertake obligation need not be express — It may be implied.

It is, no doubt, true that for a contract of suretyship there should be the concurrence of the principal debtor, the creditor and the surety, but this does not mean that there must be evidence showing that the surety undertook his obligation at the express request of the principal debtor; an implied request will also be quite sufficient. (Para 10)

Anno: AIR Manual (3rd Edn.) Contract Act, S. 126 N. 2.

(B) Contract Act (9 of 1872), S. 126 — Contract of guarantee — Simultaneous tripartite contract between surety, creditor and principal debtor not necessary.

There need not be a tripartite contract between the three parties, namely, surety, creditor and the principal debtor, simultaneously. When once a contract between the principal debtor and the creditor is formed, a contract between the surety and the creditor by which the surety guarantees the debt, can also take place. The consideration may move either from the creditor or the principal debtor or both. AIR 1940 Bom 315, Expl. (Para 12)

Anno: AIR Manual (3rd Edn.), Contract Act, S. 126 N. 2.

(C) Contract Act (9 of 1872), S. 127 — Consideration for guarantee — It is not necessary that surety should receive any advantage himself.

The very nature of a contract of guarantee does not stipulate for the surety to receive or, for that matter, retain the

*(From decision of K. P. Verma, Addl. Sub. J., 3rd Court, Muzaffarpur, D/- 15-8-1967.)

money or advantage himself as the actual beneficiary is the principal debtor. AIR 1951 Madh B 49, Ref. (Para 11)

Anno: AIR Manual (3rd Edn.), Contract Act, S. 127 N. 1.

(D) Hindu Law — Joint family — Trade — New business — Extended business — When not new business.

If the family is a trading family and the extended business is not more hazardous or speculative than the one previously existing it may not be regarded as a new business. AIR 1947 Mad 252 and AIR 1951 All 400, Ref. (Para 18)

(E) Hindu Law — Debts — Son's liability — Surety — Suretyship debt of father is not avyavaharika.

A surety bond creates a personal liability to pay the debt and comes within the meaning of the term 'vyavaharika' and the joint family estate in the hands of the son is liable for the payment of the same in view of his pious obligation to pay his father's debt. AIR 1970 Punj & Har 67 (FB), Ref. (Para 23)

Cases Referred: Chronological	Paras
AIR 1970 Andh Pra 158 (FB)	11
AIR 1970 Punj & Har 67 (FB)	22
AIR 1968 SC 534	16
AIR 1964 SC 1425	14
AIR 1959 SC 282	14, 22
AIR 1951 All 400	18
AIR 1951 Madh B 49	11
AIR 1947 Mad 252	18
AIR 1943 PC 142	16
AIR 1940 Bom 315	12
AIR 1935 Pat 376	13
AIR 1933 All 587: ILR 55 All 675	21
AIR 1920 Pat 201	20
AIR 1918 Pat 345	16
(1904) ILR 26 All 611	21
(1893) ILR 16 Mad 99	16
(1880) 6 AC 1: 43 LT 706, Duncan Fox & Co. v. North & South Wales Bank	10

Balbhadra Prasad Singh and Keshri Kishore Saran, for Appellant; R. S. Chatterjee, M. L. Sen and B. B. Sen, for Respondent.

HARI LAL AGRAWAL, J.:— This is a plaintiff's appeal arising out of a suit for declaration that the decree passed against his father (Pashupati Nath Mahtha) in Money Suit No. 17-B of 1958 by the 5th Additional District Judge, Nagpur, was not binding on him and could not be enforced against the properties falling to his share on partition, as the debt in question for which the decree was passed was Avyavaharika. The plaintiff being a minor, instituted the suit in question through his maternal uncle. In order to appreciate the question falling for our consideration, I may state the relevant facts in brief.

2. In the town of Muzaffarpur, lived one Shri S. N. Mahtha. He had two sons, namely, Rabindra Nath Mahtha and Pashupati Nath Mahtha, the father of the plaintiff. Undisputedly, a private limited company, namely, the Central Hindusthan Industrial Corporation (Private) Ltd. was started at Nagpur, in which the plaintiff's father was one of the directors. On 17th February, 1955, the aforesaid company opened a cash credit account with the defendant Bank at Nagpur. The original limit was only rupees five lacs, but this was raised from time to time. In September, 1955, it was first raised to Rs. 7.5 lakhs and on 25th February 1956, was further raised to rupees ten lakhs. According to the practice prevalent with the Bank, the defendant Bank in order to secure the loan under the above cash credit account, took a Demand Promissory Note for rupees five lakhs from the Company carrying interest at the rate of 6 per cent per annum with quarterly rests in its favour, besides (i) a Letter of Hypothecation and (ii) a Letter of Continuity on the same date. The Bank also took a Letter of Guarantee in its favour by the Directors and Principal Officer of the Company which was also executed by Shri Sri Narain Mahtha, guaranteeing the payment of the loan advanced to the defendant company. When the limits were raised, the aforesaid security documents were also suitably renewed from time to time in favour of the Bank. The Letter of Guarantee in question has been filed in this case and is Ext. C. It may be mentioned at this very place that the ancestors of the plaintiff were cloth importers when it was a controlled item. It also established a Cold Storage, namely, Himalaya Ice Cold Storage Company. Shri S. N. Mahtha was the Treasurer and Guarantee Broker of the Central Bank of India. This company, however, was floated for doing business in manganese, of course, a new venture for the family.

3. Shri S. N. Mahtha died on 16-10-1956. The remaining guarantors mentioned above, however, continued to be the guarantors of the defendant Bank in respect of the cash credit account in question, so much so that on the 1st July 1957, the Company executed fresh documents in respect of their liability in the

cash credit account namely, a Demand Promissory Note for rupees ten lakhs to which all the Directors and principal officer mentioned above (impleaded as defendants 2 to 7 in the Bank's money suit in question) also joined along with the company. On that very day various security papers, namely, Letter of Continuity and Letter of Hypothecation, etc., were also executed in favour of the Bank whereby the defendants of the Bank's money suit undertook joint and several responsibility and liability for payment of any balance that might at any time be found due from them in the aforesaid cash credit account.

4. Ultimately, the Bank had to institute the aforesaid Money Suit No. 17-B of 1958 in the Court of the 5th Additional District Judge, Nagpur, for recovery of a sum of Rs. 6,40,445.40. This suit was not contested and a petition of compromise was filed, whereby the defendants undertook to pay the entire claim of the Bank with costs in six monthly instalments, there being, also a default clause in the compromise petition. No payment was made towards the dues and the Bank got the decree transferred for execution to Muzaffarpur and put into execution in Execution Case No. 78 of 1959 in the Court of the First Subordinate Judge. The decree-holder also proceeded against the various properties which are claimed by the plaintiff to have fallen to his exclusive share on partition in his family. The present suit was instituted on 21st December, 1961, in the Court of the Second Subordinate Judge at Muzaffarpur.

5. The case of the plaintiff, as set out in the plaint, is that the decree passed against the plaintiff's father being in consequences of his being a surety for the defendant Bank in respect of the debt of the Company in question, which being without consideration, "The debt which thus came upon him was obviously 'Avyawaharika' in nature and for payment of a decree passed against the plaintiff's father on account of such an Avyavaharika debt, the plaintiff can in no manner be held liable." By an amendment in the year 1967, a further averment was added as paragraph No. 5 (a) to the plaint, and it was stated therein that "the plaintiff's father indulged in speculative and new business solely on his own personal risk and responsibility and in such conduct of his, the plaintiff's father had little or no regard to the interest of the members of his family. In this view of the matter also the debt coming upon the plaintiff's father was 'Avyavaharika' and as such the same cannot be binding upon the plaintiff. In execution of a decree passed for such 'Avyavaharika' debt incurred by the plaintiff's father, the plaintiff or his property cannot be proceeded against." The plaintiff, however, has taken also a stand that the main stake of the plaintiff's family was agriculture, besides a little money lending business, and it had never done any business, particularly the manganese business was entirely new. The plaintiff's father having neither any knowledge nor any experience of the said business, he, therefore, started as entirely risky and speculative business which was "wholly 'Avyavaharika' and as such immoral and unpious and the plaintiff is not bound to pay such a debt."

6. The stand taken in the written statement of the defendant Bank (the only defendant impleaded in this action) in short was that the business in question was not speculative and the debts incurred by the plaintiff's father were not 'Avyavaharika', rather the debt in question was taken for sound investment in a prosperous business from which the family derived sufficient profits. The defendant further asserted that the plaintiff's father and grandfather were great business magnates and had sufficient experience of investments in business and were directors of a number of mercantile institutions and, therefore, the plaintiff was fully liable to repay the debt under the decree and the suit was filed at the instance of his father simply to delay realisation of the decretal dues. The defendant also controverted the story of partition in the family of the plaintiff.

7. The learned Additional Subordinate Judge to whom the suit was ultimately transferred, dismissed the same by the impugned judgment, inter alia holding that the debt incurred by the plaintiff's father was not an 'Avyavaharika' debt as such the plaintiff was not entitled to the declaration sought for. He also disbelieved the plaintiff's case of partition in the family. He further held that the decree in question being in respect of a pre-partition debt contracted by the plaintiff's father, the alleged partition between S. N. Mahtha and his two sons would have little importance so far

this suit was concerned. The plaintiff has, accordingly, filed the present appeal.

8. Mr. Balbhadra Pd. Singh appearing in support of his appeal contended that (i) the Letter of Guarantee, the basis of the decree in question, was without any consideration so much so that there was no evidence that the plaintiff's father acted on the request of the debtor company, and as such the contract of guarantee itself was not binding and, therefore, the decree was inoperative; (ii) the doctrine of pious obligation would not apply to this case as the money advanced by the Bank never came in the hands of the plaintiff's father and he cannot be said to have retained the moneys; and (iii) in any view of the matter, the decree in question was for a debt which was not incurred by the plaintiff's father for any legal necessity and being Avyavaharika in nature, no liability attached thereunder to the plaintiff.

9. I shall take up the first two contentions together as the second contention is really a subsidiary of the first inasmuch as from the very nature of the transaction, namely, of 'cash credit', the plaintiff's father who acted as one of the sureties for the loan advanced to the Company by the Bank was not to receive the amount personally.

Section 126 of the Indian Contract Act defines "Contract of Guarantee". Under this kind of contract, the person standing as a 'surety' contracts to perform the promise or discharge the liability of a third person, namely, "the principal debtor" in case of his default. A contract of guarantee, therefore, implies the existence of the liability, actual or prospective, of a third party. Such a contract, therefore, is a collateral undertaking given by way of additional security to the creditor by the surety.

In this connection it was further contended that the creditor Bank has not proved that the contract of guarantee was created at the request of the principal debtor, namely, the private company which might have been a consideration for the contract. This argument is erroneous and must be rejected for various reasons. Firstly, the question was not raised in the trial court and, therefore, no evidence was led on this question by the defendant. In the plaint, the plaintiff did not challenge the legality of the contract of guarantee or of the compromise decree in any manner. He simply sought for a declaration that the said decree could not be enforced against him as it was with respect to an Avyavaharika debt; the debt has been said to be 'Avyavaharika' not for the reason that it was repugnant to good morals but because (i) the business for which it was incurred was a new and speculative business, and (ii) his father had not received any consideration thereunder.

We have already seen that the money suit instituted by the Bank was not contested and all the defendants entered into a compromise (vide Ext. E) immediately on the institution of the suit.

10. The position of a surety under the English Law as well as under the Indian Law appears to be almost the same, Chitty on "The Law of Contract" 23rd Edition, deals with this subject under Chapter XIII and I feel tempted to extract a small paragraph No. 1652 from page 1642 of the Book, where the law on this subject has been very succinctly enunciated:

"Parties to the contract. In Duncan Fox & Co. v. North & Souht Wales Bank [(1880) 6 AC 1, 11-12], it was pointed out by Lord Selborne that there are three possible variations in the parties to contract of suretyship. The first and simplest case is that in which all the three parties concerned are parties to the contract in the sense that both the principal debtor and the creditor agree that the surety's liability is a secondary liability only, and that the principal debtor is primarily liable for the obligations guaranteed. But it also is possible that the contract of suretyship may be recognised only as between the principal debtor and the surety, or as between the creditor and the surety, in which event the rights and duties arising out of the contract of suretyship only affect those parties."

It is, no doubt, true that for a contract of suretyship there should be the concurrence of the principal debtor, the creditor and the surety, but this does not mean that there must be evidence showing that the surety undertook his obligation at the express request of the principal debtor; an implied request will also be quite sufficient. The argument that the debtor company was not a party to the contract of guarantee nor there was any evidence that the sureties acted on the request of the debtor company, must be held to be misconceived. All these questions could be raised by the defendants in the money suit of the Bank it-

self. But the defendants in the said suit, who were all directors, sureties and principal officers of the company, never disputed the claim of the Bank, which clearly would also prove the implied concurrence of the principal debtor as well as a request. But as already said earlier, the plea not having been set up before the trial court, the plaintiff cannot make out any point on the absence of any evidence on this score.

11. In this connection I may usefully refer to the plaint of the money suit filed by the Bank. In that suit, the Bank had impleaded all the directors and principal officers of the debtor company, besides the company and the sureties, as defendants. The letter of guarantee was also executed by all of them, including the plaintiff's father and grandfather, Sri S. N. Mahtha. In my opinion, these facts are more than sufficient to establish the concurrence of the principal debtor, namely, the private limited company which, no doubt was a body corporate, but was to act only through its directors and officers.

A learned single Judge of the Madhya Bharat High Court considered the question of the consideration under a suretyship debt in some detail in the case of Sarwan v. Kunni Lal (AIR 1951 Madh B 49). On reference to Sec. 127 of the Indian Contract Act as well as the original texts, he held that anything done or any promise made for the benefit of the principal debtor was a sufficient consideration to the surety for giving the guarantee. As already said earlier, the very nature of a contract of guarantee does not stipulate for the surety to receive or, for that matter, retain the money or advantage himself as the actual beneficiary is the principal debtor. Mr. Singh, therefore, is not right in this contention that inasmuch as the father of the plaintiff did not receive the debt himself and the money for which the decree was passed was not retained by him, the decree is not binding on the plaintiff.

In a Full Bench decision of the Andhra Pradesh High Court in Kanisetti Audilaxamana Rao v. Attipalli Raghurami Reddi (AIR 1970 Andh Pra 158), forbearance to sue the debtor by the creditor on execution of a Letter of Guarantee and promissory note was held to be a valid consideration in terms of Section 127 of the Contract Act. It is also held that when a Hindu father stands as a surety for debt incurred by a stranger, the surety is not personal and his sons are bound to make good that surety. In this case also a decree was obtained against the father on the basis of the suretyship debt and the son had brought a suit for a decision that the said decree did not impose any binding obligation upon him and his brothers.

12. Some argument was also advanced on the basis of the contract of guarantee (Ext. C). It is an "Agreement between the United Commercial Bank Ltd. and S. N. Mahtha and others". The principal debtor namely, the private limited company, is not a party to this document. Mr. Balbhadra Pd. Singh, therefore, contended that inasmuch as all the three parties to the contract, namely, the debtor, the surety and the creditor were not there, Ext. C could not be said to be a contract of guarantee and, accordingly, no liability could be fastened on the plaintiff on its basis. Reliance was placed on the case of Ramchandra B. Loyalka v. Shapurji N. Bhownagree (AIR 1940 Bom 315) where it was observed that a contract of guarantee involves three parties; the creditor, the surety and the principal debtor to which those parties are privies. The contract between the principal debtor and the creditor lays the foundation for the whole transaction. Then there must be a contract between the surety and the creditor, by which the surety guarantees the debt. The argument, although attractive, is misconceived and must be rejected. This decision does not lay down as a proposition of law that there must be a tripartite contract between all the three parties simultaneously and recognises that once the foundation is laid, that is, a contract between the principal debtor and the creditor is formed, a contract between the surety and the creditor by which the surety guarantees the debt, can also take place, the consideration for which however, may move either from the creditor or from the principal debtor or both.

13. The document of guarantee in this case (Ext. C) further stipulates inter alia that "in the event of all or any of us dying or being under legal disability, the liability of the survivors or survivor of us and of the estate(s) and executors, administrators or legal representatives of the deceased guarantor shall continue until the expiration of

three calendar months notice in writing is given to you by such survivors or survivor..... or legal representatives of such deceased guarantor....." Mr. R. S. Chatterji, learned counsel for the defendant Bank, on the other hand, contended that in view of the fact that now the Bank has obtained a decree for money, the question regarding defect or infirmity, if any, in the letter of guarantee would have no bearing. In reply to this argument Mr. Balbhadra Prasad Singh placed reliance on a decision of this court in Janki Nath Paul v. Dhokar Mall Kedar Bux (AIR 1935 Pat 376) and contended that notwithstanding the contract of guarantee, having been followed by the compromise decree, it was still open to the son to show that the basis of the decree, namely, the debt and the guarantee were themselves illegal and without consideration. That may be so, but from the above discussions, it is manifestly clear that the plaintiff has categorically failed to prove any circumstance or fact which would render the contract of guarantee as invalid. The other question on which the effect of the liability on the plaintiff is contested, namely, that it was not for any legal necessity or, for that, was Avyavaharika, will be dealt by me a little later.

14. Now I take up for consideration the main contention of Mr. Singh which raises an interesting question of the Hindu Law, namely whether the plaintiff (son) is liable by reason of his pious obligation to pay his father's debt incurred as a surety for payment of money out of his interest in the joint family property. At the outset I may indicate that once this question is answered against the plaintiff, then the fact as to whether there was partition in his family before attachment of the plaintiff's properties in execution of the decree in question loses all importance because if the doctrine of pious obligation applies to this case, then the fact that the plaintiff had already separated from his father and the joint family properties were allotted to his exclusive share would not defeat the obligation and render it ineffective. It was held in the case of Virdhachalam Pillai v. Chaldean Syrian Bank Ltd. (AIR 1964 SC 1425) that if the antecedent debt was binding on the son, subsequent partition between the father and the son was of no avail to the son and a creditor has a right to proceed against the entirety of the joint family estate, including the share of the son, who was under a pious obligation to discharge it out of the family properties. The Supreme Court in the case of S. M. Jakati v. S. M. Borkar (AIR 1959 SC 282) also observed that the result of the partition in a joint family pending the execution proceeding is nothing more than a change in the mode of enjoyment and what was held jointly is by the partition held in severalty and, therefore, the attachment of the whole coparcenary estate would not be affected by the change in the mode of enjoyment because the liability of the shares which the sons got on partition remains unaffected as also the attachment itself which is not ended by partition.

15. According to Yagnavalkya, there are three classes of sureties, namely, sureties (1) for appearance, (2) for confidence, and (3) for payment. Brihaspati adds a fourth class which is very much similar to the third and differs from it in this respect that whereas a surety for payment binds himself personally to pay the loan, in the other form he undertakes to produce the property of the debtor, out of which the creditor may obtain satisfaction. There are high authorities which I would discuss hereinafter which lay down that in the first two classes, the liability of the surety is purely personal and does not extend to sons except where the surety obtains a pledge from the debtor to ensure his safety. On the other hand, there are equally very high authorities from a long past that in the other two classes, viz., when the surety undertakes to pay off the debts or to produce the goods of the debtor, the sons are liable to discharge the obligation incurred by the father. This subject is dealt with at length by the Mitakshara in its commentary on Chapter 2 of Yajnavalkya Smriti. Verse 54 of the said Smriti deals with the liability of the son of a surety and lays down that the sons are liable to pay the debt of their father incurred as surety for payment only. Mitakshara commenting on this verse quotes Vyasa as saying:

ऋणं पैतामहं पौत्रा: प्रति याग्यगतं सुत:

सम दद्यात्तस्सुतौ तु न दद्यादिति निश्चय: ॥

"A grandson should pay the debt of the grandfather; a son should also pay that debt which is incurred as surety, equal in amount to the principal only;

their sons, moreover, should not pay; this is the fixed rule."

16. The above position of law has also been very clearly summarised in Mulla's Hindu Law, Fourteenth Edition, at page 886, where a paragraph in small type under the heading 'Surety' appears. In this connection Mr. Balbhadra Pd. Singh placed reliance upon a quotation from the case of Natasayyan v. Ponnusami ((1893) ILR 16 Mad 99) referred to with approval by the Judicial Committee in the case of Hemraj v. Khem Chand (AIR 1943 PC 142). I would do better to quote it here:

"Upon any intelligible principles of morality a debt due by the father by reason of his having retained for himself money which he was bound to pay to another would be a debt of the most sacred obligation, and for the non-discharge of which punishment in a future state might be expected to be inflicted, if in any. The son is not bound to do anything to relieve his father from the consequences of his own vicious indulgences, but he is surely bound to do that which his father himself would do were it possible, viz., to restore to those lawfully entitled money he has unlawfully retained."

It was perhaps on the above observations in Natassayyan's case that Mr. Singh contended that inasmuch as the plaintiff's father had not personally received the money, therefore, had not retained it for himself, there was no pious obligation for the plaintiff to discharge the said liability. The question of the liability of a Hindu son for payment of debt incurred by a father as a surety did not fall for consideration in the above case and, therefore, the exposition of the principles of morality in the above case will have no application and it cannot be argued on the basis of the above authority that there would be no obligation for a Hindu son to pay a debt due by a father unless the father had retained the same for himself as this would be quite contrary to the notion and principles of liability under a contract of guarantee. Our own High Court as early as in the year 1918 in the case of Mahabir Pd. v. Siri Narayan (AIR 1918 Pat 345) held that it was not necessary that the money should have been actually received by the father in order to create the debt which it would be the pious duty of the son to pay.

In the case of Sita Ram v. Radha Bai (AIR 1968 SC 534), it was observed by the Supreme Court that a Hindu son governed by the Mitakshara Law is liable to pay the debts of his father even if they are not incurred for purposes of legal necessity or for the benefit of the estate, provided they are not Avyavaharika or illegal, the burden of proving which, however, lies upon the son.

17. I, now take up the other ground of attack on the document that the loan was taken for a business which was speculative and new. Let us see the evidence adduced on this question. Seven witnesses were examined by the plaintiff in support of his case. Some of them were formal in nature and were examined only to prove some documents to show that the plaintiff's family carried agricultural operations. Hemnath Choubey (P.W. 1), an old employee in the plaintiff's estate, as also Kishori Lal Mahtha (P.W. 4) and Bindeshwari Pd. Mahtha (P.W. 3) were examined to depose that the business at Nagpur was a new business and there was risk of loss in this trade. It was admitted by Uchit Narain Das (P.W. 2) that Sri Narayan Mahtha and his brother Krishna Deo Narain Mahtha had business with headquarters at Muzaffarpur and that documents were maintained in respect of the business transactions. P.W. 1 has specifically admitted in his cross-examination that documents in respect of the business at Nagpur were also maintained. Not a single paper was, however, filed on behalf of the plaintiff to show that any loss was suffered by his father, or, for that matter, the joint family in respect of the aforesaid business at Nagpur. From the evidence of P.W. 1 it would appear that the grandfather of the plaintiff was a member of the council of State. The plaintiff's father also used to live with him at Delhi and there he came in contact with some other businessmen and he started a new business in the name of a private limited company. P.W. 5 has said that the plaintiff's father had no experience at all of the new manganese business which he had started. On the other hand, Raghubir Pd. Roy (D.W. 2), who was an Officer of the Bank at Muzaffarpur, stated that it was Pashupati Nath Mahtha who had started the manganese business by floating a private limited company which earned sufficient profit and the family of the plaintiff was, accordingly, benefited by that.

Out of the three witnesses examined on behalf of the defendant Bank, the other two witnesses (D.Ws. 1 and 3) are only formal witnesses.

18. The learned Additional Subordinate Judge has drawn adverse inference against the plaintiff for non-production of any document with respect to the manganese business in question and has not accepted the plaintiff's case that the business suffered any loss. No argument has been advanced before us on this aspect of the matter, but nonetheless, this being a first appeal. I thought it proper to briefly notice the evidence on this aspect of the matter as well. On the basis of the decisions in Desu Rattamma v. Narayanarao (AIR 1947 Mad 252) and Angney Lal v. Angney Lal (AIR 1951 All 400), I would hold that if the family is a trading family and the extended business is not more hazardous or speculative than the one previously existing, it may not be regarded as a new business. However, as such argument was not advanced on this aspect of the matter, I need not enter into any further discussion on this question, particularly when the evidence is scanty.

19. Mr. R. S. Chatterjee, learned counsel appearing for the defendant Bank, cited no authority on any of the points falling for decision, although we find that the questions, although vexed, are not res integra and authorities of various High Courts are in abundance.

20. So far as our own High Court is concerned, I find decisions from as early as 1918. In Mahabir Prasad's case (supra) as well as in Balkrishna v. Sham Sundar (AIR 1920 Pat 201) this court clearly expressed the view that a son and a grandson are equally liable for the payment of the surety debts. However, there seems to be some diversity of judicial opinions as to the obligation of a grandson in the various High Courts in India. I need not advert to this question as the plaintiff of the case before us happened to be a son.

21. In Allahabad High Court also, this question has fallen for consideration times without number. As early as in the year 1904 in the case of Maharaja of Banaras v. Ram Kumar Misir ((1904) ILR 26 All 611), the liability of the Hindu son for the debt due by the father as surety was accepted. I may, however, refer to only one case in Dwarka Das v. Kishan Das, ILR 55 All 675 : (AIR 1933 All 587), where Chief Justice Sir Sulaiman, on reference to the Laws of Manu (Colebrooke's Hindu Law) and a large number of authorities of the various High Courts on the subject, laid down that according to the texts of the Mitakshara, the liability of the son exists in the case of surety for payment and rejected the contention that no liability arose for payment of debt incurred by reason of suretyship when it is not shown that consideration had been received by the father.

22. Much argument was advanced in the trial court as well as before us that the debt in question was Avyavaharika in nature. I have already discussed at some length the legal position where the father stands surety for payment of money, as in the case before us. 'Avyavaharika debt', when translated, would mean 'immoral debt', Article 298 of Mulla's Hindu Law deals with this kind of debt and they have been categorised as follows:—

(1) debts for spirituous liquors;
(2) debts due for losses at play;
(3) debts due for promises made without consideration;
(4) debts contracted under the influence of lust or wrath;
(5) debt for being surety for the appearance or for the honesty of another;
(6) unpaid fines;
(7) unpaid tolls; and
(8) any debt which is avyavaharika which is rendered by Colebrooke as equivalent to a debt for a cause repugnant to good morals.

Out of the above categories, the plaintiff has attempted to bring his case within the third and the eighth categories. I have already answered the question of consideration and have held that the suretyship debt in question could not be said to be without consideration. Let us see as to whether it is immoral in the sense that it was incurred for cause 'repugnant to good morals'.

The Supreme Court in the case of S. M. Jakati v. S. M. Borkar (AIR 1959 SC 282) held that the liability of Hindu sons in Mitakshara coparcenary family to discharge the debts of the father, the karta, which are not tainted with immorality or illegality remains unaffected and undiminished because of the pious obligation of the sons and the onus to prove that the debt was Avyavaharika lies on the sons. The principle of Hindu Law is that in a coparcenary family,

a decree obtained against the father is binding on the sons as they would be deemed to have been represented by the father in the suit. The sons are not necessary parties to a money suit against the father who is the karta. In this case, the father was a managing director of a Co-operative Bank drawing salary, and he incurred some debts as a result of negligence in discharge of his duties. It was held that the debt could not be termed as "repugnant to good morals".

This question has been considered at some greater length by a Full Bench of the Punjab and Haryana High Court in Hindustan Commercial Bank Ltd. v. Sohanlal Gagu Mal (AIR 1970 Punj & Har 67). In that case, the father had stood surety for the appellant Bank for payment of all the moneys due from a firm, of which one of his sons was the sole proprietor. An equitable mortgage was also created by the father of his interest in the properties for securing the debt of the firm. The Bank obtained a mortgage decree on the basis of the equitable mortgage against the father. His another son then instituted a suit for a declaration that the mortgage decree was not binding on him and the properties which were joint family properties were not liable to sale in execution of that decree. It was held by the High Court that the mortgage decree was wrongly passed for the sale of the father's interests in the mortgaged property and the only decree that could be passed was a money decree against the father. It was further observed that the surety bond in question created a personal liability on the father to pay the third person's debt; and that debt being neither illegal nor immoral, the joint family estate in the hands of the sons was liable for the payment of the same in view of the pious obligation of the sons to pay their father's debts. In this case on reference to the original texts of Yajnavalkya, it was held that it was open to a Hindu father to contract a suretyship debt and this lay open the joint family estate liable for its payment in case the debt is neither illegal nor immoral. Proceeding further, it was further held that this rule would not be different where the father has stood surety for the payment of a third person's debt.

23. I have already referred to the relevant terms of the surety bond in question and after considering the matter carefully, I am clear in my mind that the surety bond created a personal liability on the father of the plaintiff to pay the debt of the company which was formed at Nagpur and comes within the meaning of the term 'Vyavaharika' i.e. lawful, usual and customary and the joint family estate in the hands of the plaintiff-the son, is liable for the payment of the same in view of his pious obligation to pay his father's debt.

24. The result of the discussions made above is that there is no merit in this appeal which must fail. It is, accordingly, dismissed with costs.

P. S. SAHAY, J.:— I agree.

Appeal dismissed.

AIR 1979 PATNA 159

LALIT MOHAN SHARMA AND S. ALI AHMAD, JJ.

M/s. Bishwanath Balkrishna, Appellant v. Smt. Rampeyari Devi and others, Respondents.

A. F. A. D. No. 231 of 1975, D/- 12-5-1978.*

(A) Bihar Buildings (Lease, Rent and Eviction) Control Act (3 of 1947), Ss. 8 (2) and 11 — Suit for eviction — Plea of adjustment of excess rent — Tenability. (Contract Act (1872), Ss. 60, 61).

Where the tenant communicated his intention to the landlord to adjust the excess rent paid in case the same was not refunded to him but went on paying the rent in spite of service of notice of his intention, he would be deemed to have waived his right of getting the excess rent adjusted. Consequently, when he stopped paying rent after having paid it for some months after communication of his intention and a suit was filed on ground of default in payment of rent he could not raise the plea, without anything more on his part, of adjustment of rent as a defence to the suit. True, the tenant had a right till the last moment to have the rent for future months adjusted subject, of course, to the law of limitation. But the intention to adjust had either to be communicated to the landlord or had to be capable of being inferred by the landlord by the surrounding circumstances before he

*(From decision of C. S. Lal, 3rd Addl. Sub. J., Patna, D/- 4-4-1975.)

had become a defaulter within the meaning of S. 11. (Para 8)

Anno: AIR Manual (3rd Edn.) Contract Act, S. 60 N. 7; S. 61 N. 1.

(B) Bihar Buildings (Lease, Rent and Eviction) Control Act (3 of 1947), S. 11— Non-payment of rent subsequent to termination of tenancy by notice to quit — Decree for eviction — Validity.

Rent was payable by the tenant even after the termination of tenancy by a notice under S. 106 of the T. P. Act and a decree for eviction can be passed for non-payment of rent for a period subsequent to the termination of tenancy by a notice. AIR 1979 Pat 6, Foll. (Para 9)

(C) Bihar Buildings (Lease, Rent and Eviction) Control Act (3 of 1947), S. 11 — Subsequent suit for eviction on ground successfully opposed by tenant in earlier suit — Maintainability.

Where the landlord in an earlier suit for eviction sought amendment of plaint to have the ground of non-payment of rent added in the plaint and the tenant successfully opposed the amendment on the basis that the amendment would amount to supplying a new cause of action, the tenant would be stopped from challenging the maintainability of a subsequent suit for eviction on the ground of default in payment of rent. In such a case, as between the parties, it would be deemed that after the filing of the first suit, default in payment of rent would give a fresh cause of action to the landlord. (Para 10)

(D) Bihar Buildings (Lease, Rent and Eviction) Control Act (3 of 1947), S. 11 — Civil P. C. (1908), S. 10 — Suit for eviction under S. 11 on ground of personal need — Subsequent on ground of default in payment of rent, if barred.

Where the first suit for eviction under S. 11 was filed on ground of personal need of the landlord and the subsequent suit was filed on ground of default in payment of rent for more than two months, the second suit could not be said to be barred under S. 10 of Civil P. C. because the cause of action in the first and the second suits were different though the relief claimed was the same. (Para 11)

Anno: AIR Comm. C.P.C. (9th Edn.), S. 10 N. 4.

Cases Referred:	Chronological Paras
AIR 1979 Pat. 6	9
AIR 1976 SC 2229	9
AIR 1972 SC 2526	9
AIR 1965 SC 414	9
(1936) 2 KB 156: (1936) 2 All ER 133, Leeson v. Leeson	5
(1905) 1 KB 715: 92 LT 519, Seymour v. Pickett	6
1897 AC 286: 76 LT 579, Cory Brothers & Co. Ltd. v. Owners of Turkish Steamship Mecca	6

K. D. Chatterji, Chunnilal and Santosh Kumar Sinha, for Appellant; Shreenath Singh and Ashok Kumar Sinha, for Respondents.

S. ALI AHMAD, J.:— This is an appeal by the defendant. The suit was filed for eviction on the ground of default in payment of rent within the meaning of the Bihar Buildings (Lease, Rent and Eviction) Control, Act, 1947 (hereinafter to be called 'the Act') in the court of the Munsif, 1st Court, Patna which was dismissed. The plaintiffs filed an appeal before the District Judge, Patna and the same was allowed. Hence, this appeal was filed in this Court which was first placed before a learned single Judge but as the appeal involves complicated questions of law, it was referred to a Division Bench.

2. According to the plaintiff-respondent, the house in question belonged to them which they purchased from one Parsottamdas Jain by a registered sale deed D/- 12-1-1964 for a valuable consideration. The appellant, a partnership firm was a tenant in the ground floor of the house in question which previously was paying rent at the rate of Rs. 75 per month, but by the order of the Rent Controller, it was reduced to Rs. 20 per month. Since the plaintiff-respondents needed the house bona fide for their own occupation, they served a notice u/S. 106 of the T. P. Act on the 12th March, 1964, determining the tenancy in favour of the appellant. It may be mentioned here that the tenancy was monthly, starting from Badi 1 and ending on Sudi 15th of the same month according to the Hindu Calendar. After determining the tenancy, the respondents filed Title Suit No. 121 of 1964 for eviction of the appellant on the ground of personal necessity. After the aforesaid title suit was filed according to the plaintiff-respondents, the defendant-appellant defaulted in paying rent for a period beginning from Magh Badi 1 Sambat 2024 to Chait Sudi 15th Sambat 2025, corresponding to the period beginning from 16-1-1968 to 13-4-1968. On default in payment of rent, the

plaintiff-respondents became entitled to a decree for eviction on the ground of non-payment of rent also. They, therefore, filed an application in the suit praying to amend the plaint by adding that the defendant had defaulted in paying rent for the aforesaid period and that a decree for eviction from the premises in question be passed on that account also. The prayer for amendment of plaint was opposed by the appellant which ultimately was disallowed by this Court. The respondents thereafter filed this suit after serving another notice dated 6-2-1969 under Section 106 of the T. P. Act, which was dismissed by the trial court but decreed on appeal by the lower appellate court.

3. According to the defendant-appellant, the suit was not maintainable and was barred on account of waiver and estoppel. His case further is that the shop was originally let out on a monthly rental of Rs. 75 but subsequently the Controller under the Act fixed fair rent of the shop at Rs. 20 per month with effect from 3rd May, 1965, which corresponds to Baisakh Sudi 2 Sambat 2022. It is further said that the orders fixing the fair rent with effect from 3-5-1965 were passed on 16-10-1965 and in between these two dates, the appellant continued to pay rent at the rate of Rs. 75 per month till Agrahan Sudi 15th Sambat 2022. It is further his case that thus an excess amount of Rs. 410.67 paise was paid to the plaintiffs towards rent and that he was entitled to refund of this amount. It is further said that even after the order of the House Controller, he went on paying rent at the rate of Rs. 20 per month in the hope that the excess amount will be refunded. But in spite of several requests the plaintiffs did not return back the money and, therefore, the defendant gave a notice to the plaintiffs for the refund of the said amount but that also did not yield any result. In that situation, he claims that ultimately he started making adjustment of Rs. 20 per month towards the rent. In that way, the rent from Magh Badi 1 Sambat 2024 and onwards were being adjusted at the rate of Rupees 20 per month towards Rs. 410.67 p. paid in excess to the plaintiffs. An alternative plea that after termination of tenancy by a notice under S. 106 of the T. P. Act no rent was payable to the plaintiffs was also made and in that context it was said that as no rent was payable by the defendant there could be no default in payment of rent.

4. The trial court negatived the defence that the suit was barred by either estoppel, waiver or acquiescence but it dismissed the suit holding that the excess amount of Rs. 410.67 paise was adjusted in part towards the rent for the period beginning from Magh Badi 1 Sambat 2024 to Chait Sudi 15th Sambat 2025. On appeal, the court below held that the defendant-appellant had defaulted in paying rent for the period alleged by the plaintiffs and as such decreed the suit.

5. In this Court Mr. K. D. Chatterji, learned counsel for the appellant has first submitted that on the findings arrived at by the court below Rupees 410.67 paise was paid in excess as rent to the plaintiff-respondents and that this amount was not refunded as claimed by the respondents and consequently the rent for the period beginning from Magh Badi 1 Sambat 2024 to Chait Sudi 15th Sambat 2025 stood adjusted and, therefore, the finding of non-payment of rent recorded by the court of appeal below was erroneous in law. Mr. Shreenath Singh, learned counsel for the respondents, on the other hand, urged that under S. 8 (2) of the Act it was open to the defendant-appellant either to claim refund of the excess amount paid or claim adjustment. According to him, since the appellant had claimed refund of the excess amount he could not claim adjustment. In support of their respective arguments, learned counsel for the parties have referred us to several decisions. But before I consider the cases, it will be useful to keep in mind S. 8 (2) of the Act which empowers the tenant to take refund of the excess amount paid as rent or to get it adjusted towards future rent. This sub-section reads thus:—

"When the fair rent of a building has been determined or re-determined, any sum in excess or short of such fair rent paid, whether before or after the date appointed by the Controller under sub-sec. (3), in respect of occupation for any period after such date, shall in case of excess, be refunded to the person by whom it was paid or at the option of such person, be otherwise adjusted and, in case of shortage, be realised by the landlord as arrears of rent from the tenant."

A reading of this sub-section makes it quite clear that in case the tenant makes

a demand for refund of the excess amount paid as rent the landlord is obliged to refund the same. But in case the tenant makes an option to get the excess amount of rent adjusted towards future rent it will be so done. Ss. 60 and 61 of the Indian Contract Act are also relevant in this connection. According to S. 60 of the Indian Contract Act, the creditor has the right of appropriation up to the very last moment. The right terminates when the creditor has made an appropriation and communicated it to the debtor. S. 61 of the Contract Act provides that where neither party makes any appropriation, payments are to be applied in the discharge of debt in order of time. The crux of these two sections appears to me that where adjustment is claimed then the party claiming it must communicate his intention. Same view was taken in the case of Leeson v. Leeson reported in (1936) 2 K B 156 where it was held that "an appropriation of payment cannot be inferred from an intention in the mind of the debtor uncommunicated to the creditor. It can only be inferred from the circumstances known to both parties."

6. The House of Lords in the case of Cory Brothers and Co. Ltd. v. Owners of the Turkish Steamship 'Mecca' (1897 AC 286) had occasion to consider the principle regarding appropriation of payment and right to appropriate. Their Lordships observed that "when a debtor pays money on account to his creditor and makes no appropriation to particular items, the creditor has the right of appropriation and may exercise the right up to the last moment, by action or otherwise; the application of the money is governed, not by any rigid rule of law, but by the intention of the creditor, expressed, implied or presumed". The principle laid down in this case was later relied on in the case of Seymour v. Pickett (1905-1 KB 715) by Lord Justice Vaughan Williams when his Lordship observed that "when a payment made by a debtor to his creditor has not been appropriated by the former, the creditor is entitled to elect how he will appropriate the payment 'up to the very last moment' as was said by Lord Macnaghten in The Mecca (1897 AC 286 at p. 294) and he may make an appropriation even when he is being examined as a witness in an action by him against the debtor." In Halsbury's Laws of England (4th Edition, Vol. 9, at page 349, para 505 this subject has been dealt with as follows:—

"Where several distinct debts are owing by a debtor to his creditor the debtor has the right when he makes a payment to appropriate the money to any of the debts that he pleases, and the creditor is bound, if he takes the money to apply it in the manner directed by the debtor. If the debtor does not make any appropriation at the time when he makes the payment, the right of appropriation devolves on the creditor.

An appropriation by the debtor need not be made in express terms, but must be communicated to the creditor or be capable of being inferred, it may be inferred where the nature of the transaction or the circumstances of the case are such as to show that there was an intention to appropriate."

Thus, according to Lord Halsbury also appropriation by the debtor either must be communicated to the creditor or at least be capable of being inferred from transactions or the circumstances of the case that there was an intention to appropriate.

7. The authorities referred to above lead me to the irresistible conclusion that a creditor has unfettered right to appropriate advance in any manner he likes. All that is necessary is that his intention to appropriate should be communicated to the other side or in case there is no such communication then subsequent transaction and circumstance must lead the other side to infer that the right to appropriate has been exercised. Having determined the position, I now proceed to examine if the appellant has been able to establish that the rent for three months stood adjusted out of Rs. 410.67 paise that was paid in excess to the plaintiff-respondents.

8. By a notice dated 15-11-1965 (Ext. B), the appellant called upon the plaintiff-respondents to refund Rs. 410.67 p. towards rent. It was also said in that notice that in case the amount was not refunded then the "amount shall be adjusted from the future monthly rental of Rs. 20 per month from 2-12-1965 onwards with interest at Re. 1 per cent. per month and cost hereof till finally adjusted which please note". According to the plaintiff-respondents, they refunded the amount on receipt of the notice (Ext. B) but the finding is against them. The position, therefore, is that the ex-

cess money was not refunded by the plaintiffs. Since the excess money was not refunded, it was not necessary for the appellant to pay rent for subsequent months until July, 1966, when Rupees 410.67 paise was to be fully adjusted. But the appellant in spite of serving the notice went on remitting rent to the plaintiffs month after month at the rate of Rs. 20 per month till December, 1967. The rent so remitted was being accepted by the respondents. The appellant by remitting the rent after service of the notice (Ext. B) gave a complete go-by to the notice and the option of getting the rent adjusted for subsequent months starting from 2-12-1965 was waived. The respondents also accepted the rent for all these months till Dec. 1967. Therefore, the conduct of the parties subsequent to the notice (Ext. B) was that month to month rent was offered by the appellant and accepted by the respondents. Till then there was not one single circumstance on the basis of which it could be inferred that the appellant intended to get future rent from 16-1-1968 onwards adjusted. It is true that the appellant had a right till the last moment to have the rent for future months adjusted subject, of course, to the law of limitation. But, that intention had either to be communicated to the respondents or had to be capable of being inferred by the respondents by the surrounding circumstances before he had become a defaulter within the meaning of S. 11 of the Act. It was not open to the appellant not to pay rent for more than two months (as he had already become defaulter) and then claim adjustment for the first time in the written statement when the suit was filed for eviction on that ground and that is what has been done by him. In these circumstances, the court of appeal below was, therefore, justified in holding that the appellant could not claim adjustment and, therefore, its finding that the appellant had defaulted in paying rent for the period beginning from Magh Badi 1 Sambat 2024 to Chait Sudi 15th Sambat 2025 is correct.

9. Mr. Chatterji next contended that the notice under S. 106 of the T. P. Act was served on the appellant on 13-3-1964 and as a result of this notice the tenancy was terminated. According to him, thereafter the appellant became only a statutory tenant and as such, no rent was payable by him. The appellant according to learned counsel, therefore, could not be said to have defaulted in paying rent for the period in question. Mr. Chatterji in support of this argument has referred to the case of Anand Nivas Pvt. Ltd. v. Anandji Kalyanji's Pedhi (AIR 1965 SC 414) and the case of J. C. Chatterjee v. Sri Kishan Tandon (AIR 1972 SC 2526). The question as to whether rent is payable or not after termination of tenancy by a notice under Section 106 of the Transfer of Property Act was considered by us in the case of Madhusudan Prasad v. Smt. Shusama Dasi, Second Appeal No. 705 of 1975 disposed of on 28-3-1978: (reported in AIR 1979 Pat 6). We held on a consideration of the aforesaid two cases of the Supreme Court and the case of Damadilal v. Parashram (AIR 1976 SC 2229) that rent was payable by the tenant even after the termination of tenancy by a notice under S. 106 of the T. P. Act and a decree for eviction could be passed for non-payment of rent for a period subsequent to the termination of tenancy by a notice. In that view of the matter, this argument also has to be rejected.

10. The third point raised by Mr. Chatterji is that the suit was not maintainable as the respondents had earlier filed Title Suit No. 121 of 1964 for the same relief. According to him, the relief prayed for in both the two suits, namely, Title Suit No. 121 of 1964 and the suit out of which this appeal arises was that the appellant be evicted from the suit premises. His argument is that the proper course for the respondents was to file an application for amendment of the plaint of Title Suit No. 121 of 1964 and to have the ground of non-payment of rent also incorporated therein. This argument also has no substance. The respondents did file an application for amendment of plaint in Title Suit No. 121 of 1964 and wanted the fact of non-payment of rent subsequent to the filing of the suit to be added in that plaint. They also prayed that a decree for eviction from the suit premises be passed also on the ground that the appellant had defaulted in paying rent for more than two months. But the prayer was opposed and the learned Munsif before whom the case was pending held that the amendment prayed for was not possible. Against that order Civil Revision No. 754 of 1968 was filed by the respondents. The appellants opposed this civil revision also and contended that the amendment sought for will not only

change the nature of the suit but will also introduce a ground for ejectment which will amount to supplying a new cause of action. Mahapatra, J. (as he then was) accepted the contention of the appellants and held that "the present attempt on the part of the plaintiff to introduce by way of amendment another ground for ejectment will be supplying a new cause of action". The learned Judge, therefore, dismissed the civil revision application. The position, therefore, is unambiguously clear. The appellants having succeeded in opposing the prayer for amendment of the plaint are now stopped from challenging the maintainability of the present suit on that account and further as between the parties it was finally decided that default in payment of rent subsequent to the filing of Title Suit No. 121 of 1964 gave a fresh cause of action to the respondents. That being so, the present suit cannot be said to be not maintainable.

11. Lastly Mr. Chatterji urged that the suit was not maintainable by virtue of S. 10 of the Civil P. C. The section reads thus:—

"No Court shall proceed with the trial of any suit in which the matter in issue is also directly and substantially in issue in a previously instituted suit between the same parties or between parties under whom they or any of them claim litigating under the same title where such suit is pending in the same or any other court in (India) having jurisdiction to grant the relief claimed or in any court beyond the limits of (India) established or continued by the (Central Government) and having like jurisdiction, or before (the Supreme Court)."

A perusal of this section makes it clear that it does not deal with the maintainability of the suit. It only provides that the trial of a suit filed subsequently shall be stayed if in a previously instituted suit between the same parties the matter in issue is directly and substantially the same. Even if it be assumed that it affects the maintainability of the suit this section has no application to the facts of this case. The fact in issue in Title Suit No. 121 of 1964 was as to whether the respondents required the house in good faith for their own occupation while the fact in issue in the present suit is as to whether the appellant had defaulted in paying rent for more than two months. Therefore, although the relief claimed for in the two suits is the same the issue and cause of action in the two cases is not the same. That being the position S. 10 of the Civil P. C. does not help Mr. Chatterji. The suit, therefore, cannot be said to be not maintainable under this section also.

12. In the result, I do not see any merit in this appeal which must be dismissed with costs. Hearing fee Rs. 110.

LALIT MOHAN SHARMA, J.:— I agree.

Appeal dismissed.

AIR 1979 PATNA 164

K. B. N. SINGH, C. J. AND P. S. SAHAY, J.

Baikunth Singh, Petitioner v. North Bihar Regional Transport Authority and others, Respondents.

Civil Writ Jur. Case No. 1400 of 1976, D/- 16-5-1978.

Motor Vehicles Act (4 of 1939), Ss. 57 (8), 47 (3), 48 — Extension for route under S. 57 (8) — Compliance with Section 47 (3) — Necessity — S. 48, if attracted.

In view of Ss. 47 and 57 before granting stage carriage permit, two independent steps have to be taken. Firstly, there should be a determination by the Transport Authority of the number of stage carriages for which permits can be granted under S. 47 (3); thereafter, applications for stage carriage permits should be entertained. The Transport Authority is not competent to grant stage carriage permits for more carriages than fixed under S. 57 (3). Once the limit is fixed the only question before the authority to be considered is whether the operator is a fit person to be granted a permit or not in the light of the matters set out under S. 47 (1). The R.T.A. has to consider the applications on merit and has to confine within that limit, and if it transgresses the limit the action will be without jurisdiction. Thus before the grant of stage carriage permit the provisions of S. 47 and the procedure laid down under Section 57 have to be complied with. AIR 1969 SC 1130, AIR 1970 SC 1542, AIR 1974 SC 391 and AIR 1972 All 169 (FB), Foll. (Para 4)

If the original route is changed by bringing in a new route by extension,

it shall be treated as an application for grant of a new permit, and all the formalities and procedures which are followed for the grant of a new permit have also to be followed in such cases. The limit has to be fixed under S. 47 (3), and then it has to be published in the gazette for inviting objections under S. 57 (3). Thus in cases for extension of a route as required under S. 57 (8), it is also necessary to comply with the provisions laid down under S. 47 (3). The conditions attached under S. 48 (3) relate to the grant of permit at the initial stage, but if there is a prayer for the extension under S. 57 (8), S. 48 will not be attracted. AIR 1964 Cal 442, AIR 1965 Andh Pra 229 and AIR 1963 Mys 261, Foll.; 1969 Pat LJR 104, Dist. (Para 5)

Anno: AIR Comm. M. V. Act (1st Edn.) S. 57 N. 16, 9; S. 47 N. 12 and S. 48 N. 2, 5.

Cases Referred: Chronological	Paras
AIR 1974 SC 391	4
AIR 1972 All 169 : 1972 All LJ 1 (FB)	4
AIR 1970 SC 1542	4
AIR 1969 SC 1130	4
1969 Pat LJR 104	5
AIR 1965 Andh Pra 229	5
AIR 1964 Cal 442	5
AIR 1963 Mys 261	5

Rana Pratap Singh No. 2 and Sheojee Prasad, for Petitioner; K. N. Singh (Standing Counsel No. 4) and Jayanandan Singh (Junior Counsel), for the State; Amala Kanta Choudhury, K. N. Keshava and R. P. S. Singh (for Nos. 5 to 10) and Badri Narain Singh (for No. 4), for Respondents.

P. S. SAHAY, J.:— This application under Arts. 226 and 227 of the Constitution of India is for quashing Annexures 1 and 2, the order of the North Bihar Regional Transport Authority, Muzaffarpur (respondent No. 1) dated 8-2-75 and Annexure 3, the order passed by the State Transport Appellate Tribunal (respondent No. 11) dated 18-5-76. The aforesaid orders have been passed under the provisions of the Motor Vehicles Act (hereinafter called the Act).

2. In order to appreciate the points raised some necessary facts have to be stated. The petitioner was granted stage carriage permit for the route Begusarai-Barauni via Eastern Tilrath Gumti, Barauni Block, Pipra Chowk and has been operating the same. Radha Krishna Singh (respondent No. 4) holds a similar permit for his route Sagi-Begusarai, which covers a distance of 29 miles. On 30-3-71 respondent No. 4 filed an application before respondent No. 1 for a further extension of his permit covering a distance of 10 miles more from Begusarai to Barauni, via Eastern Tilrath Gumti, Barauni Block, Pipra Chowk. The said application was published in the official gazette on 9-6-71 in order to invite objections under S. 57 (3) of the Act, and the petitioner filed objection to the aforesaid extension on 7-7-71. Respondents 5 to 10, holders of stage carriage permits for various routes indicated below also filed applications for extension of their permits which was also published and the petitioner did not file any objection in his case:

(For stage carriage permits see next page).

Respondent No. 1 in its meeting dated 8-2-75, after considering the reports of respondents 2 and 3 and in view of the State Government policy, granted temporary and provisional extensions to all those applicants for the routes prayed for. A copy of the resolution granting extension to respondent No. 4 is filed herewith marked Annexure 1 and of the permission granted to respondents 5 to 10 is filed herewith marked Annexure 2. The petitioner filed an application in revision before the State Transport Tribunal (respondent No. 11), which was numbered as T.R. 53 of 1975. A similar application was also filed by respondent No. 4, Radha Krishna Singh, which gave rise to T.R. No. 59 of 1975, in which the petitioner was also impleaded as opposite party, challenging the grant of temporary and provisional extension of permits and praying for permanent extension. Respondents 5 to 10 also prayed for permanent extension. All the applications were heard together by the Chairman, State Transport Appellate Tribunal, Bihar, at Muzaffarpur, who by his order dated 18-5-76 dismissed the application filed by the petitioner.

The applications filed by respondent No. 4 and also respondents 5 to 10 were allowed and respondent No. 1 was directed to make a permanent extension of the permits granted to him. The Tribunal has also held that the petitioner should have filed two applications whereas he has filed only one, challenging the grant of permit to respondent No. 4 only and, therefore he could not raise any objection so far as respondents 5 to 10 are concerned. The Tribunal also

Name	Route	Permit No.	Date of application for extension.	Extension sought for.	Date of Publication.	Objection by whom filed and date.
1	2	3	4	5	6	7
Radha Krishna Singh (R. 4)	Begusarai-Sagi (26 miles)	192/70	30.3.71	Begusarai Barauni (10 miles)	9.6.71	Baikunth Singh (7.7.71)
Srikanth Pd. Singh (R. 5)	do	206/73	11.4.74	do	26.6.74	No Objection
Umakanth Singh (R. 7)	Bakri-Begusarai (21 miles)	1/74	11.4.74	do	do	do
Amresh Kr. Singh (R. 8)	Begusarai-Sagi (26 miles)	207/73	15.2.74	do	do	do
Ramakant Singh (R. 6)	Chatar-Begusarai (46 miles)	210/73	15.2.74	Begusarai to Barauni (10 miles)	do	do
Chandreshwar Singh (R. 9)	Begusarai-Sagi (26 miles)	208/73	do	do	25.9.74	do
Ramsagar Singh (R. 10)	do	109/73	11.4.74	do	3.7.74	do

rejected the contention raised on behalf of the petitioner that before deciding their cases for extension there should have been an order under S. 47 (3) fixing the limit of the vehicles. On merit also, the Tribunal held that on the reports of the authorities it was satisfied that the extension was justified in view of the public demand. A copy of the order of the Tribunal dated 18-5-76 has been filed along with the application marked as Annexure 3. Being aggrieved by the aforesaid order the petitioner has moved this court for quashing.

3. Mr. Rana Pratap Singh II appearing on behalf of the petitioner has contended that before granting extension to respondents 4 to 10 there should have been an order as required under S. 47 (3) of the Act, and in absence of such an order the whole proceeding was without jurisdiction. Secondly, it has been contended that though the petitioner did not file any objection against the extension of the permit so far as respondents 5 to 10 are concerned, still he was entitled to challenge the same, as the order was completely without jurisdiction. Mr. Amala Kanta Choudhary appearing on behalf of respondents 5 to 10 has contended that in cases covered by S. 57 (8), S. 47 (3) is not attracted and even if no limit has been fixed under the aforesaid section, the order cannot be said to be without jurisdiction. It has also been submitted by him that the authorities have power to attach condition under S. 48 (3), which is an independent section and not controlled by S. 47 (3). Counter-affidavit has also been filed on behalf of his clients supporting the order passed by respondent No. 1 extending their permits and also of the Tribunal directing the authority to grant permanent permits to them. A similar argument has also been advanced by Mr. Badri Narain Singh appearing on behalf of respondent No. 4. On his behalf also a counter-affidavit has been filed supporting the order of respondent No. 1 and also of the Tribunal.

4. Before considering the submissions raised on behalf of the parties it will be necessary to refer to some of the provisions of the Act. Application for stage carriage permit has to be filed under S. 46 of the Act which lays down various conditions that have to be satisfied before an application can be filed. Section 47 deals with the procedure to be followed by the Regional Transport Authority while considering such application, and it will be relevant to quote S. 47 (3) which is in controversy in this case, in extenso:

"A Regional Transport Authority may, having regard to the matters mentioned in sub-sec. (1), limit the number of stage carriages generally or of any specified type for which stage carriage per-

mits may be granted in the region or in any specified area or on any specified route within the region."

Section 57 deals with the procedure in applying for and in granting of the permits, and under S. 57 (3) on receipt of application the same has to be published for inviting objections within thirty days, and such objections are actually considered by the Transport Authority while granting permits. Permits are then granted under S. 48 (which is not necessary to be mentioned for the purpose of this application), which lays down various conditions. On examination of the relevant provisions under Ss. 47 and 57 before granting stage carriage permit, two independent steps have to be taken. Firstly, there should be a determination by the Transport Authority of the number of stage carriages for which permits can be granted under S. 47 (3); thereafter, applications for stage carriage permits should be entertained. The Transport Authority is not competent to grant stage carriage permits for more carriages than fixed under S. 57 (3). Having once fixed the limit the authority publishes under S. 57 (3) the application together with a notice of the date before which representations can be submitted and the date on which the representations have to be considered.

After having done so, the next thing that the authority has to consider is whether the permit should be granted, and it has to act within that limit fixed under S. 47 (3) and ultimately grant or refuse the permit under S. 48 (1). Therefore, once the limit is fixed, the only question before the authority to be considered is whether the operator is a fit person to be granted a permit or not in the light of the matters set out under sub-sec. (1) of S. 47. This is also clear from the opening words of S. 48 (1) which empowers the Authority to grant or refuse permit and starts with the words "subject to the provisions of Section 47". Reference in this connection may be made to R. Obliswami Naidu v. Addl. State Transport Appellate Tribunal, Madras (AIR 1969 SC 1130). In the case of Mohd. Ibrahim v. S.T.A. Tribunal, Madras (AIR 1970 SC 1542), it has been held that the provisions of Section 47 (3) are not an empty formality and has to be strictly complied with.

In Rattan Lal Gupta v. Suraj Bhan (AIR 1974 SC 391), on which both the parties had relied, has simply laid down that before a permit is granted, strength must be fixed in order to avoid manipulation. In a Full Bench case of the Allahabad High Court reported in AIR 1972 All 169 (Ajit Kumar v. R.T.A., Kanpur), their Lordships held that before grant of permit strength must be fixed. The Regional Transport Authority has to consider the applications on merit and has to confine within that limit, and if it transgresses the limit the action will be without jurisdiction. It has been further observed that the proceeding under S. 47 (3) is administrative and no party has the right to be heard while fixing the limit, whereas the proceedings under S. 57 (3) are quasi-judicial in nature and the rules of natural justice must be observed. Thus, on a careful consideration of the authorities, it is absolutely clear that before the grant of stage carriage permit the provisions of S. 47 and the procedure laid down under S. 57 have to be complied with.

5. Now, I shall consider whether in applications for grant of extension of permits as required under S. 57 (8) a limit has to be fixed or not. It will be better to quote sub-sec. (8) of S. 57 which reads thus:

"An application to vary the conditions of any permit, other than a temporary permit, by the inclusion of a new route or routes or a new area or, in the case of a stage carriage permit, by increasing the number of services above the specified maximum, or in the case of a contract carriage permit or a public carrier's permit, by increasing the number of vehicles covered by the permit, shall be treated as an application for the grant of a new permit:

Provided that it shall not be necessary so to treat an application made by the holder of a stage carriage permit who provides the only service on any route or in any area to increase the frequency of the service so provided, without any increase in the number of vehicles."

Reading the above provisions it is clear that any change in the terms and conditions of the permit, including the extension of a new route, shall be treated as an application for the grant of a new permit, the only exception being that it will not be considered as a new permit if the frequency of the permit-holder who provides the only service on any route or in any area is increased. In the instant case, according to the chart

which has been given above, the original route was different and the extension sought for completely changed the nature of the original permit. The word 'route' has been defined in S. 2 (28-A). 'Route' means a line of travel which specifies the highway which may be traversed by a motor vehicle between one terminus and another. Therefore, in my opinion, if the original route is changed by bringing in a new route by extension, it shall be treated as an application for grant of a new permit, and all the formalities and procedures which are followed for the grant of a new permit have also to be followed in such cases. The limit has to be fixed under S. 47 (3), and then it has to be published in the gazette for inviting objections under S. 57 (3).

In the instant case it is clear that on the application for the extension of the permits by respondents 4 to 10 there was publication under S. 57 (3), and the procedure was thus partly followed. I am supported in my view by the decision of the Calcutta High Court in Sudhir Kumar v. R.T.A., Burdwan (AIR 1964 Cal 442), where it has been held that extension of an existing permit by including new area has to be treated as an application for a new permit for which applications under sub-secs. (2) and (3) of S. 57 have to be made. In Kannayya Naidu v. R.T.A. (AIR 1965 Andh Pra 229) it has been held that S. 57 (8) is not only procedural but substantive, because by varying the terms of the permit it has to be treated as a new permit. The Division Bench of the Mysore High Court in S. M. Shinde v. S. B. Bagli (AIR 1963 Mys 261) took the view that variations of the terms and conditions of the permit under S. 58 (3) can only be complied with by following the procedure laid down for the disposal of an application for a new permit.

It may also be relevant to examine S. 62 in this connection which deals with grant of temporary permits for a period of four months, and this can be done without following the procedure laid down in S. 57. This also supports my view that in all other cases, including the grant of new permit or extension of a permit the prescribed procedure has to be strictly complied with. Thus, on a careful consideration of the various provisions of the Act and the case laws which have been discussed above, it is difficult to agree with the finding of the Tribunal that in cases for extension a route as required under S. 57 (8), it is not necessary to comply with the provisions laid down under S. 47 (3). It is also difficult to accept the contention of Mr. Amala Kanta Choudhury that the Tribunal has attached certain conditions to the permit, acting in exercise of the powers under S. 48 (3), but such powers have to be exercised within the limits prescribed under the aforesaid clause which certainly does not include extension of a permit and could not have been so because of the proviso to S. 48 which reads as follows:

"Provided that no such permit shall be granted in respect of any route or area not specified in the application."

These conditions, in my opinion, relate to the grant of permit at the initial stage, but if there is a prayer for the extension, as in the instant case, under S. 57 (8), S. 48 will not be attracted. Reliance has also been placed on behalf of respondents 5 to 10 on the decision in the case of Arbind Kumar Singh v. Ansar Motor Service (1969 Pat LJR 104), but, in my opinion, it is an authority only for the limited purpose that against an order passed under S. 57 (8), no appeal is maintainable and only a revision can be filed. Therefore, this authority does not support the contention raised on behalf of respondents 5 to 10.

6. On a careful consideration of the points which have been raised in this case I am of the opinion that the order passed by the Transport Authority (respondent no. 1) and also by the Tribunal (respondent no. 11) is wholly without jurisdiction because of non-compliance with the provisions laid down in S. 47 (3). In view of the fact that the petitioner has succeeded on the first point, it is not necessary to consider the second point raised on his behalf in this application. No doubt, no objection regarding the grant of permit to respondents 5 to 10 was made by the petitioner, but since the entire matter has come before us and it has been found that the provisions of the Act have not been strictly complied with, it will only be just and proper for us to interfere even with the orders passed in favour of respondents 5 to 10 in the instant case.

7. In the result, the application is allowed. Let a writ of certiorari issue quashing the order of respondent No. 1 as contained in Annexures 1 and 2 and the order of respondent No. 11 as contained in Annexure 3. In the circum-

stances of this case there will be no order as to costs.

K. B. N. SINGH, C. J.:— I agree.

Application allowed.

AIR 1979 PATNA 169

K. B. N. SINGH C. J. AND P. S. SAHAY, J.

Lakshmi Prasad Bhagat and another, Petitioners v. State of Bihar and others, Respondents.

Civil Writ Jur. Case No. 1851 of 1977, D/- 9-5-1978.

(A) Civil P. C. (5 of 1908), S. 11 — Matter left undecided in prior proceeding — S. 11 places no bar. (Bihar Tenancy Act (8 of 1885), S. 48-E).

The prior proceeding under S. 48-E Bihar Tenancy Act as it stood prior to Bihar Act 8 of 1970 for declaration of Bataidari right of the raiyat dismissed as not maintainable for want of averment of dispossession held did not operate as res judicata and a subsequent proceeding under the same section was possible. (Para 5)

Anno: AIR Comm. Civil P. C. (9th Edn.), S. 11 N. 105.

(B) Bihar Tenancy Act (8 of 1885), Section 48-E — Word 'may' in sub-section (3) means 'shall' — Collector bound to refer proceeding to the Board — He can decide it himself only in stated circumstances.

Promotion of settlement between the under-raiyat and the landlord through the good offices of the Board being the principle underlying the scheme of the Act its constitution and reference of the dispute to it under sub-sec. (3) of S. 48 is a must on the proceeding being entertained and initiated by the Collector. The word 'may' in the sub-sec. (3) should be construed as 'shall'. Circumstances viz., that the Collector can differ from the Board's findings and come to its own decision based on reasons as provided for under sub-sec. (8), or that on the Board failing to transmit the record of the proceeding within 6 months the Collector can decide the matter himself or the further circumstance that under sub-sec. (12) he has the power of general control and supervision over the Board do not override the said mandatory provision under sub-sec. (3). AIR 1973 Pat 275, Foll. (Paras 5 to 7)

LV/BW/F588/78/TVN

Cases Referred: Chronological Paras

AIR 1973 Pat 275 6

(1880) 5 A C 214 : 49 LJQB 577 Frederic Guilder Julius v. Right Rev. The Lord Bishops of Oxford 6

Gorakh Nath Singh and Sheojee Prasad for Petitioners; K. D. Chatterji, Advocate-General, S. N. Jha, Standing Counsel No. 2 and C. M. Jha, Junior Counsel, for the State; Parmanand Sharan Sinha for Respondent No. 4.

ORDER:— In this application under Articles 226 and 227 of the Constitution the petitioners have prayed for quashing the order of the Land Reforms Deputy Collector Saharsa, dated the 4th of Feb. 1977, declaring respondent No. 4 to be a bataidar in respect of the land in dispute, a copy of which has been filed as Annex. 1.

2. Petitioner No. 1 is the recorded raiyat of land bearing plot No. 6756, khata No. 392 having an area of 1 bigha, 5 kathas and 17 dhurs situate in village Chandaur Tola Hanuman Nagar, in the district of Saharsa, petitioner No. 2 being his brother's son. The case of the petitioners is that petitioner No. 1 gave 2 kathas of land to Mohan Hazra (respondent No. 4) for constructing his house and residing in the same and the rest of the land remained in the cultivating possession of the petitioners. Taking advantage of his house being on a portion of the plot, respondent No. 4 on 15-6-1956 filed an application under S. 48-E of the Bihar Tenancy Act (hereinafter referred to as 'the Act') in respect of the entire plot a copy of which has been filed as Annexure 2. The said application was forwarded to the Circle Officer, Sour Bazar, and the Circle Officer after notice to the parties constituted a Board and the Board found that respondent No. 4 was not the bataidar of the land. Disagreeing with the finding of the Board, the Circle Officer came to the conclusion that respondent No. 4 was the bataidar. On appeal by the petitioners, the order of the Circle Officer was set aside by the Sub-Divisional Officer, Saharsa, by his order dated 17-12-1957 (Annex. 3). The petitioners' grievance is that notwithstanding the aforesaid order, respondent No. 4 filed a second petition on 6-12-1976 before respondent No. 3 (Annexure 4) on which respondent No. 3 initiated a proceeding under Section 48-E of the Act and without constituting any Board as required under sub-sec. (6) of Section 48-E of the Act he held an enquiry himself and came

to the conclusion that respondent No. 4 was a bataidar of the land in question and declared him as such by his order dated 4-2-1977 (impugned Annexure 1).

3. The challenge of the petitioners against the impugned order is twofold. Firstly, in view of the order in the earlier proceeding (Annexure 3), no second proceeding under S. 48-E of the Act could be initiated by respondent No. 3 as the order in the previous proceeding will operate as res judicata. The second ground of attack is that respondent No. 3 the Collector under the Act, has no jurisdiction to initiate a proceeding and dispose it of without reference to the Board.

4. There is no substance in the first contention of learned counsel inasmuch as from the order in the earlier proceeding dated 17-12-1957, which is Annexure 3 to the writ petition, it appears that the application under S. 48-E of the Act was held to be not maintainable. The provisions of S. 48-E (1) of the Act, as existed in 1957, required that an application under that section could be maintainable only when 'an under-raiyat is or has been ejected by his landlord from his tenancy or any portion thereof at any time after the 1st February, 1953, in contravention of S. 89" and not in the case of even threatened dispossession as is provided under the present S. 48-E which has been brought in by Section 3 of Bihar Act VIII of 1970. The application, therefore, not being maintainable in absence of the necessary averment regarding dispossession, the order in the earlier proceeding (Annexure 3) cannot be held to be res judicata as nothing was decided in that proceeding except that the application was not maintainable.

5. There is, however, substance in the second contention of Mr. Singh that when an application under S. 48-E has been entertained and a proceeding has been initiated under sub-sec. (1) of Section 48-E, the Collector under the Act is bound to refer the matter to the Board and not to decide the dispute himself. Sub-sec. (3) of S. 48-E, which is relevant, may be usefully reproduced:

"When a proceeding is initiated under sub-sec. (1) the Collector may refer the matter (hereinafter referred to as 'dispute') to a Board to be appointed by him, for promoting the settlement of the dispute between the under-raiyat and the landlord."

Sub-secs. (4) and (5) deal with the constitution of the Board and filling of vacancies for the office of Chairman or Panchas in the Board. Sub-sec. (6) lays down the procedure to be followed by the Chairman and reads as follows:—

"The Chairman of the Board to which a dispute is referred, shall give written notice to the under-raiyat and his landlord in the prescribed manner and the Board shall make endeavour to bring about an amicable settlement of the dispute and when an amicable settlement of the dispute is brought about, the Board shall forthwith submit a report containing the terms on which settlement had been brought about, to the Collector, who may dispose of the proceeding in accordance with the terms of the report:

Provided that failure on the part of any member of the Board to sign the report shall not affect the validity of the same."

Sub-sec. (7), which is also relevant, may usefully be reproduced:

"Where a Board does not succeed in bringing about an amicable settlement of the dispute, it shall make enquiry into the same, receive such evidence as it considers necessary, record its findings on the disputes and transmit the entire record of the proceeding forthwith to the Collector who may dispose of the proceeding in accordance with the terms of the findings. Provided that failure on the part of any member of the Board to sign the finding shall not affect the validity of that finding:

Provided further that if any member does not want to sign the findings of the Board he will submit his disagreement on the findings in writing failing which the Chairman will submit his notes on the subject."

If the Collector disagrees with the findings of the Board then he has to proceed under sub-sec. (8) of S. 48-E and after notice to the parties he can make such enquiry as he thinks necessary and pass any order as mentioned in the three sub-clauses of sub-sec. (8). Under sub-sec. (9) the Collector shall state the grounds on which the order is made and specify the period not exceeding six months within which the order has to be carried out. Sub-sec. (10), which is relevant, may usefully be reproduced:

"If the Board fails to record its findings or transmit the records as required under sub-sec. (7), within a period of six

months from the date of its appointment, the Collector may withdraw the proceeding from the Board and decide the dispute himself according to the provisions of this section."

It is thus manifest that the Collector gets power to enquire into the matter firstly in case of disagreement under sub-sec. (8) and secondly where the Board fails to record its findings or transmit the records within six months from the date of its appointment and not otherwise.

6. Mr. Parmanand Saran Sinha learned counsel appearing on behalf of respondent No. 4, however, has urged that as under sub-sec. (3) quoted above, the Collector may refer the matter to a Board, under sub-sec. (8) he has power to differ with the findings of the Board and enquire into the matter and under sub-sec. (10) he has also power to decide the dispute himself in case the Board does not submit its findings within six months from the date of its appointment, it must be inferred that the Collector has power in appropriate cases after initiation of a proceeding under S. 48-E (1) of the Act to decide the dispute himself and the expression 'may' does not mean 'must'. Aid is also sought from sub-sec. (12) of S. 48-E, which lays down that:

"The Board shall have the same power regarding the summoning and attendence of witnesses and compelling the production of document as a Civil Court has under the Civil P. C., 1908 (V of 1908) and the Collector shall have general control and superintendence over the Board."

This submission of learned counsel is without any substance. Whether the expression 'May' used in sub-sec. (3) is obligatory or mandatory has been fully examined in the case of Ram Narain Singh v. State of Bihar (AIR 1973 Pat 275) and it has been held that the expression 'may' means 'must'. It was observed in that decision as follows (at p. 280):

"Thus, the rule laid down by the Lord Chancellor (Earl Cairns) in Frederic Guilder Julius's case (1880) 5 AC 214 is applicable to the case before us. The power conferred by this section is coupled with the duty of the Collector, the person to whom it is given to exercise it. It has, therefore, to be construed as imperative. Whenever the Collector comes to know of the existence of any of the three conditions, either suo motu or on an application of an under-raiyat, he is duty bound to initiate a proceeding."

7. It is thus manifest that the expression 'may refer the matter (hereinafter referred to as 'dispute') to a Board' occurring in sub-section (3) of Section 48-E of the Bihar Tenancy Act means that if the Collector, under the Act on being satisfied about the existence of any of the three conditions, initiates a proceeding, he must refer the dispute to a Board for promoting the settlement of the dispute between the under-raiyat and the landlord. There is, therefore, no escape from the conclusion that once the proceeding is initiated, the Collector under the Act, has no jurisdiction to decide the matter himself, without constituting a Board in the first instance, and he is bound to constitute a Board for promoting settlement of the dispute. Learned Advocate General, appearing on behalf of the State, has also conceded that this is the correct legal position. The fact that the Collector under the Act can, in certain circumstances, interfere into the matter, as urged by learned counsel appearing on behalf of the contesting respondent, cannot override the mandatory requirement of sub-sec. (3), aforesaid. In other words, the fact that the Collector, in appropriate cases, may not accept the findings of the Board, and may make such enquiries, as he may think fit, and pass any of the three orders, as contemplated under sub-section (8), or the fact that, if the Board fails to transmit the findings within six months from the date of the appointment of the Board, he can decide the proceeding himself, cannot override the initial mandatory requirement of sub-sec. (3). Such power cannot also be inferred from the mere fact that the Collector, under sub-sec. (12) has power of general control and superintendence over the Board. The power of general control and superintendence in the Collector has to be there, because it is the Collector, who can, under sub-sec. (5), in case the services of the Chairman or any Member of the Board ceased to be available, appoint any suitable person, in the prescribed manner, in the absentee's place, and has the final say in the matter even after the Board's finding. The scheme of the Act being that in the first instance a Board has to be suitably constituted for promoting settlement of the dispute between the parties,

its very purpose will be defeated, if the Collector is left with the power to constitute the Board in some cases and not in others. Such a construction would make the provision discriminatory and vulnerable under Art. 14 of the Constitution. That being the dominant purpose of the legislation, the submission of learned counsel for the contesting respondent that the Collector under the Act can, in appropriate cases, decide the dispute himself, is without any substance. We, therefore, hold that after initiating a proceeding the Collector under the Act has no jurisdiction to decide the dispute himself.

8. We accordingly quash the order of the Land Reforms Deputy Collector, Saharsa, dated the 4th Feb., 1977, as contained in Annexure '1', and remand the case to him with a direction to proceed with it in accordance with law and in the light of the observations made above. In the circumstances, we make no order as to costs.

Petition allowed;
Case remanded.

AIR 1979 PATNA 172

B. P. JHA AND HARI LAL AGRAWAL, JJ.

Rasik Lal Singh and others, Petitioners v. State of Bihar and others, Respondents.

Civil Writ Jur. Case No. 2464 of 1976, D/- 22-11-1978.

(A) Bihar Tenancy Act (8 of 1885), S. 48-E (10) and (6) — Collector deciding dispute between parties under S. 48-E (10) — Before recording evidence he must endeavour to bring about amicable settlement — Failure to do so renders his order invalid.

Under S. 48-E (10) the Collector has to decide the dispute between an under-raiyat and landlord according to the provisions of S. 48-E. Therefore in deciding the dispute under S. 48-E (10) he must before recording evidence under S. 48-E (7) make endeavour to bring about an amicable settlement between the parties as required by the mandatory provisions of S. 48-E (6). Failure to do so renders his order under S. 48-E (10) invalid. (Paras 2, 3)

(B) Bihar Tenancy Act (8 of 1885), Section 48-E (10) and (8) — Order of Collector under S. 48-E (10) — No appeal lies.

An appeal against the order of the Collector under S. 48-E (10) is not maintainable. An appeal lies only from an order passed under S. 48-E (8). (Para 4)

Parmeshwar Prasad, for Petitioner; Madan Mohan (for No. 4) and R. N. Bhagat and Iqbal Ahmad (Jr. Counsel to Govt. Pleader No. 3), for other Respondents.

ORDER: — In an application under Arts. 226 and 227 of the Constitution of India, these petitioners (landlords) pray for quashing of Annexures 1 and 2. Annexure 1 contains an order of the Deputy Collector Land Reforms under S. 48-E(10) of the Bihar Tenancy Act, 1885, (Act 8 of 1885) (hereinafter to be referred to as 'the Act').

2. The Deputy Collector Land Reforms decided the dispute between an under-raiyat and the landlords under S. 48-E (10) of the Act for the reasons that the Board failed to record its findings and to transmit record to the Collector under sub-s. (7) of S. 48-E of the Act. In this circumstance the Collector decided the dispute under S. 48-E (10) of the Act. Section 48-E (10) of the Act provides that in such circumstance the Collector may withdraw the proceeding from the Board and decide the dispute himself according to the provisions of this section. By virtue of sub-s. (10) of S. 48-E of the Act, the Collector shall have to decide the dispute himself according to the provisions of S. 48-E of the Act. Sub-sec. (6) of S. 48-E of the Act requires that the Board shall make endeavours to bring about an amicable settlement of the dispute between the parties. If the Board fails to bring about amicable settlement between the parties, then it shall record evidence under sub-s. (7) of S. 48-E of the Act. Under sub-section 10 of Section 48-E of the Act, the Collector shall follow all the provisions of this section. If it is so, the Collector is required to make endeavours to bring about an amicable settlement of the dispute between the parties. If the Collector fails to bring about an amicable settlement between the parties, then he will be entitled to record evidence under sub-section (7) of Section 48-E of the Act.

3. In the present case, it is clear from the order as contained in Annexure '1' that before recording evidence the Deputy Collector Land Reforms did not make any endeavour to bring about an amicable settlement of the dispute be-

tween the parties. Hence, we hold that the Deputy Collector Land Reforms while holding an inquiry under sub-s. (10) of S. 48-E of the Act did not follow the mandatory provisions of sub-s. (6) of S. 48-E of the Act. In this view of the matter, we quash the order of the Deputy Collector Land Reforms as contained in Annexure 1 as he failed to follow the procedure laid down under Section 48-E (6) of the Act.

4. Annexure 2 is an order in appeal. In our opinion, the appeal is not maintainable against the order passed by the Collector under S. 48-E (10) of the Act. An appeal lies only from an order passed under sub-s. (8) of S. 48-E of the Act. We quash Annexure 2 on the ground that the appeal itself is not maintainable under the provisions of this Act.

5. In the result, the petition is allowed and Annexures 1 and 2 are quashed. The parties will bear their own costs.

Petition allowed.

AIR 1979 PATNA 173

R. P. SINHA AND B. P. JHA, JJ.

Ramendra Nath Bose and others, Appellants v. Birendra Nath Bose and others, Respondents.

A. F. O. O. No. 228 of 1971, D/- 25-9-1978.*

Civil P. C. (5 of 1908), O. 9, R. 9 and S. 151 — Application under O. 9, R. 9 dismissed for default — Application for restoration is maintainable under S. 151.

Where the application under O. 9, R. 9 for setting aside the order of dismissal of the suit for default is itself dismissed for default, an application under S. 151 for restoration of the application under O. 9, R. 9 is maintainable even though the order dismissing the application under O. 9, R. 9 for default is appealable under O. 43, R. 1 (c). AIR 1978 Pat 339 (FB), Foll. (Para 4)

Anno: AIR Comm. C. P. C. (9th Edn.), O. 9, R. 9, N. 10; S. 151, N. 2A.

Cases Referred: Chronological Paras

AIR 1978 Pat 339 (FB) 4

AIR 1959 Pat 121 (FB) 4

Guneshwar Prasad, for Appellants; Birendra Mohan Singh, for Respondents.

JHA, J.: — The plaintiffs preferred appeal under O. 43 (1) (c) of the Code of Civil Procedure against an order rejecting an application under O. 9, R. 9 of the Civil P. C.

2. The plaintiffs filed a partition suit (Title Suit No. 108 of 1965) before the Subordinate Judge, Bhagalpur. On 1st June, 1970 the suit was dismissed for default of the plaintiffs. Thereafter, the plaintiffs filed an application under O. 9, R. 9 of the Civil P. C. for setting aside the order of dismissal of the suit on the ground mentioned in the petition. In the application under Order 9, Rule 9 of the Civil P. C. these plaintiffs (appellants) stated that plaintiff No. 1 was in-charge for doing Pairvi in the case and he could not come on the date fixed for hearing for the simple reason that his mother was seriously ill. It was also stated in the petition that plaintiff No. 2 could not be present as he was medical practitioner at Naugachhia. The Court fixed 13-2-71 for hearing of the petition under O. 9, R. 9 of the Civil P. C. When the case was called on 13-2-71, the plaintiffs were absent and as such the Miscellaneous Case No. 53 of 1970 was dismissed for non-prosecution. Miscellaneous Case No. 53 of 1970 arose out of the application filed by the appellants under O. 9 R. 9 of the Civil P. C. It is against this order that the plaintiffs have preferred an appeal to this Court. It is mentioned in the order-sheet dated 13-2-71 that at 3 p.m. a petition for time as well as a petition under S. 151 of the Civil P. C, were filed by the appellants. The Court below rejected the petition under S. 151 of the Civil P. C. on the ground that the order dismissing the application under O. 9, R. 9 of the Civil P. C. is appealable.

3. The short point for consideration in this appeal is:—

Whether the petition under S. 151 of the Civil P. C. is maintainable in a case where the petition under O. 9, R. 9 is dismissed for default?

4. In my opinion, even though a petition under O. 9, R. 9 of the Civil P. C. is dismissed for default, a petition under S. 151 of the Civil P. C. is maintainable in view of the decision of the Full Bench of this High Court in Civil Revn. No. 713 of 1970 (Bajrang Rai v. Ismail Mian dated 12th May, 1977) : (AIR 1978 Pat 339). In that case it has been held that where an

*(From order of B. Rai 2nd Addl. Sub-J., Bhagalpur, D/- 13-2-1971).

application under O. 9, R. 13 of the Code has been dismissed for default, an application under S. 151 of the Code is maintainable for restoring an application under O. 9, R. 13 of the Code. The same analogy applies in the present case. In the present case, the application under O. 9, R. 9 of the Civil P. C. was dismissed for default on 13-2-71 and on the same date these appellants applied for restoration of the hearing of the petition under S. 151 of the Civil P. C. The Court below rejected the petition under S. 151 of the Civil P. C. for the simple reasons that this petition is not maintainable, as the party can prefer an appeal under O. 43, R. 1 (c) of the Civil P. C. The Full Bench was of the opinion that though the appeal can be preferred against the dismissal of default of an application under O. 9, R. 13 of the Civil P. C. there is no bar for the defendants to move an application under S. 151 of the Civil P. C. In other words the Full Bench (supra) overruled the decision in Doma Choudhary v. Ram Naresh Lal. (AIR 1959 Pat 121). Relying on the Full Bench decision (supra) I set aside the order of dismissal for default dated 13-2-1971 and direct the Court below to hear the restoration petition filed under S. 151 of the Civil P. C.

5. In the result, the application is allowed and the impugnd order dated 13-2-1971 is set aside and the case is being sent back to the Court below for fresh hearing of the petition filed by the appellants under S. 151 of the Civil P. C. The parties will bear their own costs.

SINHA, J.: — I agree.

Appeal allowed.

AIR 1979 PATNA 174

B. P. JHA AND S. K. JHA, JJ.

Ram Narain Prasad, Petitioner v. Seth Sao, Opposite Party.

Civil Revn. No. 1446 of 1976, D/- 27-7-1978.*

(A) Civil P. C. (5 of 1908), S. 115 (1), Proviso and O. 18, R. 1 — Order directing defendant to begin with the case — Order held not revisable.

Where the defendant pleaded discharge in a suit for arrears of rent and electricity charges the trial Court directed him under O. 18, R. 1, Civil P. C. to adduce his evidence to begin with, the order not attracting any of the conditions stated in the Proviso to sub-s. (1) of S. 115 was not revisable. It did not purport to finally dispose of the suit or other proceeding or occasioned failure of justice. The order was one within the discretion of the trial Court and on the admission of liability to pay rent and electricity charges the defendant was rightly directed to begin with the case. (Paras 7 and 8)

Anno: AIR Comm.. Civil P. C. (9th Edn.), S. 115, N. 20 and O. 18, R. 1, N. 3.

(B) Civil P. C. (5 of 1908), S. 115 (as amended by Amendment Act of 1976) — Revision petition admitted after Amendment Act — Amended provision will apply. (Para 7)

Anno: AIR Comm., Civil P. C. (9th Edn.), S. 115, N. 2.

S. C. Ghosh and K. K. Ghosh, for Petitioner; Vijoy Nandan Sahay, for Opposite Party.

ORDER: — This revision petition is filed by the defendant against the order of the Additional Munsif, 2nd Court, Patna, directing him (the defendant) to lead his evidence.

2. The plaintiff filed a suit for recovery of Rs. 1,654.41 from the defendant. According to the case of the plaintiff, the defendant is a tenant of the plaintiff. The defendant pays a monthly rent of Rs. 71/- exclusive of electric charges. Apart from the monthly rent, the defendant is required to pay electric charges to the plaintiff.

3. The defendant admits in his written statement that he is the monthly tenant of the plaintiff. He also admits that he is to pay electric charges apart from monthly rent. He further stated in his written statement:—

"that it is respectfully mentioned that whenever electric bill was received by the plaintiff this defendant used to read the sub-meter installed in the shop occupied by the plaintiff and after adjustment of the amount, he (defendant) used to accompany the plaintiff for the electricity office and paid the electricity charge of his share to the plaintiff and the plaintiff used to make payment in presence of this defendant on behalf of this defendant as well as for himself."

4. On a perusal of the above mentioned paragraph in the written statement, it is clear that the case of the defendant was that he had paid the electric charges for the period in question (between Jan., 1972 and Nov., 1972).

*(Against order of S. A. Raja Naqbi, 2nd Addl. Munsif, Patna, D/- 12-11-1976).

5. On these facts, the Court below, relying on O. 18, R. 1 of the Civil P. C. (hereinafter to be referred to as the Code), was of opinion that the onus is on the defendant to begin with the case.

6. The short point for consideration is: Whether this Court should exercise the revisional jurisdiction on the facts of this case or not?

7. In our opinion, the answer must be given in the negative. This revision petition was admitted on 14th March, 1976 and by that time the Civil P. C. (Amendment) Act, 1976 (hereinafter to be called the Amendment Act) had come into force. By virtue of the Amendment Act, it is clear that if a revision petition has been admitted after the Code of Civil P. C. (Amendment) Act, 1976 has come into force then the provisions of the Amendment Act shall apply. By virtue of S. 43 of the Amendment Act, S. 115 of the Code was amended to the following effect:—

"Section 115 of the Principal Act shall be renumbered as sub-s. (1) thereof, and —

(a) to sub-s. (1) as so re-numbered, the following proviso shall be added, namely:—

'Provided that the High Court shall not, under this section, vary or reverse any order made, or any order deciding an issue, in the course of a suit or other proceeding, except where —

(a) the order, if it had been made in favour of the party applying for revision, would have finally disposed of the suit or other proceeding, or

(b) the order, if allowed to stand, would occasion a failure of justice or cause irreparable injury to the party against whom it was made.';

x x x x"

By virtue of the Amendment Act, the High Court shall not interfere with any order in a suit except where the order finally disposes of the suit or other proceeding in favour of the party or the order would occasion a failure of justice or irreparable injury to the party against whom it was made. In the present case, the Court below directed the defendant to begin with the case for the simple reason that the defendant admitted the facts alleged by the plaintiff and the defendant also pleaded certain additional facts which compelled the Court to direct him (defendant) to begin with the case. In our opinion, the Court below was justified in exercising the discretion. We also hold that the case of the defendant does not come within the proviso to Section 115 of the Code as added by the Amendment Act. By this order, the Court has not finally disposed of the suit in favour of any party. The order simply directs the defendants to begin with the case on the basis of O. 18, R. 1 of the Code. In our opinion, if the order is allowed to stand, it would not occasion a failure of justice nor cause irreparable injury to the defendant. Hence, we hold that the Court below was justified in exercising the jurisdiction which was vested in it and we shall not interfere with the impugned order because it does not come within the purview of the proviso to S. 115 of the Code.

8. While exercising the jurisdiction of revision, the High Court should not ordinarily interfere with the discretion of the Court below though it may be erroneous. The High Court should interfere only if the impugned order passed by the Court is without jurisdiction or it falls within the proviso to S. 115 of the Civil P. C.

9. In the result, the petition is dismissed. The parties will bear their own costs.

Petition dismissed.

AIR 1979 PATNA 175

B. P. JHA AND S. K. JHA, JJ.

Bihar State Board of Religious Trusts, Appellant v. Baldeo Gir, Respondent.

Appeal From Appellate Decree No. 412 of 1971, D/- 11-7-1978.*

Bihar Hindu Religious Trusts Act (1 of 1951), S. 2 (1) — "Religious Trust" — Definition — Private trust in respect of idol excluded — Trust when can be called private trust.

In the instant case a trust was created for the worship of a family idol and it was found that the beneficiaries were ascertained individuals; further the temple was situated within the campus of the residential building, moreover, even though public were admitted to the temple, they were not authorised to enter the temple as a matter of right.

Held that the trust was the private and not the public trust. Thus the trust was not a "religious trust" within the meaning of S. 2 (1) of the Act and consequently, would not be governed by the Act. First Appeal No. 362 of 1969, D/- 14-4-1978 (Pat), Foll.; AIR 1971 SC 2057, AIR 1957 SC 133, AIR 1970 SC 2025, Explained. (Paras 9, 10, 12)

*(Against decision of Uma Kant Jha, 2nd Addl. Dist. J., Gaya, D/- 21-4-1971).

LV/AW/F602/78/AMG/DVT

Cases Referred: Chronological Paras

(1978) Frst Appeal No. 362 of 1969, D/- 14-4-1978 (Pat), Bihar State Board of Religious Trust v. Lakshman Prasad Singh 10
AIR 1971 SC 2057 11
AIR 1970 SC 2025 13
AIR 1957 SC 133 : 1957 All LJ 416 12
(1920) First Appeal No. 94 of 1920 (Pat) 8, 12

Bhupendra Narain Sinha, for Appellant; Prem Lal and Kedar Nath Verma, for Respondent.

JUDGMENT :— The Bihar State Board of Religious Trusts, through the special Officer, has preferred an appeal to this Court against the judgment of the lower appellate court dated 21st April, 1971.

2. The plaintiff-respondent filed the suit for a declaration that the temple of Shri Pita Maheshwar Jee and the properties attached to the temple be declared as private trust of the plaintiff. The plaintiff also prayed that the provisions of the Bihar Hindu Religious Trusts Act, 1950 (hereinafter referred to as the Act), do not apply to the present case.

3. The defendant, Bihar State Board of Religious Trusts (hereinafter referred to as the Board) resisted the claim of the plaintiff on the ground that the temple in question is a public temple.

4. On these facts both the courts below concurrently held that the temple in question is a private temple belonging to the plaintiff.

5. The short point for consideration in this appeal is: whether the temple in question is a public trust or private trust under the provisions of the Bihar Hindu Religious Trusts Act (Act No. 1 of 1951)?

6. According to the plaintiff, the temple in question originally belonged to Mostt. Sita Dai, wife of Bihari Lal Maharwar Gayawal. Mostt. Sita Dai being the proprietress of the temple, transferred her proprietary interest into the temple and the properties attached thereto to Chaman Lal Pandey by virtue of deed of gift dated April, 1852 and since that date Chaman Lal Pandey became the absolute owner of the temple in question. By virtue of the deed of gift, Chaman Lal Pandey became the absolute owner of the temple as well as in respect of the properties attached to the temple. One Mohan Lal Kanthia had brought Title Suit No. 174 of 1886 against Chaman Lal Pandey, challenging the title of Chaman Lal Pandey in that suit. By the judgment dated 30th Nov. 1886 Chaman Lal was declared to be the absolute proprietor of the temple of Pita Maheshwar Jee.

7. When Chaman Lal became old, he executed a will dated 30th June, 1896 in favour of his daughter Mostt. Aiyana Dai bequeathing the temple and properties attached thereto in her favour. In the will it was also mentioned that after the death of Aiyana Dai her son Kashi Lal shall be the absolute proprietor of the subject matter of the will. By virtue of the will, Mostt. Aiyana Dai became the absolute proprietress of the temple and the properties attached thereto and her son Kashi Lal became the absolute proprietor after the death of Aiyana Dai. When Kashi Lal attained majority, he executed an "Izara" deed dated 8th April, 1907 in respect of the entire temple of Shri Pita Maheshwar Jee for a term of five years in favour of Raghunandan Gir. On 15-4-1909 Kashi Lal executed a sale deed for a condideration of Rs. 6998/- in favour of Raghunandan Gir in respect of the entire temple of Shri Pita Maheshwar Jee and the properties attached to the temple. On 1st March, 1948 Raghunandan Gir executed a will in favour of his nephew Baldeo Gir (Plaintiff) in respect of the temple of Shri Pita Maheshwar Jee and the properties attached to the temple. Baldeo Gir applied for grant of probate of the will and the probate was granted by the subordinate Judge III Court, Gaya by judgment dated 20th Dec. 1951. In an appeal also the High Court confirmed the order of probate granted by the Subordinate Judge III Court, Gaya by the judgment dated 15th Jan. 1954. The subject-matter of the will was the temple of Shri Pita Maheshwar Jee and the properties attached to the temple. It is on the basis of the will dated 1st March, 1948 that the plaintiff claims the proprietary interest in the temple in question and in the properties attached to the temple.

8. The abovementioned documents were also considered by Shri Dawsan Miller, C. J. and Shri H. Foster, J. in a judgment in First Appeal No. 94 of 1920 (Ext. 10 (a)). While considering these documents their Lordships came to the following conclusions:—

"Having regard to the documentary evidence in the case from which it appears that since the year 1852 the property in suit has been disposed of or dealt with by those from time to time in possession as if they had a proprietary and transferable interest therein....."

It is on the basis of this judgment (Ext. 10 (a)), we hold that since 1852 the predecessors-in-interest of the plaintiff was claiming the suit properties as private properties. In other words, since 1852 Sita Devi was claiming the temple of Shri Pita Maheshwar Jee and the properties attached thereto as her private trust. It is in this view of the matter that Sita Devi transferred her entire proprietary right in the temple to Chaman Lal Pandey. Chaman Lal Pandey also transferred his interest by virtue of a will in favour of Mostt. Aiyana Dai and Kashi Lal. Kashi Lal transferred his proprietary interest to Raghunandan Gir and Raghunandan Gir transferred his proprietary interest in favour of Baldeo Gir. In our opinion, these documents clearly suggest that since 1852 the predecessors-in-interest of the plaintiff were treating the temple of Pita Maheshwar Jee and the properties attached to the temple as a private trust and not a public trust. This fact is also being supported by a decision of the Division Bench of this Court in First Appeal No. 94 of 1920 (Ext. 10 (a)).

9. The word "Religious Trust" is defined under Section 2 (1) of the Bihar Hindu Religious Trusts Act which runs as follows:—

" "religious trust" means any express or constructive trust created or existing for any purpose recognised by Hindu Law to be religious, pious or charitable, but shall not include a trust created according to the Sikh religion or purely for the benefit of the Sikh community and a private endowment created for the worship of a family idol in which the public are not interested:"

According to this definition, a private endowment created for the worship of family idol in which public are not interested, is not included within the purview of the definition of "religious trust". Hence on the materials on record, we hold that the temple of "Pita Maheshwar Jee" was created for the worship of the family of the plaintiff and his predecessors-in-interest and the public are not interested and as such the temple in question is a private trust.

10. There is another circumstance which suggests that the temple in question is a private trust. In this connection the lower appellate Court held in para 9 that the plaintiff resides in the compound of the temple. This fact itself is enough to suggest that the temple in question is a private temple. In this connection a reference was made to a Division Bench judgment of this Court in Bihar State Board of Religious Trust v. Lakshman Prasad Singh (judgment dated 14th April, 1978 in F. A. No. 362 of 1969). In para. 11 of the judgment it has been held as follows:—

"In order to ascertain as to whether a trust is a private trust or a public trust, the test is whether the beneficiaries are definite and ascertained individuals or uncertain and fluctuating individuals. If the answer comes to the effect that the beneficiaries are definite and ascertained individuals then it is a private trust. If the beneficiaries are uncertain and general public then it is a public trust. If the beneficiaries of the trust are limited to the guru and the chelas of the guru, then also it is a private trust for the simple reason that the beneficiaries of the trust are ascertained individuals. The other test to decide as to whether a trust is a private or public trust is that whether the management of the trust is being controlled by the Shebait or by the public. If there is an averment in the deed of dedication to the effect that the income and expenditure account shall be scrutinised by a body consisting of the local persons each year, then it will be a public trust. If the day to day management is being controlled by the Shebait in respect of a family idol, then it will be deemed to be a private trust. The third test is whether the temple or the trust is situated within the campus of the residential building or at a public place. If the deity is situated inside the residential building, then an inference can be drawn that it is a private trust. If the deity is situated in a public place outside the residential compound, then an inference can be drawn that it is a public trust. Each case will depend on the facts and circumstances of each case.

The Court should not draw inference on the basis of an individual circumstance but on the basis of the cumulative effect of all the circumstances in the case. An inference should not be ordinarily drawn that a trust is a public trust, merely because the Sadhus are entertained in the temple and the villagers attend the temple in a certain function. The Court should also be cautious in drawing the inference from the facts and circumstances of the case as a whole.

The main test is: Whether the beneficiaries of the temple are ascertained individuals or general public? If on the evi-

dence an inference can be drawn that the general public are freely admitted in the temple as a matter of right, then certainly it is a public trust. The mere fact that the public are freely admitted to the temple cannot mean that the public are admitted as a matter of right and the Court should not readily infer therefrom that it is a public trust."

Relying on these tests, we hold that the beneficiaries of the temple in question are ascertained individuals. In that case (referred to above) it has been held that if the trust is situated within the campus of the residential building then an inference can be drawn that it is a private trust. We hold that the temple in question is a private trust on two grounds, namely, (1) that the beneficiaries of the temple are ascertained individuals, namely, the plaintiff and his predecessors and (2) that it is a private trust because the temple is situated within the campus of the residential building of the plaintiff.

11. Learned counsel for the appellant contends that it is a public temple because the public are freely admitted to the temple. It has been held in the Bihar State Board of Religious Trust v. Mahant Sri Biseshwar Das (AIR 1971 SC 2057) that the mere fact that the public are admitted to the temple without any hindrance does not necessarily mean that the public are admitted as a matter of right and the Court should not, therefore, infer that this is a public trust. Relying on the Supreme Court decision, we hold that the mere fact that the public are freely admitted to the temple, it does not mean that it is a public temple.

12. Learned counsel for the appellant also relied on a decision in Deoki Nandan v. Murlidhar (AIR 1957 SC 133). In this connection he referred to para. 7 of the decision. The relevant portion is quoted herein below:—

"The cardinal point to be decided is whether it was the intention of the founder that specified individuals are to have the right of worship at the shrine, or the general public or any specified portion thereof."

In this connection we hold that the documents suggest that the intention was that only the specific individual shall worship the deity and not the public. The documents further suggest that since 1852 the predecessors-in-interest of the plaintiff have been treating the temple of Pita Mahehwar Jee as private trust and the plaintiff is also treating the same as private trust. Both the Courts below have not found that the public were authorised to enter inside the temple as a matter of right. Learned counsel for the appellant also relied on a portion of para. 13 of the aforesaid decision which runs as follows:—

"In the absence of a deed of endowment constituting the Thakurwara, the plaintiff sought to establish the true scope of the dedication from the user of the temple by the public."

In the present case, there are documents since 1852 to suggest that the proprietary interest in the temple was transferred from one person to another. This finding is also supported by a Division Bench decision of this Court in First Appeal No. 94 of 1920 (Ext. 10 (a) quoted above). Hence, we hold that the decision in Deoki Nandan's case (supra) does not help the appellant. On the other hand the decision in Deoki Nandan's case (supra) supports the case of the plaintiff. In that case it has been held that if the temple is situated within the precincts of the residential building, then an inference can be drawn that it is a private temple. In that case the Supreme Court held that as the idol was not installed within the precincts of the residential quarters but in a separate building constructed for that very purpose and hence it was a public temple. In the present case also the temple is situted within the residential campus of the plaintiff and hence we hold that it is a private temple.

13. Learned counsel also relied on a decision in Goswami Shri Mahalaxmi Vahuji v. Shah Ranchhoddas Kalidas (AIR 1970 SC 2025). It is on the basis of this decision that learned counsel for the appellant contends that if a temple is originated as a public temple then nothing more is required to be proved that it is a public temple. In that decision it has also been held that if the temple has been proved to have originated as a private temple, then there must be proof to show that this is being used as a public temple. In the present case it has been proved by various documents that the temple originated as a private temple and as such the Board (the appellant) was required to prove that it is a public temple. In the present case both the Courts below have concurrently held that the temple in question originated as a private temple and the defendant failed to prove that it is a public temple. Hence this decision also does not help the defendant.

14. Both the Courts have concurrently held that it is a private temple. In this connection, the Courts below rejected the evidence of the defendant and accepted the evidence of the plaintiff. In view of the concurrent findings of facts arrived at by the Courts below, we do not intend to interfere with the judgment of the lower appellate Court.

15. In the result, the appeal is dismissed. The parties will bear their own costs.

Appeal dismissed.

AIR 1979 PATNA 179

S. SARWAR ALI AND
S. K. CHAUDHURI, JJ.

Kadam Lal Yadav, Petitioner v. The Additional Member, Board of Revenue and others, Respondents.

Civil Writ Jurn. Case Nos. 3342 to 3345 of 1975, D/- 19-5-1978.

Bihar Land Reforms (Fixation of Ceiling Area and Acquisition of Surplus Land) Act (12 of 1962), S. 16 (3) — Application under — Parties — Application based on one transaction — Subsequent transaction executed few days earlier to the application but registered later on — Applicant entitled to make the subsequent transferee party to the suit. (Registration Act (16 of 1908), S. 47).

Where a subsequent transfer takes place a few days before pre-emption application is made but is registered later on, the applicant could not have any knowledge of the transfer till it is registered and therefore the applicant would be entitled to add the subsequent transferee as party even though under S. 47 of Registration Act the registration relates back to the date of registration. 1971 BLJR 994 and AIR 1973 Pat 199, Rel. on.; 1976 BBCJ 649 : AIR 1977 NOC 120, Disting.. (Para 7)

Anno: AIR Manual (3rd Edn.). Registration Act, S. 47. N. 2.

Cases Referred: Chronological	**Paras**
AIR 1977 NOC 120 : 1976 BBCJ 649	9
AIR 1973 Pat 199	8
1971 BLJR 994	7, 8, 10

Kailash Roy, Binod Kumar Roy and Nawal Kumar Sharma, for Petitioner; S. N. Jha (Standing Counsel No. 2) and Sudhakar Choudhury Jr. Counsel to Standing Counsel No. 2, for Respondents Nos. 1 to 4 in CWJC No. 3342 of 1975; S. N. Jha, Standing Counsel No. 2 and Shardanand Jha, Jr. Counsel to Standing Counsel No. 2, for Respodents; No. 1 to 4 in CWJC No. 3343 of 1975. S. N. Jha, Standing Counsel No. 2 and Chandra Mohan Jha, Jr. Counsel to Standing Counsel No. 2. for Respondents; 1 to 4 in CWJC No. 3344 of 1975; S. N. Jha, Standing Counsel No. 2 and Arun Kumar Jha, Jr. Counsel to Standing Counsel No. 2; for Respondent Nos. 1 to 4 in CWJC No. 3345 of 1975; Parmeshwar Prasad Sinha, Motilal Roy and H. K. Kumar, for Respondent No. 9 in CWJC Nos. 3342 to 3345 of 1975.

S. K. CHOUDHURI, J.: — These four writ applications have been heard together and are being disposed by a common judgment as the facts are similar and the points involved are common.

2. All these writ applications arise out of a common order passed by the Additional Member, Board of Revenue, respondent No. 1 dated 18-9-1975 disposing of four revision applications. By the said order the member allowed all the revision applications after holding that the applications for pre-emption filed under Sec. 16 (3) of the Bihar Land Reforms (Fixation of Ceiling Area and Acquisition of Surplus Land) Act, 1961 (Bihar Act 12 of 1962) (hereinafter called the Act) were not maintainable in the absence of the subsequent transfer.

3. One Kadam Lal Yadav is the petitioner in all these writ applications who filed four pre-emption applications under S. 16 (3) of the Act, all on 14-11-1969 claiming the said right against the original transferees. Respondents Nos. 1 to 4 in each of the writ applications are the revisional, appellate and the original authorities under the Act. These four applications gave rise to four cases which were separately numbered. The first transferee has been shown as respondent No. 5 in each of the writ applications. The first sale deeds in all the cases were executed on 9-10-1969. The property conveyed under the said sale deeds have been described in para 2 of each of the writ applications. The vendor was one Roshan Rai, predecessor-in-interest of respondents 6 and 7 of each of the writ applications and one Kashim Rai who has been made respondent No. 8. The sale deeds executed on 9-10-1969 were registered on 29-10-1969.

4. In C. W. J. C. 3342 of 1974 and C. W. J. C. 3345 of 1975 the second sale deed conveying the property covered by

the first sale deed was executed by the first transferee on 7-11-1969 in favour of Bishundeo Yadav who has been made respondent No. 9 in each of these two writ applications. The registration of the sale deed was completed on 16-12-1969.

In C. W. J. C. 3343 and 3344 of 1975 the first transferee executed sale deeds on 13-11-1969 which were registered on 14-1-1970.

5. The petitioner's case put forward in the pre-emption application was that the original transferee, respondent No. 5 was neither a co-sharer nor an adjoining raiyat whereas the petitioner is a co-sharer and adjoining raiyat with regard to the property conveyed under the sale deed registered on 29-10-1969 and is entitled to re-conveyance of the land from the original transferee. The Deputy Collector, Land Reforms, respondent No. 4 issued notice to the transferors and the first transferee. After notice the transferors appeared and filed a petition stating that they had ceased to have any interest in the lands in question and therefore not necessary parties. In the show cause filed by the first transferee, respondent No. 5 it was stated that he has already transferred the lands in question to respondent No. 9 and the application for pre-emption was premature. Having come to know of the second transfer from the show cause filed by the original transferee four separate applications were filed in each of the four pre-emption cases for adding the subsequent transferee as a party on the ground that he had no knowledge previously about the subsequent transfer and that the said transfer is collusive, sham and farzi, created to defeat the purpose of the Act. Respondent No. 4 by his order dated 25-5-1970, rejected all the 4 petitions and a copy of the order has been made Annexure 2 to each of the writ applications. Therefore respondent No. 4 dismissed the pre-emption cases by a common order dated 20-6-1970, a copy of which has been made Annexure 4. Accordingly four appeals were filed which were allowed by common order dated 17-11-1971 (Annexure 5). Thereafter four revision applications were filed before the Board of Revenue which were heard by the Additional Member who was pleased to allow the applications by a common order dated 18-9-1975 contained in annexure.

6. Mr. Kailash Roy, learned Counsel appearing in support of all these writ applications contended that in the facts and circumstances of the case the subsequent transferee who has been made respondent No. 9 should have been allowed to be added as party by the Board of Revenue as the petitioner had no knowledge of the subsequent transaction but came to know of the same only from the show cause filed by the first transferee in the original court. Learned Counsel, therefore contended that it was a fit case where respondent No. 9 should have been allowed to be added as party respondent and the Board would have been justified in remanding the case for a fresh decision in accordance with law. Mr. Parmeshwar Pd. Sinha, learned Counsel who opposed these applications, on the other hand, contended that the pre-emption applications having been directed against the first transaction, the Board of Revenue was fully justified in allowing the revision applications on the ground that the pre-emption application were not maintainable in the absence of the subsequent transferee.

7. In support of the contention put forward by Mr. Roy he relied upon a Bench decision of this Court in Ramchandra Yadav v. Anutha Yadav, (1971 BLJR 994). According to the learned Counsel this decision on all fours applies to the present case and according to the principle laid in that case that if the petitioner had no knowledge of the second transaction he should have been allowed to make him a party in the proceeding instead of rejecting the application under Section 16 (3) of the Act. Learned counsel drew our attention to the fact that when the pre-emption application were filed the second transfer deed was not registered and therefore they could not have any knowledge of the second transaction though they were executed prior to the filing of the pre-emption application. I have already disclosed above the different dates of the transactions. In two of the cases only one day before the filing of the pre-emption applications the second deeds were executed whereas in the other two cases they were executed only one week before. In my opinion, therefore, Mr. Roy was right in contending that the petitioner had no knowledge of the execution of the second deeds when the pre-emption applications were filed. It is true that the view taken by the Board that on registration of the second deeds of title would actually relate back to the date of execution under S. 47 of the Indian Registration Act, 1908

and therefore the subsequent transferee was a necessary party is correct. Therefore the question is as to whether in the facts and circumstances of the case the subsequent transferee namely respondent No. 9 should be allowed to be added as party and the case should be decided afresh in their presence.

8. In Ramchandra Yadav's case (supra) a day prior to the filing of the application under S. 16 (3) of the Act the second deed was executed though it was registered later. It has been pointed out that under S. 47 of the Indian Registration Act the title on registration would relate back to the date of execution. The question raised in that case was as to whether in such circumstances a person claiming the right of pre-emption could proceed with his application in the absence of the subsequent transferee. It has been stated in that case that mere purported execution of the document may not be sufficient to defeat the application under S. 16 (3) of the Act. If the execution was made before the application for pre-emption was filed claiming the right of re-conveyance of the property conveyed under the first deed in favour of the original transferee, though registered later on, the application under S. 16 (3) of the Act will fail because the registration relates back to the date of execution. It has been further held that if however it is found that the document was ante-dated and that it was, as a matter of fact, after the filing of the pre-emption application executed by the subsequent transferee by ante-dating the sale deed the right of pre-emptor under S. 16 (3) cannot be defeated nor can it be defeated if the sale deed was farzi. After discussing the law aforesaid in that case and pointing out the circumstances of that case and indicating the uncertainty in the position of law their Lordships in exercise of their discretion did not feel inclined to deny the opportunity to the petitioner of that case to substantiate his claim in regard to the second sale deed. Accordingly, their Lordships allowed the writ application and remitted back the case to the first authority for retrial after giving an opportunity to the petitioner to implead the subsequent transferee as party in the application filed under S. 16 (3) of the Act. Question of limitation was not relevant for decision in the circumstances of the case.

It is not necessary to refer in detail to the other decision cited by Mr. Roy namely AIR 1973 Pat 199 (Smt. Sudama Devi v. Rajendra Singh). Suffice it to say that the same principle pointed out in Ramchandra Yadav's case (1971 BLJR 994) (Supra), has been laid down in this case also after discussion of relevant decisions.

9. Mr. Parmeshwar Pd. Sinha, however, in support of his contention relied upon a Bench decision of this Court in Abdullah Mian v. Jodha Rout, (1976 BBCJ 649 : (AIR 1977 NOC 120), but that case is clearly distinguishable as the pre-emption application was filed in that case after the registration of the second transfer was complete and therefore in that case the principle that the title on registration relating back to the date of execution under S. 47 of the Indian Registration Act did not arise. It appears from the judgment of that case that though the fact of the second transfer was mentioned in the pre-emption application itself still the second transferee was not made a party and the pre-emption application was not directed against the second transferee. Under those set of circumstances it has been held in that case that the second sale deed having been registered before the application under S. 16 (3) of the Act was filed, it should have been directed against the second transaction making the petitioner of that case a party to the proceeding who was the second transferee. Under those set of circumstances the petitioner of that case (who was the second transferee) was not allowed to be made party on the ground that the application under S. 16 (3) of the Act had become barred long ago against the petitioner (of that case). Therefore, in my opinion, this case does not support the contention put forward on behalf of the respondent.

10. For the reasons stated above and special circumstances pointed out above I am of the opinion that after following the case of Ramchandra Yadav (1971 BLJR 994) (Supra), the subsequent transferee should be allowed to be added as a Party in the proceeding and the proceeding should be decided afresh by the authority.

11. An objection was raised by Mr. Parmeshwar Pd. Sinha that the Member of the Board of Revenue having found that the lower appellate court was not justified in recording a finding of benami nature of transaction with regard to the second transfer deeds, the law applicable on the subject has been rightly applied

by it. It is true that the Board has stated that the finding of the lower appellate court regarding benami nature of the transaction was not satisfactory and was based on insufficient materials but Mr. Kailash Roy pointed out that Benami nature of transaction was not raised in the applications under S. 16 (3) of he Act by the petitioners. There what was pleaded was that the subsequent transactions were collusive, sham and farzi and executed in order to defeat the provision of Ceiling Act. Learned Counsel, therefore, contended that the authorities confused fraudulent and sham nature of the transaction with that of Benami. According to the learned counsel the authorities should have given a finding on the sham nature of transaction instead of entering into Benami character whose ingredients are different. It appears that the submission of Mr. Roy is well founded and therefore, the petitioner should get an opportunity to support his allegation regarding the sham nature of the subsequent transfer.

12. For the reasons stated above all the four writ applications are allowed, the Judgments of the authorities contained in annexures 2, 4 and 5 are quashed and all the four cases are remanded to the original authority which will give opportunity to the petitioner to add the subsequent transferee, who has been made respondent No. 9 to each of the writ applications, as party to each of the proceedings and after notice decide all the four cases in accordance with law.

There will however be no order as to costs.

SARWAR ALI, J:— I agree.

Petitions allowed.

AIR 1979 PATNA 182

MADAN MOHAN PRASAD, J.

Bimal Kumar, Petitioner v. Shivanandan Prasad Chowdhary and another, Opposite Parties.

Civil Revn. No. 12 of 1977, D/- 12-5-1978.*

(A) Bihar Buildings (Lease, Rent and Eviction) Control Act (3 of 1947), S. 11A — Bihar Buildings (Lease, Rent and Eviction) Act (16 of 1977), S. 3 — Order passed under S. 11A of Act 3 of 1947 after it ceased to exist on statute book — Order is saved and deemed to be legal in view of S. 3 of Act No. 16 of 1977 the same being made retrospective in operation. 1978 BL JR 442 Rel. on. (Para 6)

(B) Bihar Buildings (Lease, Rent and Eviction) Control Act (3 of 1947), Ss. 2 (f), 11A — 'Tenant' — Does not include sub-tenant — Sub-lessee inducted without landlord's permission not liable to pay rent to landlord — Court cannot direct such a sub-tenant to deposit rent.

In the absence of a contract between the landlord and the alleged sub-tenant, no order for deposit of rent by the latter can be passed under S. 11A. For in such a circumstance, no arrears would be payable by the sub-tenant to the landlord. The word 'tenant' does not include 'sub-tenant' within the meaning of Section 11A. 1968 BLJR 643 Foll. (Para 7)

Looking to the definition of tenant as contained in S. 2 (f) it would be clear that only that sub-tenant who has been inducted with the permission of the landlord who is covered by the said definition and is required to pay rent. A person not so inducted has no legal relationship with landlord whatsoever. He thus owes no legal duty to pay rent to the landlord directly or through tenant. So he cannot be directed to pay arrears of rent and future rent under S. 11A. AIR 1957 Pat 437 Disting. (Para 8)

Cases Referred:	Chronological Paras
1978 BLJR 442	6
1968 BLJR 643	7
AIR 1957 Pat 437 : ILR 36 Pat 424	9

Bindeshwari Prasad Sinha, for Petitioner; Guneshwar Prasad, for Opposite Parties.

ORDER:— This is an application in revision directed against an order passed under S. 11A of the Bihar Buildings (Lease, Rent & Eviction) Control Act, 1947.

2. It appears that the plaintiff filed a suit against the petitioner and another person saying that the latter was the tenant and the petitioner (the second defendant) was a person to whom the shop in question had been sublet without the plaintiff's consent. He prayed for eviction on grounds of non-payment of rent as also for sub-letting of the building in question. During the course of the suit a petition under S. 11A of the aforesaid Act was filed which led to the present order

*(Against decision of Sayeed Akhtar Raza Naquabi, 2nd Addl. Munsif, Patna, D/- 13-12-1976).

passed on the 13th of Dec. 1976, by which the court below has directed both the defendants to deposit the arrears of rent from the date of the filing of the suit within 15 days of the order, and the current and future rent by the 15th day of every month failing which their defence against ejectment is to be struck off. Hence this application.

3. The defence of the petitioner is that he is merely a salesman and not a sub-tenant at all. He objected to any order being passed against him under S. 11A of the Act. Incidentally it may be mentioned that the other defendant also denied the relationship of landlord and tenant existing between him and the plaintiff.

4. The court below, however, found the relationship of landlord and tenant existing between the parties and accordingly passed an order directing both the defendants to deposit the arrears of, and current and future rents, as stated earlier.

5. Counsel for the petitioner has urged two points. Firstly, that the order was passed on a date, namely, the 13th of Dec. 1976, when the aforesaid Act had ceased to exist on the statute book. Secondly, that on the plaintiff's own case, the petitioner was a sub-tenant and in view of a decision of this Court no order under S. 11A of the Act to deposit rent can be passed against a sub-tenant. I may state at the very outset that while there is force in the second contention, there is none in the first.

6. I had occasion to consider at great length the question which is now being raised, namely, as to whether an order passed after the expiry of the Act, would be deemed to be a legal order by virtue of the retrospective clause contained in S. 3 of the Bihar Buildings (Lease, Rent & Eviction) Control Act of 1977. The same point had arisen in Civil Revn. No. 232 of 1977 (Probhat Kumar Das v. Santhal Paharia Sewa Mandal) disposed of on 16-12-1977.* I had come to the conclusion that the Act having retrospective effect, it would be deemed to be in existence after the actual expiry of the previous Act of 1947. In that view of the matter the Act of 1977 being deemed to be in force on the date of the order passed in the present case, the order cannot be assailed on that ground.

7. The second contention of learned counsel must succeed. In the case of Babu Sheonandan Lall v. Ramprit Bhagat (1968 BLJR 643) the same point had arisen and the learned Judge held that in the absence of any contract between the plaintiff landlord and the alleged sub-tenant, no order for deposit of rent by the latter could be passed under S. 11A of the Act. I respectfully concur in the view. The learned Judge, for coming to the conclusion aforesaid, had taken into consideration the fact that there was no contract between the plaintiff and the sub-lessee and thus there could not be said to be any arrears of rent payable by the latter to the former. For that reason for the purpose of S. 11A, the learned Judge said that "tenant" could not include a "sub-tenant".

8. Besides the aforesaid, I would like to add to the reasons. The definition of the word "tenant" contained in S. 2 (f) lays down that it means any person by whom or on whose account rent is payable for a building. Thus a sub-tenant who has been inducted with the consent of the landlord becomes a person who may pay rent to the landlord through the tenant or directly. Such a person may also be called a person on whose account rent is payable. It may be payable by the tenant on behalf of the latter or by the latter directly. I am unable to take the view that rent may be considered to be payable on account of a sub-lessee who has been inducted without the consent of the landlord and who is not recognised by the landlord. The relationship of landlord and tenant cannot be said to be existing between a landlord and a sub-lessee so inducted. The second consideration which occurs to me is that where a sub-lessee has been inducted in defiance of the law, he cannot legally be recognised as such. As would appear from S. 11A, sub-letting a building without the consent of the landlord is not legal and is considered to be a good ground for ejectment of the tenant himself. If that be so, how can the said sub-lessee be treated as a tenant for the purpose of payment of arrears or current or future rent. Thirdly, where the sub-lessee has come into existence without the consent of the landlord, it cannot be said that he is liable to pay any rent to the landlord unless the landlord recognises him. It is well known that rent is payable on account of the contract between the parties and in the case of a tenancy the parties are the landlord and the tenant and no third person. Rent

*Reported in 1978 BLJR 442.

cannot, therefore, be payable to any person other than the landlord except in accordance with any contract to the contrary. Therefore, by no stretch of imagination it can be said that a sub-lessee not recognised by the landlord is bound to pay rent to the landlord or that on his account any rent is payable to the landlord.

9. Counsel for the opposite parties conceded that for the purpose of S. 11A of the Act the word "tenant" will not include a sub-lessee inducted without the consent of the landlord. He, however, drew my attention to the Bench decision in the case of Suresh v. Shamal (ILR 36 Pat 424): (AIR 1957 Pat 437) where it was held by a Bench of this Court that 'tenant' included a 'sub-lessee'. In that view of the matter, my first re-action was to refer this case to a larger Bench for considering the correctness of the decision in that case. Counsel for the parties, however, persuaded me to decide the case on the limited point since the civil revision petition itself has been lying in this Court for over a year and the order has been in suspense for the last one year and a half and the plaintiff-opposite party is suffering injury on that account. It is said that he is not interested in getting the law settled and in no more than getting the case disposed of. It appears that the aforesaid decision was cited before Tarkeshwar Nath, J., and he distinguished it on the ground that in the Division Bench case the question was as to whether a sub-lessee could be evicted being considered to be a tenant within the meaning of S. 2 (f) and the question as to whether he would be a tenant for the purpose of S. 11A of the Act was not the point to be decided in that case. It is well known that every decision is given on the facts of the case and is a law on that point. The facts in that case were different inasmuch as Bench was considering as to whether the sub-lessee could be evicted. If I may say so with great respect the dominant consideration in the minds of their Lordships was that if a sub-lessee is not deemed to be a tenant within the meaning of S. 2 (f), then he cannot be evicted at all under S. 11. In this background the definition of the term "tenant" was said to include a sublessee as well. In that case, it appears, the order was passed against the tenant alone and not against the sub-tenant. The order was executed in the civil court and an objection under S. 47 was taken. The objection was dismissed. The appellate court affirmed it. Further appeal to this Court was also unsuccessful and thus there came to be a Letters Patent Appeal of which their Lordships were ultimately seized. The law laid down in that case must, therefore, be limited to the application thereof in so far as an order of eviction against a person who is said to be a sub-lessee without the consent of the landlord, is concerned, and the observations of their Lordships cannot be construed to cover other cases, for instance, a case under S. 11A of the Act as well. Although I have expressed my views slightly differently in so far as the present case is concerned, I am conscious that I am bound by the decision of their Lordships in the Division Bench. But that does not stand in the way of my deciding the present application being on distinctly different grounds.

10. Learned counsel for the petitioner further contended that the order must be struck down as a whole, that being a composite one. I am afraid, I cannot persuade myself to accept this contention. The order directs both the defendants to deposit and there is no reason why the order cannot be severed into two. So far as the present petitioner is concerned he has no liability. There can hardly be any doubt that the liability is of the principal defendant, the tenant, and therefore, there is no reason for striking down the order passed against him, more so, when he has not come to this Court in revision.

11. In the result, I would set aside the order of the court below in so far as the present petitioner is concerned. This application is accordingly allowed to that extent. In the circumstances of the case, there would be no order as to costs.

12. In view of the delay already occurred, the court below will do well to expedite the hearing of this case.

Revision partly allowed.

AIR 1979 PATNA 185

K. B. N. SINGH C. J. AND
P. S. SAHAY. J.

Bimal Chand Bothra and another, Petitioners. v. State of Bihar and others, Respondents.

Civil Writ Jur. Case No. 1814 of 1974, D/- 2-5-1978.

(A) Kosi Area (Restoration of Land to Raiyats) Act (30 of 1951), Ss. 3 and 4 — Proceedings for restoration of land — Notice of, to interested parties — Validity.

Where the postal peon's report though stated at one place that the parties on whom the notice of restoration proceeding under S. 3 had to be served had 'refused' to accept the notice, it was clear from the said report that the addressees could not be available as they were not living at the address at which the notices were sent, it must be inferred that there was no effective service of the notice of the proceeding on the addressees. (Para 6)

(B) Kosi Area (Restoration of Land to Raiyats) Act (30 of 1951), S. 10 (1) (b) — Persons aggrieved by passing of order for restoration of land applying for review of order — Rejection of review application and subsequent delivery of possession to raiyat — Aggrieved parties not filing objections either after rejection of review application or after delivery of possession, under S. 10 (1) (b) — Review application could not be considered as application under S. 10 (1) (b) and treated as such. (Para 9)

(C) Kosi Area (Restoration of Land to Raiyats) Act (30 of 1951), S. 16 (3) — Kosi Area (Restoration of Land to Raiyat) Rules (1952), R. 12 — Appeal under S. 16 — Limitation of 30 days prescribed therefor under R. 12 is applicable.

Section 16 (3) gives power to the State Government to frame rules regarding procedure for hearing and disposal of the appeal which also includes the period of limitation. Accordingly, the period of limitation of 30 days prescribed under R. 12 for filing of appeals under S. 16 is applicable to such appeals. 1972 Lab IC 784 (Pat) and AIR 1967 SC 1823, Disting. (Para 12)

(D) Kosi Area (Restoration of Land to Raiyats) Act (30 of 1951), Pre. — Party aggrieved by order of restoration of land and not having notice of restoration proceedings not availing of remedies open to him of filing petition under Section 10 or of filing appeal — Cannot claim remedy of review which is not provided for under the Act. AIR 1966 SC 1164 Disting. (Para 13)

Cases Referred: Chronological Paras

1972 Lab IC 784 : 1971 Pat LJR 619	11
AIR 1967 SC 1823	12
AIR 1967 Bom 472	11
AIR 1967 Punj 166 (FB)	11
AIR 1966 SC 1164	13
AIR 1965 All 410 : 1964 All LJ 946	11
AIR 1964 Madh Pra 75	11
AIR 1964 Mad 376	11

Shreenath Singh and Chunni Lal, for Petitioners; S. N. Jha (Standing Counsel No. 2) and Arun Kumar Jha (Jr. Counsel) (For the State) and Kanhaiya Prasad Singh and Kapileshwar Prasad Yadav (For Respondent No. 4), for Respondents.

P. S. SAHAY, J.:— This application under Arts. 226 and 227 of the Constitution of India is for quashing the order dated 3-10-1972 of the Deputy Collector, Supaul (Annexure 3) and the order dated 16-8-1974 passed by the Additional Collector, Saharsa (Annexure 5) under the provisions of the Kosi Area (Restoration of Land to Raiyats) Act, 1951 (hereinafter referred to as the Act). By the above orders, the land, having an area of 39.97 acres, details of which are given hereunder, has been ordered to be restored to Bishwanath Mandal (respondent No. 4) on payment of Rs. 12/- as compensation to Dukha Mandal and Rs. 5984/- to the State of Bihar:

Plot—wise area of the lands restored

Khata No.	Plot No. (Old)	Area A. Dec.
146	1336	0.57
	1337	26.82
	1338	0.24
	1339	0.10
	1340	0.02
	1341	0.08
	1342	1.49
	1337 (P)	10.65
	Total	39.97

2. In order to appreciate the points it will be necessary to state some facts. The lands in question belonged to the ancestors of respondent No. 4, and Sripat Singh and others were the landlords of the same. In the year 1938 the landlords brought Rent Suit 2074 of 1938 against the ancestor of respondent No. 4 which was decreed, and there was an execution case, No. 860 of 1941. The lands

were auction sold on 27-6-1941, and it was ultimately confirmed on 13-8-1941 and delivery of possession was obtained by the landlords. Sometime in the year 1941, Mahadeo Mandal, ancestor of respondent No. 4, took settlement of different plots of Khata No. 146. In the year 1949 petitioner No. 2 took settlement of 10.65 acres out of plot No. 1387 and 12.40 acres out of plot No. 1337. Petitioner No. 1 also took settlement of 8.62 acres out of plot No. 1337; and those lands were reclaimed by these petitioners and were made fit for cultivation. 5 acres of the total land which was taken settlement of by these petitioners was converted into an orchard, after having fenced with barbed wire, in which a pucca well was sunk and about 125 mango saplings were planted. Rent was being paid to the ex landlords and, after the vesting in the state of Bihar, new Jamabandis Nos. 191 and 192 were created in their favour. Petitioner No. 1 in the year 1956 went to Calcutta and joined some service there, and petitioner No. 2 also went there in the year 1962 and started his medical practice there. Mahabir Baitha was looking after their affairs, and they had no place of residence in village Chhatapur.

3. On 27-5-1972 respondent No. 4, Bishwanath Mandal filed an application under S. 3 of the Act for restoring 39.97 acres of land, impleading the petitioners and others as parties, on which a case was registered as Land Restoration Case 409 of 1972. In the aforesaid case, seven persons were opposite party including these two petitioners. Notices were sent to the petitioners by their Chhatapur address, and copies of the said notice have been filed as Annexures 1 and 1A to this application. The notices could not be served, and a report was made by the peon that the petitioners had been living in Calcutta and, therefore, the notices were hung up in the house. A copy of the peon's report has been filed marked as Annexures 2 and 2A to this application. Again, notices by resgistered post were sent to the petitioners, and they were returned unserved with a note that the addressees were not residing at Chhatapur and, therefore, the letters were being returned. Copies of the report have been filed marked as Annexures 7 and 7A. On 22-8-1972 three of the opposite party, namely, Manik Chand Bothra, Rishav Chand Bothra and Abhai Chand Bothra appeared before respondent No. 3 and filed a petition that they had no concern with the land, and, therefore, they should be expunged from the record. The aforesaid petition was ordered to be kept on the record.

"On 3-10-1972 respondent No. 3, exercising the powers of the Collector under the Act, passed the final order in this case (vide Annexure 3), holding that in spite of service of notice these petitioners had not appeared and that they had actually refused to accept the registered notice sent by post, and, therefore, there was valid service of notice on them. He also considered the case of respondent No. 4 on merit and passed the order in his favour restoring the land. Sometime in Nov. 1972 the petitioners learnt about the ex parte order from their nephew, Rishav Chand Bothra, and they executed a power of attorney in his favour on 3-11-1972 and 7-11-1972 to take necessary action in the matter. Two petitions were filed by Rishav Chand on behalf of the petitioners on 17-11-1972. In one it was prayed that there was standing paddy crop on the land, which was restored in favour of respondent No. 4, and he should be allowed a month's time to bring a stay order, as he wanted to move in revision and, in the meantime, no delivery of possession should be given to respondent No. 4. A copy of the aforesaid application has been filed, marked as Annexure 4. Another application was filed under O. 47, R. 1 of the Civil P. C. to review the order passed on 3-10-1972 on the ground that there was no valid service of notice on these petitioners and they being interested in the land, the ex parte order passed in favour of respondent No. 4 was wholly without jurisdiction, illegal and without any justification. A copy of the application is also filed with this application, marked as Annexure 4A.

Respondent No. 3 heard the lawyers appearing on behalf of the petitioners and respondent No. 4 on the same date and fixed 23-11-1972 for orders. He, however, on a consideration of the points raised in the application, held that there was valid service of notice on these petitioners and in spite of that they did not appear and, therefore, final order had to be passed which was perfectly legal and valid. It was also held by him that no objection under Section 10 and no appeal under S. 16 had been filed on behalf of the petitioners,

and the application for review was also not maintainable. A copy of the aforesaid order has been filed, marked as Annexure 6 to this application. It seems that against the orders dated 3-10-1972 (Annexure 3) and 23-11-1972 (Annexure 6) appeal was filed on 2-1-1973 before respondent No. 2, which was numbered as Land Restoration Appeal 15 of 1972-73. Respondent No. 2 in his detailed order also held that there was valid service of notice on these petitioners and also considered the case on merits and dismissed the appeal on the ground that it was time barred. A copy of the said order has been filed, marked Annexure-5. Respondent No. 4 completed all the formalities as directed by the Court and a writ of delivery of possession was issued on 1-12-1972 and possession was actually delivered on 5-12-1972, which will be clear from the order dated 30-12-1972. After that, no objection was filed by any party, and, therefore, the proceeding was ordered to be closed on 6-1-1973. Being aggrieved by the aforesaid order, the petitioners have moved this Court for quashing Annexures 3 and 5.

4. Mr. Shreenath Singh, learned counsel appearing for the petitioners has contended that there was no service of notice on the petitioners and respondents 2 and 3 have committed error of record in holding that notices had been served on the petitioners, and thus, according to him, there are errors apparent on the face of the record, and, therefore, the orders passed by the authorities as contained in Annexures 3 and 5 are fit to be set aside. It has also been submitted that Rishav Chand had appeared in the proceeding in his personal capacity and not on behalf of the petitioners, as held by respondent No. 3, and the same mistake has been committed by the appellate Court (respondent No. 2). Mr. Singh has also submitted that the application filed on 17-11-1972 was actually a petition under S. 10 of the Act, though it was wrongly labelled, and the authorities should have considered it as such. Lastly, it has been contended that respondent No. 2 has committed error of law in holding that the appeal was time-barred, and, according to learned counsel, there is no period of limitation prescribed under the law in filing appeal under the aforesaid Act.

5. Mr. K. P. Singh appearing on behalf of respondent No. 4 has supported the orders passed by the authorities which, according to him, are fully justified on the facts and circumstances of the case. He has urged that the points which have been raised on behalf of the petitioners require investigation of facts, and this Court under the writ jurisdiction should not interfere with the orders passed by the authorities. It has also been submitted on behalf of respondent No. 4 that the land has been restored to him 5-12-1972 and that after a lapse of so many years his possession should not be disturbed. The learned Standng Counsel appearing on behalf of the State has submitted that the authorities were perfectly justified in passing the orders and that it has been rightly held that the appeal was time-barred.

6. First of all, I will take up for consideration whether there was valid service of notice on the petitioners. Notices were sent to them by their Chhatapur address, but they were returned unserved after having been hung on the house with a note that the petitioners were not living there and had shifted to Calcutta, vide peon's reports (Annexures 2 and 2A). Therefore, notices by registered post were sent to the petitioners. and there was a note by the postal peon that the addressees were not available and, therefore, the letters were being returned (vide Annexures 7 and 7A). The question of service of notice has been discussed in detail in para 5 of the order passed by respondent No. 3 (Annexure 3). It has been wrongly stated that according to the report of the postal peon the addressees had refused to accept the letters, which is not true. In the peon's report at one place it has been said 'refused', on which much stress was laid on behalf of respondent No. 4, but from the peon's report itself it is clear that the addressees could not be available as they were not living there, and thus there was no question of their refusal. The same mistake has also been committed in the order, dated 16-8-1974. Learned counsel appearing on behalf of respondent No. 4 has invited our attention to the petition filed by Rishav Chand and two others on 22-8-1972 disclaiming any interest in the property. It has been sought to be argued that Rishav Chand being the nephew of the petitioners must have informed his uncles about the proceedings. No such inference can be drawn. They were parties in their independent capacity and there should have been a valid service

of notice on all of them. Therefore, even if three persons, namely, Manik Chand, Rishav Chand and Abhai Chand had appeared and filed petition, the petitioners cannot be said to have the notice of the proceedings. In the order (Annexure 3) it has also been wrongly stated that the lawyer had appeared for opposite party 1 to 5, and this has not been challenged by the counsel appearing on behalf of respondent No. 4. Therefore, I have no hesitation in holding that there was no valid service of notice of the proceedings on the petitioners, and the first contention raised on behalf of the petitioners must be accepted.

7. The next point to be considered is whether the order passed by the authorities is liable to be set aside on the ground of non-service of notice. This requires consideration whether the application filed by the petitioners on 23-11-72 and appeal on 2-1-73 were maintainable or time-barred, as held by the authorities. The order was passed on 3-10-1972 (Annexure 3), of which the petitioners derived knowledge in November 1972 and power of attorney was executed by them in favour of Rishav Chand on 3-11-1972 and 7-11-1972. This Rishav Chand filed two applications on 17-11-1972 one under O. 47, R. 1 for review of the order passed on 3-11-1972 and the other for stay of the delivery of possession till the filing of revision. Both the applications were rejected on 23-11-1972 (vide Annexure 6). An appeal against the orders dated 3-10-1972 and 23-11-1972 was preferred on 2-1-1973, and the appeal was dismissed on 16-8-1974 (vide Annexure 5) on the ground that Rishav Chand had appeared and the petitioners had also knowledge about the proceedings and the appeal was time-barred. On merit also, respondent No. 3 held that the order was perfectly justified and required no interference.

8. It will be relevant to examine the provisions of the Act. Under S. 3 a petition has to be filed before the authorities, and notices are sent under S. 4, and persons after service of notice can file objections under S. 5. All these objections are considered under S. 5 (2) of the Act. If parties do not appear after due service of notice, then ex parte order is passed under S. 6. Under the provisions of S. 7 the authority has to decide whether the claim made by the petitioner is valid or not and then pass final order in the case, after determining the actual area to be restored under S. 8. Under S. 10, if any person had no notice about the proceedings prior to the delivery of possession of the properties, objection can be filed under S. 10 (1) (a). In case the possession of the land is delivered under Section 10 (1) (b), application should be filed within one month of the date of dispossession. Under S. 10 (2), it will be incumbent upon the officer concerned to make an enquiry and investigate the claim made by the objector and pass necessary orders in the case under Section 10 (3). Any person aggrieved by the aforesaid order can prefer an appeal, as required under S. 16. Thus reading the aforesaid provisions of S. 10, persons not having been served with notice can file petition before the authorities before the delivery of possession, and, in case delivery of possession is made, within one month from the same. And such petitions will be considered and investigated, and, after due notice to the other side, necessary orders are passed. The authorities can also order for giving back the possession of the land, of which delivery of possession had been given. This order is also appealable under S. 16 from which an appeal lies to the prescribed authority, as mentioned in S. 16 (1) (a) and (b).

9. It has been strenuously argued by Mr. Shreenath Singh that the petition filed on 17-11-1972, though wrongly labelled as a petition for review, in pith and substance it was a petition under S. 10 of the Act, and was actually filed before the delivery of possession was effected. On the same day another application was filed not to deliver possession to respondent No. 4 till the matter was decided in revision. Both the prayers were rejected on 24-11-72, and the petitioners did not move any superior Court against the aforesaid order for staying the proceedings and the delivery of possession, though they were aware of the fact that respondent No. 4 was trying his best to take delivery of possession after depositing the amount as per direction of the Court. As I have stated earlier, from the order sheet dated 30-12-72 it is clear that delivery of possession was effected on 5-12-72 and no action had been taken on behalf of anyone under S. 10 of the Act, and the proceeding was closed on 6-1-73. Under S. 10 (1) (b) the petitioners could have filed objections within one month from

5-12-72, and this was never done. Thus, it is clear that the petitioners never cared to take protection under this section, which could have given them an effective remedy. Therefore, in my considered opinion, the petition filed by the petitioners on 17-11-72 could never be treated as an application under S. 10 of the Act. I am also conscious of the fact that mere wrong labelling of the petition cannot be a ground for throwing away the entire petition. All that has to be seen is the substance and not the form. But from the facts which I have stated above, by no stretch of imagination the application dated 17-11-72 could be treated as an application uner S. 10, and the petitioners never insisted for the same at any stage. They had actually appeared in the proceedings but never took any care to see what orders had been passed subsequently and, rather, allowed the delivery of possession to be effected and the proceedings to be closed by the authorities.

10. I will now consider the submission that the appeal before the Additional Collector was not time-barred, as held by respondent No. 2 in his order dated 16-8-74 (Annexure 5). Two orders were passed by respondent No. 3 one on 3-10-72 (Annexure 3) and the other on 23-11-72 (Annexure 6). Against the two aforesaid orders an appeal was filed before respondent No. 2 which was registered as L. R. A. 15 of 1972-73. From every order passed under the Act, under S. 16 (1) an appeal shall lie, and the appellate authorities are mentioned in S. 16 (1) (a) and (b). It is relevant to quote sub-s. (3):

"Appeals under this section shall be heard and disposed of in accordance with the prescribed procedure."

Under S. 17 powers have been given to the State Government to frame rules for the purpose of carrying out the provisions of the Act, and under S. 17 (2) (d), rules can be framed for the procedure for hearing and disposal of appeals filed under S. 16. In exercise of the powers conferred under S. 17 of the Act, rules have been framed on 29-5-52, which are known as Kosi Area (Restoration of Land to Raiyats) Rules, 1952. Rule 12 reads as follows:

"An appeal under S. 16 shall be heard and disposed of in the manner as prescribed for hearing and disposal of appeals under the Bihar Tenancy Act."

The period of limitation under the Bihar Tenancy Act is 30 days u/s. 184 (Sch. III). Learned counsel for the petitioners has contended that under the provisions of the Act no period of limitation has been fixed for filing an appeal under S. 16, and, therefore, there is no limitation for filing the appeal. It has been contended that though under R. 12, quoted above, appeal has to be preferred within 30 days as under the Bihar Tenancy Act, this is ultra vires in absence of any specific period fixed under the Act. Therefore, according to learned counsel, the appeal which was preferred by the petitioners on 2-1-73 was not time-barred, as held by respondent No. 2.

11. In this connection, reliance has been placed on a Bench decision of this Court in the Regional Director, Government of India v. N. G. Iyer (1971 Pat LJR 619) : (1972 Lab IC 784). In that case the Regional Director of the Employees' State Insurance Corporation, Bihar Region, wanted to recover employees' contribution from the employers from 15-12-57 to 31-12-64 under the provisions of S. 75 (2) of the Employees' State Insurance Act, 1948 (ESI Act). It was resisted on the ground that it was time-barred, and the Court held that the Corporation was entitled to contribute from 30-8-63 and not for the period prior to that date. On appeal to the High Court, it was held that no part of the claim was barred under the provisions of Art. 137 of the Limitation Act read with S. 77 (1A) of the ESI Act, because the articles of Limitation Act applied only to the cases covered by the Civil P. C., and R. 77 (1A) had come into force from 28-1-68. On behalf of the employer-respondents reliance was placed on R. 17, which had been framed fixing a period of limitation of 12 months from the due date, under S. 96 (1) (b) of the ESI Act, which gave power to the State Government (Bihar) to frame rules, and reads as follows: see S. 96 (1) (b):

"The procedure to be followed in proceedings before such Court, and the execution of orders by such Court."

The different States framed their own rules fixing 12 months period of limitation (sic) were ultimately challenged in the High Courts whether the rules were ultra vires or not. In Employees' State Insurance Corporation v. Madhya Pradesh Government (AIR 1964 Madh Pra 75), Employees' State Insurance Corporation v. Bharat Barrel and Drum Manufacturing Co. (AIR 1967 Bom 472), Solar Works v. Employees' State Insur-

ance Corporation (AIR 1964 Mad 376) and United India Timber Works v. Employees' State Insurance Corporation (AIR 1967 Punj 166 (FB)), it was held that the rules were ultra vires of the powers of the rule-making authority, and a contrary view was taken by a Bench decision of the Allahabad High Court in M/s. A. K. Brothers v. Employees' State Insurance Corporation (AIR 1965 All 410). This Court also held that the rules were ultra vires, because no such power had been given to the rule making authority under any of the provisions of the Act. On the same analogy, it has been sought to be argued that R. 12 of the Kosi Area (Restoration of Land to Raiyats) Rules, quoted above, is ultra vires, because no period of limitation could be fixed under this rule. Sub-sec. (3) of S. 16 is quoted above. The word 'prescribe', according to Chambers's Dictionary, is to lay down as a rule or direction — to give as an order — to give directions for, as a remedy — to render useless or invalid through lapse of time — to lay down rules. The word 'procedure', according to Wharton's Law Lexicon Dictionary (20th Edition), is a mode in which the successive steps in litigation are taken. Thus, it will be seen that the language which has been used under sec. 96 of the ESI Act is absolutely different from that which has been used in S. 16 (3) of the Act in question. Under S. 96 only rules regarding the procedure to be followed in the Court had to be framed by the State Government and certainly it could not give power to fix any period of limitation; whereas, S. 16 (3) of the Act in question clearly lays down that an appeal filed under the Act shall be heard and disposed of according to the prescribed procedure. There cannot be any hearing unless the appeal is instituted, and for that 30 days' limitation has been prescribed under S. 7 (d) of the Act read with R. 12 of the Rules. The expression "procedure to be followed" in S. 96 of the ESI Act is certainly of a narrower import and cannot be construed to mean to confer a power on the rule making authority to prescribe limitation for institution of proceedings. According to Halsbury's Law of England, Third Edition, Vol. 24, page 181, para 331. "Those provisions of statute of limitation which bar the remedy and not the right are rules of procedure only and form part of the lex fori". Therefore, S. 16 (3) of the Act gives power to the State Government to frame rules regarding procedure for hearing and disposal of the appeal which, in my considered opinion, will also include the period of limitation. No such power, as I have indicated above, had been given under S. 96 of the ESI Act, and, therefore, it was held that the rules framed fixing limitation of twelve months were in excess of the power and, therefore, ultra vires. The instant case is, therefore, clearly distinguishable from the facts of that case.

12. Reliance has also been placed on another decision of the Supreme Court, in Sales Tax Officer, Ponkunnam v. K. I. Abraham, reported in AIR 1967 SC 1823. That was a case relating to Central Sales Tax and the Rules framed by the State of Kerala. Section 8 (4) gave power to State Government to frame such rules and reads as follows (at p. 1824):

"The provisions of sub-s. (1) shall not apply to any sale in course of inter-State trade or commerce unless the dealer selling the goods furnishes to the prescribed authority in the prescribed manner."

Under the aforesaid power, R. 6 was framed, and the second proviso was inserted by the Government's notification on 16-1-61 and is as follows:

"Provided also that all declaration forms pending submission by dealers on 2nd May 1960 shall be submitted not later than 16th of Feb. 1961."

It was argued on behalf of the Sales Tax Officer that the respondent-assessee had not filed his declaration before 16-2-61 according to the aforesaid proviso, and thus he was not entitled to take any advantage under the rule. It was, however, urged on behalf of the assessee that the proviso to R. 6 was ultra vires of S. 8 (4) read with S. 13 (4) (e) of the Act. It was held by their Lordships that the phrase "in the prescribed manner" occurring in S. 8 (4) referred to above only conferred power on the rule-making authority to prescribe a rule stating all the particulars which had to be mentioned in the prescribed form, the nature and the value of the goods sold and the persons to whom they had been sold, but certainly the phrase "in the precsribed manner" does not take in the time element, and, threfore, does not authorise the rule-making authority fixing any time limit for filing declaration by the registered dealer. Therefore, in this decision the words "prescribed manner"

used in the context did not give any power to the rule-making authority to fix any date for filing the return.

The language of S. 16 (3) of the Act in question is far wider than the language which has been used in S. 8 (4) of the Central Sales Tax Act and is thus of narrower import which only gave the power to the rule-making authority to state the particulars to be included in the form, and, therefore, it has been held that no time limit should have been fixed under the rules. This decision also in no way helps the petitioners. The order was passed by respondent No. 3 on 3-10-72 and the review petition was also dismissed on 23-11-72. Against both the orders appeal was preferred before respondent No. 2 on 2-1-73, and it was beyond 30 days from both the orders, and it has been rightly held to be time-barred. I have also rejected the contention that there is no period of limitation for filing appeal under this Act, and the petitioners have not been vigilant in pursuing their legal remedies.

13. Learned counsel for the petitioners has submitted that the application for review was maintainable, and in this connection reliance has been placed on a decision of the Supreme Court in Sub-Divisional Officer, Mirzapur v. Raja Srinivas Prasad Singh (AIR 1966 SC 1164). He relied on para 12 of the judgment wherein it has been held that a decision reached behind the back of a necessary party to whom notice must be sent is not binding upon such party, and the Court may in such a case can reopen the proceedings to give the party a chance to state his case. This proposition of law is now well settled and cannot be disputed, because such decisions will be against the well-recognised principles of natural justice. But if a party, having learnt about an adverse order passed against him, as in the instant case, fails to avail the legal remedies, cannot take advantage of his own wrong. I have no doubt held that the petitioners had no notice of the proceeding and the order dated 3-10-72, but certainly they learnt about that in Nov. 1972. Two courses are surely open to them, either to prefer an appeal against the order passed under sec. 16 and, if necessary, also to file an application under S. 5 of the Limitation Act for condoning the delay or to file a petition under S. 10 of the Act. But they did not do so and, on the other hand, filed an application for review, for which there was no provision under the Act. The aforesaid decision of the Supreme Court is also of no assistance to the petitioners.

14. The merit of the case has also been discussed in great detail especially in the order passed by respondent No. 3 (vide Annexure 3). This Act is a beneficial piece of legislation for restoring lands to those tenants whose lands had been sold for arrears of rent or they were ejected for arrears of rent which were treated as abandoned during the period between 1st of Jan. 1939 and 31st of Dec. 1950, in absence of raiyats due to floods in the river Kosi. The petitioners claimed to have taken settlement sometime in the year 1949 and converted a portion of the land as an orchard by planting mango saplings. The trees also must have been of very small size and thus they were not entitled to adequate compensation for the same. Moreover, it is also clear that they have left the village Chhatapur and have settled in Calcutta for the last so many years. Equity, therefore is also not in their favour.

15. On a careful consideration of the points raised in the case, I am of the opinion that no ground for interference has been made out, and the application is accordingly dismissed. But in the circumstances of the case there will be no order as to costs.

K. B. N. SINGH. C. J.: — I agree.

Petition dismissed.

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K. B. N. SINGH, C. J. AND LALIT MOHAN SHARMA, J.

Sharda Prasad Karansheel, Petitioner v. State of Bihar and others, Respondents.

Civil Writ Jur. Case No. 946 of 1974, D/- 9-1-1979.

Bihar Government Premises (Rent Recovery and Eviction) Act (20 of 1956), Ss. 2 (a), 5, 6 — Allotment — What constitutes — Proceedings for recovery of rent and damages — Maintainability.

Before steps for recovery of rent are taken, it must be shown that the occupier was in possession of the Government premises in pursuance of an "allotment"; and damages under S. 5 (3) can be recovered only after an assessment of the same under sub-s. (1) or (2) of S. 5

after giving the person concerned notice and opportunity to show cause. The definition of the term 'allotment' makes it abundantly clear that it has not been used in the Act in its ordinary grammatical meaning. It is only after the conditions mentioned in S. 2 (a) are shown to have been complied with that it can be held that there has been an allotment. This restricted meaning given to the expression does not allow the occupier to escape the liability of paying occupation rent, for, the procedure laid down in S. 5 of the Act takes care of all other cases. It is only a question of assessment of the amount with notice to the person concerned, before the steps for realisation can be taken.

The first requirement of an "allotment" is a grant in writing. The letter written by the Dy. Secreary, P.W.D., to the Executive Engineer, Central Division, P.W.D., Patna, stated that it had been decided that catering arrangement for the Legislature Club should be entrusted to Jai Hind Hotel. The statements in the letter indicated that the letter merely conveyed a decision to make a grant in favour of the Proprietor of Jai Hind Hotel and did not itself constitute a grant. Many steps had to be taken before it could be said that "an allotment" within the meaning of the Act was made. A written agreement for that purpose was correctly envisaged in the letter, but such an agreement was never executed. The rental itself was not fixed and even the date from which the allotment could be said to have been made was uncertain in the future and depended upon the parties taking prompt steps on the lines suggested in the letter. Therefore, there was no allotment. Section 6 of the Act, for that reason was not attracted. The amount by way of damages could not be by any stretch of imagination covered by S. 6 of the Act. Steps under S. 5 had to be taken before this amount could be realised and, admittedly, the procedure under S. 5 of the Act had not been followed.

(Paras 7, 10, 11, 12, 15, 16)

Shreenath Singh, Jugeshwar Prasad Sinha, Kandhya Prasad and Ashok Kumar Sinha, for Petitioner; S. N. Jha (Standing Counsel No. 2) and Arun Kumar Jha (Jr. Counsel), For the State.

LALIT MOHAN SHARMA, J.:— By this writ application, the petitioner has challenged a certified proceeding in the following facts and circumstances. He is the proprietor of a hotel running in the town of Patna and also executes catering work outside the hotel premises. According to the case made out in the writ application, a building belonging to the State Government, situate on the Gardiner Road (Patna), is used as Legislature Club for the benefit of the members of the Bihar Legislature. The Club is managed by a Club Committee appointed by the Speaker of the Legislative Assembly and the Committee appoints a caterer for the canteen attached to the Club for the benefit of the members of the Bihar Legislature. In 1958, the then Secretary of the Legislature Club Committee appointed the petitioner as the catering contractor of the canteen. The petitioner started the work on 1-11-1958 and continued the service till July, 1964. The petitioner has asserted that he had to supply meals at concessional rates which fact has been denied in the counter-affidavit.

2. Admittedly, the petitioner was given some space in the Club premises for running the canteen. No rent, however, was paid at any point of time. According to the petitioner's case, no rent was payable and no demand towards the same was ever made, but in the counter-affidavit, it has been stated that rent had been demanded on several occasions. In 1968 the impugned certificate proceeding was started for realisation of a sum of Rs. 42,750.54 by way of rent and damages. The authorities have taken steps under the provisions of the Bihar Government Premises (Rent Recovery and Eviction) Act, 1956 read with the Public Demands Recovery Act.

3. According to the petitioner's case, there was no allotment within the meaning of the term as defined in the Act and, consequently, no rent is payable. So far as damages are concerned, it is said that there has been no assessment in accordance with law and nothing is, therefore, recoverable from the petitioner. The petitioner has further challenged the validity of the proceedings on the ground that the same do not conform to the mandatory requirements of law.

4. The case of the State of Bihar is that an allotment of a portion of the premises was made by a letter dated 7-11-1958 and the objection raised by the petitioner has no merit. The other objections have also been countered. The impugned certificate proceeding has been commenced by the letter Annexure 2 to

which a legal requisition for certificate in Form 2 was attached.

5. The objections raised before the Certificate Officer, the respondent No. 3, were rejected by his order as contained in Annexure 3 and an appeal filed therefrom was dismissed by the Additional Collector, the respondent No. 4, as per his order contained in Annexure 4. A revision application was thereafter filed and dismissed by the Commissioner and a further revision by the Member, Board of Revenue. The two orders have been attached to the writ application respectively as Annexures 5 and 6. The petitioner has prayed for quashing of the certificate proceeding and Annexures 2 to 6.

6. The Bihar Government Premises (Rent Recovery and Eviction) Act, 1956 was passed in 1956 to provide for collection of rents from persons in occupation of Government premises and for their eviction. In the present case, Ss. 5, 6 and 7 which deal with the collection of rent and damages are relevant. They are in the following terms:—

"5. Power to recover damages: (1) Where any person is in unauthorised occupation of any Government premises, the competent authority may, in the prescribed manner, assess such damages on account of the use and occupation of the premises as it may deem fit, and may, by notice served by registered post or in such manner as may be prescribed, order that person to pay the damages within such time as may be specified in the notice.

(2) Where any person in occupation of any Government premises commits such acts of waste as are likely to affect materially, the value or utility of the premises, the competent authority may, by notice served by registered post or in such other manner as may be prescribed, order that person to pay such damages as may be assessed by such authority within such time as may be specified in the notice:

Provided that, before assessing damages under sub-s. (1) or (2), the competent authority shall communicate to the person concerned the grounds on which it is proposed to make such assessment and require him to show cause within a month why assessment should not be made.

(3) If any person refuses or fails to pay the damages within the time specified in the notice, the damage may be recovered as arrears of land revenue".

"6. Notice of demand for rents not paid-(1) Where an arrear of rent is payable by any person for occupation of Government premises, the competent authority may at any time after thirty days from the date on which the rent accrued due, serve or cause to be served upon the person liable a notice of demand stating the name of the person, the amount payable by him and the Government premises in respect of which it is due.

(2) The notice of demand shall be signed by the competent authority."

"7. Recovery of rent.: If the arrears of rent for which notice of demand has been served are not paid to the competent authority within thirty days from the date of the service of the notice or such extended period as the competent authority may allow, such arrears with all costs of recovery shall be recoverable as arrears of land revenue".

7. The persons from whom money has to be realised in lieu of their occupation of Government premises are divided in two categories; those who occupy the premises on 'allotment' as defined in S. 2, and those who are said to be in 'unauthorised occupation'. Section 5 deals with the persons in unauthorised occupation and provides for the assessment of damages as well as for their recovery. Section 6 provides for demand of the arrears of rent from persons in occupation after allotment and Section 7 with the recovery of nonpayment. The expression 'allotment' has been given special meaning by Section 2 (a) of the aforesaid Act which is in the following terms:

"2 (a) 'allotment' means the grant, in writing, by or on behalf of the State Government, of a right of use and occupation of any Government premises to any person does not include a grant by way of lease",;

By the definition of 'rent' in Section 2 (f) of the Act, it is referable to an 'allottee'. The occupation by any person either without any allotment or after expiry of one month from the date on which an allotment is cancelled under Section 3 is 'unauthorised occupation' within Section 2 (g). Therefore, it follows that before steps for recovery of rent are taken, it must be shown that the occupier was in possession of the Government premises in pursuance of an 'allotment'; and damages under S. 5 (3) can be recovered only after an assessment of the same under sub-sec. (1)

or (2) of S. 5 after giving the person concerned notice and opportunity to show cause. Mr. Shreenath Singh, the learned Counsel for the petitioner, has contended that in the present case, neither the petitioner had occupied the premises on 'allotment' in his favour nor have the damages been assessed according to law. As mentioned in para 5 of the Commissioner's order, a demand of Rs. 39980.54P as arrears of rent was made by letter dated 18-5-67 and by another notice of the same date, damages amounting to Rs. 2770/- were also claimed.

8. In paragraph 9 of the writ application, it has been asserted that there has not been any allotment in favour of the petitioner within the meaning of the aforesaid Act and no reply thereto was attempted on behalf of the respondents in their counter affidavit, although comments have been made on several paras of the writ application. After the case was heard on three dates, it was adjourned to facilitate the State to file a supplementary counter affidavit which the State and the other contesting respondents did on 1-9-1978. In paras. 7 and 23 of this affidavit, it was averred that an allotment of the premises was made by the Government in favour of the Jai Hind Hotel belonging to the petitioner and his brother, the respondent No. 11, and that this fact is established by the letter dated 7-11-1958, annexed by the writ petitioner to his application as Annexure 7 and another letter dated 9-4-1959 Annexure A/9 to the supplementary affidavit. It is further stated that the rent was fixed under Financial Rule 45B as evidenced by the letter dated 4-12-1962 (Annexure A/10). It has been stated both in the original counter affidavit as well as in the supplementary one that an undertaking had been given on behalf of the Management of the Jai Hind Hotel by respondent No. 11 on 18-1-1959 that reasonable rent be fixed by the Government and charges for consumption of electricity and water supply would be paid. The learned Standing Counsel during the course of his argument further relied on the findings recorded by the Certificate Officer and other authorities against the petitioner.

9. The petitioner had admittedly remained in possession of the premises in question from 1-11-1958 to 30-7-1964 for which rent is being claimed at a rate fixed by the Government under the Financial Rule referred to in the supplementary counter affidavit.

10. The point is as to whether the petitioner occupied the premises on an 'allotment' within the meaning of the aforesaid Act. The definition of the term, as quoted above, makes it abundantly clear that it has not been used in the Act in its ordinary grammatical meaning. It is only after the conditions mentioned in Section 2 (a) are shown to have been complied with that it can be held that there has been an allotment. This restricted meaning given to the expression does not allow the occupier to escape the liability of paying occupation rent, for, the procedure laid down in Section 5 of the Act takes care of all other cases. It is only a question of assessment of the amount with notice to the person concerned, before the steps for realisation can be taken. The first requirement of an 'allotment' is a grant in writing and the question is as to whether the letter dated 17-11-1958 (Annexure 7) satisfies it.

11. The letter Annexure 7 was written by the Deputy Secretary, P. W. D., to the Executive Engineer, Central Division, P.W.D., Patna, stating, that it had been decided that catering arrangement for the Legislature Club should be entrusted to Jai Hind Hotel. It is, therefore, mentioned that

"In pursuance of this decision the following action has to be taken immediately".

A large number of steps are enumerated therein to be taken immediately, but in the future. The entire premises were in posssesion of another caterer Marwari Hotel and a decision was taken to divide the space between the two hotels and directions were given for clear demarcation for the purpose of possession of the two caterers and for taking certain steps in that regard including installation of separate electric and water meters. Conditions 5 to 9, mentioned in the aforesaid letter, are as follows:

"5. A written undertaking should be obtained from each party that they should pay reasonable rent for the Government premises to be occupied by each at rate to be fixed by Government and also charges for consumption of electricity and water supply.

6. The Government furniture in possession of the present caterer (Messrs Marwari Hotel) should be withdrawn. The new caterer should henceforth make

his own arrangement with regard to furniture.

7. It is thought desirable to execute an agreement on annual rather than on monthly basis. A draft agreement should accordingly be prepared in consultation with the G. P. Patna and furnished to this department immediately for approval.

8. Rent under F. R. 45B should be calculated separately for each portion of the canteen premises to be occupied by each party as indicated above. The amounts of rents so calculated should be forwarded to this Department immediately.

9. As the next session of the Bihar Legislature is to commence from the 13th Nov. 1958 action should be taken on the lines indicated above with the utmost expedition so that the caterer may start functioning the (?) 12-11-1958 at the latest and the Legislature may (?) be put to any inconvenience".

12. The statements in the letter, specially those in the above quoted portion, indicate that the letter merely conveyed a decision to make a grant in favour of the Proprietor of Jai Hind Hotel and did not itself constitute a grant. Many steps had to be taken before it could be said that "an allotment" within the meaning of the Act was made. A written agreement for that purpose was correctly envisaged in the seventh condition, quoted above, but it is not suggested before us that such an agreement was, ever executed. The rental itself was not fixed by Annexure 7 and even the date from which the allotment could be said to have been made was uncertain in the future and depended upon the parties taking prompt steps on the lines suggested in the letter. I must, therefore, hold that the case of the respondents about Annexure 7 making an allotment is fit to be rejected.

13. During the course of the hearing, a large number of letters were filed on behalf of the respondents as Annexures 'A' series and Mr. S. N. Jha, learned Standing Counsel, suggested that an allotment should be inferred from Annexures A/8, A/9 and A/10. Annexure 'A/8 contains an undertaking promising to pay rent which might be fixed by the Government and electric and water charges. It is signed by respondent No. 11 Anirudh Prasad as the Manager of the canteen on the 18th Jan. 1959. Mr. Shreenath Singh argued that the undertaking given by the respondent could not be binding on the petitioner in absence of an authority granted by the petitioner in favour of the respondent No. 11, and in any event, the undertaking which is in the following terms indicates that the rent was not fixed till then:

'I undertake to pay reasonable rent for the Government premises occupied by me at a rent to be fixed by Government and also charges for consumption of electricity and water supply.

Yours faithfully,
Sd. Anirudh Karmsheel
Manager
M. L. A. Club Canteen".

Mr. Shreenath Singh also suggested that this undertaking may be enforced against the respondent No. 11 after steps are duly taken under S. 5 of the Act which have not been done so far. It was also urged that this annexure instead of proving 'allotment' within the meaning of the Act, establishes that no allotment had been made till 18-1-59 either under Annexure 7 or Annexure A/8. No acceptable answer has been attempted by the learned Standing Counsel to these arguments which appear to be well founded. It is true that the petitioner and respondent No. 11 are brothers but that by itself will not mean that whatever the respondent No. 11 has said or written will be binding on the petitioner in absence of an authority, either express or implied. In any event, the undertaking Annexure A/8 falls far short of proving 'allotment'.

14. So far Annexure A/9 is concerned, it is a letter dated 9-4-1959 from the Executive Engineer, Central Division to the Deputy Secretary, P. W. D. stating that certain steps in accordance with Annexure 7 had been taken and para. 3 thereof is in the following terms.

"3. The premises have been settled with M/s. Jai Hind Hotel and M/s. Marwari Hotel as suggested by you". This letter does not make a grant; it rather assumes that a grant had already been made. Obviously, the Executive Engineer stated about a settlement in the wide and general meaning of the term. He was not concerned with the technical and narrow scope of the expression 'allotment' and his opinion is not of much consequence. Annexure A/10 is another letter dated 4-12-1962 from the Chief Engineer to the Executive Engineer, P.W.D. saying that the standard rent had been fixed at Rs. 540.98 Np. This

again shows that there could not have been any 'allotment' earlier.

15. All other letters produced on behalf of the State were dealt with in great detail by Mr. Shreenath Singh and since no specific reliance was placed by the learned Standing Counsel on them during his argument, it is futile to deal with them in detail. Suffice it to say that none of the documents produced before this Court by the respondents leads to a different conclusion. I, therefore, hold that no 'allotment' within the meaning of the Act was made in favour of the petitioner either by Annexure 7 or by any other document. S. 6 of the Act, for that reason, is not attracted.

16. The amount of Rs. 42,750.54 P. which is being realised from the petitioner, is admittedly made up of two amounts, a sum of Rs. 39,980.54 P. claimed as arrears of rent and another sum of Rs. 2770.00 as damages. It has rightly not been denied on behalf of the State that the second amount by way of damages cannot be by any stretch of imagination covered by Section 6 of the Act. Steps under S. 5 had to be taken before this amount could be realised and, admittedly, the procedure under S. 5 of the Act has not been followed. No reply by the Learned Standing Counsel was attempted so far as this amount is concerned and the petitioner's contention has to be allowed.

17. The result is that the entire certificate proceeding must be held to be illegal and has to be quashed.

18. Mr. Shreenath Singh raised several other questions as well, in support of this writ application, inter alia, challenging the certificate proceedings on the grounds of violation of R. 7 of the Bihar Government Premises (Rent, Recovery and Eviction) Rules, 1957 and of several requirements under some of the sections and Forms of the Public Demand Recovery Act. Since this writ application is succeeding on the grounds indicated above, I do not consider it necessary to decide other questions, and hope that if the State authorities take fresh steps for recovery of lawful dues, they will be careful in complying with all the procedural requirements in the the matter before starting a certificate proceeding.

19. For the reasons mentioned above, the certificate proceeding along with the orders as contained in Annexures 3, 4, 5 and 6 of the writ application are quashed and this writ application is accordingly allowed, but without costs. This judgment, however, will not prejudice the right of the State Government or its authorities to take appropriate steps under S. 5 of the Bihar Government Premises (Rent, Recovery and Eviction) Act, 1956, for realisation of the lawful dues.

K. B. N. SINGH, C. J.:— I agree.

Petition allowed.

AIR 1979 PATNA 196

B. P. JHA AND HARI LAL AGRAWAL, JJ.

State of Bihar and others, Petitioners v. Paras Nath Pandey and others, Opposite Party.

Civil Revn. No. 1331 of 1976, D/- 21-12-1978.*

Arbitration Act (10 of 1940), Ss. 31, 2 (c) — Jurisdiction — Award filed under S. 14 in Court of first Subordinate Judge — Application under S. 33 — Subordinate Court alone has jurisdiction to entertain the application.

Where the plaintiff filed an application under S. 14 for passing a decree in terms of the award in the Court of first Subordinate Judge a subsequent application under S. 33 by the defendant was maintainable before the same first Subordinate Judge who had jurisdiction under S. 31 read with S. 2 (c) to entertain the same. (Para 3)

Per B. P. Jha, J.: — In the instant case, the first Subordinate Judge had jurisdiction to entertain an application under S. 14 of the Act and as such all subsequent applications (such as one under S. 33) arising out of the proceedings under S. 14 of the Act are to be made in view of S. 31 (4) read with S. 2 (c) in the Court of the first Subordinate Judge and in no other Court. (Para 3)

Per Hari Lal Agrawal, J. (agreeing):— The application under S. 33 is directly covered within the mischief of S. 31 (2). By the rigour of that provision such a question has got to be decided only "by the court in which the award under the agreement has been or may be filed .....". AIR 1953 SC 313 Ref. (Para 7)

*(Against order of M. P. Gupta 1st Sub. J., Muzaffarpur, D/- 9-11-1976).

CW/CW/B207/79/VBB

The petitioner had no option to choose any other forum in view of the restriction contained in S. 31 (2) and the only forum available to it was the court of the first Subordinate Judge.

(Para 8)

Anno: AIR Manual, (3rd Edn.,) Arb. Act, S. 31, N. 3 & 6.

Cases Referred: Chronological Paras
AIR 1953 SC 313 7

Radha Raman, Addl. Advocate General, D. N. Sinha, Standing Counsel No. 4, and R. C. Sinha, for Petitioners; Shreenath Singh, for Opposite Party.

B. P. JHA, J.:— The defendants — first party preferred a civil revision application challenging the validity of the order dated 9-11-1976 passed by second Subordinate Judge, Muzaffarpur.

2. The opposite party No. 1, Paras Nath Pandey, filed an application under Section 14 of the Arbitration Act, 1940 (Act 10 of 1940) (hereinafter referred to as the Act) in the court of first Subordinate Judge, Muzaffarpur, on 28-9-1972 which was registered as title suit No. 177 of 1972. The opposite party, Paras Nath Pandey, filed this application for passing a decree in terms of the award. Later on the application was transferred for hearing before the first Additional Subordinate Judge, Muzaffarpur, The defendants — first party filed an application under S. 33 of the Act on 13-2-1974 before the first Additional Subordinate Judge, Muzaffarpur. The plaintiff (Paras Nath Pandey) raised an objection about the maintainability of the miscellaneous case. By the order dated 25-6-1974 the first Additional Subordinate Judge upheld the validity of the petition filed by the defendant first party before him. Later on, the case was again transferred to the court of Second Subordinate Judge, Muzaffarpur, for disposal. In the court of second Subordinate Judge, Muzaffarpur, the plaintiff again filed an application on 31st Aug. 1976 in respect of the maintainability of the petition filed by the defendant first party under S. 33 of the Act. The main objection of the plaintiff was that the first Additional Subordinate Judge had no jurisdiction to entertain an application under S. 33 of the Act as it was not a court within the purview of S. 31 (4) of the Act.

3. It is relevant to quote S. 31 (4) of the Act which runs as follows:

"31 (4) Notwithstanding anything contained elsewhere in this Act or in any other law for the time being in force, where in any reference any application under this Act has been made in a Court competent to entertain it, that Court alone shall have jurisdiction over the arbitration proceedings and all subsequent applications arising out of that reference and the arbitration proceedings shall be made in that court and in no other Court."

On a perusal of S. 31 (4) of the Act it is clear that all subsequent applications arising out of the reference and the arbitration proceedings shall be made in that court which has jurisdiction to entertain an application under the Act. In the present case the first Subordinate Judge, Muzaffarpur, had jurisdiction to entertain an application under S. 14 of the Act and as such all subsequent applications arising out of the proceedings under S. 14 of the Act shall be made in the Court of the first Subordinate Judge and in no other court. The word 'Court' has also been defined under S. 2 (c) of the Act which runs as follows:—

"2 (c) — "Court" means a Civil Court having jurisdiction to decide the questions forming the subject-matter of the reference if the same had been the subject-matter of a suit, but does not, except for the purpose of arbitration proceedings under S. 21, include a Small Cause Court".

On a perusal of S. 2 (c) 'Court' means a Civil Court having jurisdiction to decide the question forming the subject-matter of the reference. In the present case the first Subordinate Judge Muzaffarpur, was the Civil Court where an application under S. 14 of the Act could have been filed. If it is so, all the subsequent applications arising out of a proceedings under Section 14 of the Act shall be filed before the first Subordinate Judge, Muzaffarpur, in view of S. 31 (4) read with Section 2 (c) of the Act. In this circumstance, second Subordinate Judge was justified in recalling the order dt. 25-6-74. By the order dt. 25-6-74 the first Additional Subordinate Judge upheld the maintainability of the petition filed by the defendant first party under S. 33 of the Act. It is this order which was recalled by the second Subordinate Judge, Muzaffarpur. In our opinion, the impugned order of the second Subordinate Judge, Muzafferpur, is correct in law. Hence the second Subordinate Judge directed the defendant first party to file a proper application under Section 33 of the Act before the court

having proper jurisdiction. In our opinion, there is nothing wrong in the order. In view of S. 31 (4) read with S. 2 (c) of the Act the application under S. 33 is required to be filed before the first Subordinate Judge, Muzaffarpur.

4. In the result the petition is dismissed. The parties will bear their own costs.

HARI LAL AGRAWAL, J.: — 5. While I agree with the judgment of my learned brother that this application must fail, I would like to add a few observations of my own. From the facts, already stated by my learned brother, it is clear that the application under S. 14 (2) of the Arbitration Act was filed in the court of the first Subordinate Judge, Muzaffarpur and that the title suit in question, which was registered on that application, was therefore transferred to the court of the first Additional Subordinate Judge under the orders of the District Judge. There an application under S. 33 of the Arbitration Act was filed by the petitioners — State of Bihar. A preliminary objection was taken by the opposite party that the court of the first Additional Subordinate Judge had no jurisdiction to entertain the said application. The learned Additional Subordinate Judge accepted the objection and, by the impugned order, has held that he had no jurisdiction to entertain the application filed by the petitioner under S. 33 of the Arbitration Act.

6. The Arbitration Act contains specific provisions with respect to the jurisdiction of the court which could entertain an application for reference or such other applications which can be filed under the various other provisions of the Act and has also defined the word "Court" which under cl. (c) of S. 2 means a Civil Court having jurisdiction to decide the question forming the subject-matter of the reference if the same had been the subject-matter of a suit.

Section 33 under which the application was filed by the petitioner provides that any party to an Arbitration agreement or a person under him desiring to challenge the existence or validity of an Arbitration agreement or an award etc. shall apply to the Court which shall decide the questions on affidavits. The expression "Court" is referable to the definition of this word in S. 2 (c) already extracted earlier.

7. In order to answer the question arising for consideration in this case reference has got to be made to the provisions contained in S. 31 which is a provision exclusively dealing with the question of "jurisdiction" of the Courts. Sub-sec. (1) of this section deals with the Court where an award may be filed. Sub-sec. (2) thereof further provides that all questions regarding the validity, effect or existence of an award or an Arbitration agreement between the parties to the agreement or persons claiming under them shall be decided by the Court in which the award under the agreement has been or may be filed, and by no other Court. (Emphasis is mine).

As already noticed earlier, the application of the petitioner filed under S. 33 of the Act was to challenge the existence or validity of an Arbitration agreement or an award. Such an application is directly covered within the mischief of sub-s. (2) of S. 31 being a question regarding the validity, effect or existence of an award or an Arbitration agreement between the parties. By the rigour of that provision such a question has got to be decided only "by the Court in which the award under the agreement has been or may be filed..." It has been seen that the award in this case was filed in the Court of the first Subordinate Judge, Muzaffarpur. It has, therefore, got to be held that inasmuch as the questions raised by the petitioner could be decided only by the Court of the first Subordinate Judge the application under S. 33 could be filed in that Court. It is, therefore, quite clear that apart from the first restriction that all the applications under this Act are to be filed in a Court having jurisdiction in the matter to which the reference relates, in view of the fact that the award had already been filed in a particular Court, all those questions enumerated in sub-s. (2) of S. 31, could be decided by that Court alone and no other Court even assuming that there was any other competent Court to entertain an independent application under S. 33 of the Act. The scheme of the above provisions clearly lays down that once an application is made with reference to an arbitration agreement in one Court no matter either before or after the filing of the award, that Court alone has the exclusive jurisdiction to deal with all the matters in connection with the reference. In the case of Kumbha Mawji v. Dominion of India (AIR 1953 SC 313) the

Supreme Court observed that while sub-sec. (1) of S. 31 determines the jurisdiction of the Court in which an award can be filed, sub-ss. (2), (3) and (4) are intended to make that jurisdiction effective in three different ways;—

"(1) by vesting in one Court the authority to deal with all questions regarding the validity, effect or existence of an award or an arbitration agreement;

(2) by casting on the persons concerned the obligation to file all applications regarding the conduct of arbitration proceedings or otherwise arising out of such proceedings in the Court; and

(3) by vesting exclusive jurisdiction in the Court in which the first application relating to the matter is filed.

8. It may be said that reading S. 31 generally the question of jurisdiction must be decided with reference to the provisions of Ss. 16 to 20 of the Civil P. C. and the parties can, if so inclined, regulate the jurisdiction by choosing appropriate matter for reference; (a) without the intervention of the Court; (b) with the intervention of the Court, when no suit is pending or (c) in suits.

In a case falling under cl. (a) the award may be filed in any Court having jurisdiction in the matter to which the reference relates, in accordance with the provisions of sub-s. (1) of S. 31, keeping, however, in view the definition of the "Court" as defined in S. 2 (c) of the Act. But in cases falling under cls. (b) and (c), the award has to be filed in the Court which made the order of reference. Every Civil Court having jurisdiction to decide the question forming the subject-matter of the reference, if the same had been subject-matter of the suit, is a Court in which an award may under the provisions of sub-s. (1) of S. 31 could be filed. It is, however, not necessary to lengthen this decision as the petitioners had no option to choose any other forum in view of the restriction contained in S. 31 (2) and the only forum available to it was the Court of the first Subordinate Judge. I would, therefore, hold that the learned Additional Subordinate Judge has committed no error of jurisdiction and this application has got no substance and must fail. I would, accordingly, dismiss the same.

Application dismissed.

AIR 1979 PATNA 199

B. P. JHA AND B. S. SINHA, JJ.

Raghunath Prasad, Appellant v. Baijnath Dwivedi, Respondent.

A. F. O. O. No. 273 of 1977, D/- 4-1-1979.*

Provincial Insolvency Act (5 of 1920), S. 33 — Insolvency proceedings — Schedule of creditors — Application for inclusion of name in Schedule — Enquiry under S. 33 — Scope of — Decision of Civil Court not binding — Application being for inclusion and not addition of name, it cannot be treated as one under O. 1, R. 10 of C. P. C. (Civil P. C. (5 of 1908), O. 1, R. 10).

There is no provision in the Act which provides insolvency Court to add any person as creditor without holding any enquiry as envisaged under S. 33. A creditor can come to the insolvency Court before adjudication and after adjudication as well as before discharge of insolvent but he will not be declared as creditor unless an adjudication has been made and enquiry under S. 33 has been made. In respect of enquiry under S. 33, the Court shall not hold any enquiry about the factum of being creditor in respect of such person who has been accepted as creditor by the insolvent. In that case the Court will hold only an enquiry about the quantum of debt. But in a case where the creditors are not being accepted by the insolvent then in that case the insolvency Court is required to hold enquiry either under S. 33 (1) or under S. 33 (3) about the factum that he is a creditor in respect of such debt, and also about the quantum of such a debt simultaneously. The insolvency Court is not bound also by a Civil Court decree in favour of the creditor. (Paras 6, 8)

Held that the declaration of "A" as a creditor was in contravention of S. 33. The insolvency Court was not bound by the decision of the Civil Court. A complete machinery has been set up by the Act to hold an enquiry about existence of the debt. The Act also provides that the decision of the insolvency Court shall be final between the parties. It is therefore clear that even if there is a decree, the insolvency Court is entitled to hold enquiry as to whether there exists a real debt or not between the

*(Against order of Mahendra Pd. Sinha, 1st Addl. Dist. J., Chapra, D/- 12-9-1977).

CW/CW/B211/79/AMG/MVJ

parties. Further, it could not be said that no enquiry as provided under S. 33 was necessary as the application by "A" was under O. 1, R. 10 of the C. P. C., as the application was for the inclusion, and not addition of "A" 's name in the schedule of the creditors. (1892) 2 QB 633; AIR 1965 SC 920; AIR 1964 SC 1223, Foll. (Paras 6, 7, 9)

Anno: AIR Manual (3rd Edn.), Provincial Insolvency Act, S. 33, Notes 1, 2; AIR Comm., C. P. C. (9th Edn.), O. 1, R. 10, N. 11.

Cases Referred: Chronological Paras

AIR 1965 SC 920 : 1965 All LJ 482 7
AIR 1964 SC 1223 7
(1892) 2 QB 633 : 67 LT 401, Fraser, Ex. P. Central Bank of London 7

Jugal Kishore Prasad and K. N. Tewary, for Appellant; Tarakant Jha and Shashi Shekhar Dwivedi, for Respondent.

B. P. JHA, J.: — The debtor preferred this appeal under S. 75 (2) of the Provincial Insolvency Act (Act V of 1920) (hereinafter to be referred to as the Act) against the order dated 12-9-1977, passed by the First Additional District Judge, Chapra.

2. The debtor (appellant) filed an application under S. 10 of the Act for being adjudged as insolvent. During the pendency of the insolvency proceeding respondent Baijnath Dwivedi filed an application for including his name in the schedule of the creditors. It is said that the debtor Raghunath Prasad and his sons contracted to sell their house with Baijnath Dwivedi for Rs. 21,000/-. To this effect the debtor and his sons entered into a contract on 24-3-1969. On 24-3-69 Baijnath Dwivedi advanced Rs. 11,000/- in pursuance of the contract to Raghunath Pd. and Raghunath Pd. executed a Mahandanama in this respect. It is also agreed that Rs. 8000/- would be paid by Baijnath Dwivedi to the three creditors namely Mahendra Pd., Advocate, Badri Narain Singh and Dr. Sushila Devi. It was also agreed that balance of Rupees 2,000/- would be paid at the time of registration.

It was further alleged by Baijnath Dwivedi that the debtor did not carry out the terms of the contract and as such he filed a title Suit No. 166 of 1969 for specific performance of contract dated 24-3-1969. The aforesaid title suit was decided on the 30th April, 1977 by the Second Additional Sub-Judge, Chapra. By this judgment the Second Additional Sub-Judge, Chapra awarded Rs. 19,000/- as compensation to Baijnath Dwivedi. It is on the basis of this judgment respondent Baijnath Dwivedi filed an application before the Insolvency Court that his name should be included in the list of creditors.

3. On these facts the Insolvency Court directed that Baijnath Prasad be added as a creditor in the insolvency petiton.

4. Learned counsel for the appellant attacks the validity of the impugned order on the ground that it is contrary to S. 33 of the Act.

5. In my opinion there is sufficient force in the contention of the learned counsel for the appellant. It is relevant to quote S. 33 of the Act which runs as follows;

"33. Schedule of creditors.— (1) When an order of adjudication has been made under this Act all persons alleging themselves to be creditors of the insolvent in respect of debts provable under this Act shall tender proof of their respective debts by producing evidence of the amount and particulars thereof, and the Court shall by order, determine the persons who have proved themselves to be creditors of the insolvent in respect of such debts and the amount of such debts, respectively, and shall frame a schedule of such persons and debts:

Provided that if, in the opinion of the Court, the value of any debt is incapable of being fairly estimated, the Court may make an order to that effect and thereupon the debts shall not be included in the schedule.

(2) A copy of every such schedule shall be posted in the Court house.

(3) Any creditor of the insolvent may, at any time before the discharge of the insolvent, tender proof of his debt and apply to the Court for an order directing his name to be entered in the schedule as a creditor in respect of any debt payable under this Act and not entered in the schedule and the Court, after causing notice to be served on the receiver and the other creditors who have proved their debts and hearing their objections if any shall comply with or reject the application."

On a perusal of S. 33 (1), it is clear that when an application is filed by a creditor along with proof of the debt then the Court shall by order determine the persons who have proved themselves to be the creditors of the insolvent in respect

of such debt. The Court shall further determine the amount of such debt and shall frame a schedule of such creditors and debts.

6. There are two types of creditors under the Act, admitted creditors and disputed creditors. The Court shall not hold any enquiry about the factum of being creditor in respect of such person who has been accepted as creditor by the insolvent. In that case the Court will hold only an enquiry about the quantum of debt. But in a case where the creditors are not being accepted by the insolvent then in that case the Insolvency Court is required to hold enquiry either under S. 33 (1) or under S. 33 (3) about the factum that he is a creditor in respect of such debt. In the present case the respondent is not accepted as creditor by the debtor-appellant. In such a case the insolvency Court is required to hold enquiry either under S. 33 (1) or under S. 33 (3) as to whether he is a creditor in respect of the debt or not. In such a case the insolvency Court is further required to determine the amount of such debt and thereafter the insolvency Court shall frame a schedule of such creditors and the debts. In my opinion, the insolvency Court is required to hold enquiry simultaneously in respect of (1) that a person is a creditor of such debt and (2) about the quantum of debt. In the present case the insolvency Court without following the procedure as laid down either in S. 33(1) or in S. 33 (3) held the respondent as a creditor. The respondent can be declared as a creditor u/s. 33 of the Act in respect of a debt. The insolvency Court is further required to find out the amount of debt also.

7. In the present case the Court below treated the judgment of the 2nd Subordinate Judge in title Suit No. 166 of 1969 as an evidence of debt. It is a settled law that the insolvency Court is authorised to decide all the questions which may arise in the insolvency proceeding and the decision of the insolvency Court is final. It is also clear from the wordings of S. 4 (2) of the Act. Section 4 (1) of the Act provides that the insolvency Court shall have full power to decide the question in the insolvency proceeding under S. 4 (2) of the Act. It is provided that every such decision shall be final and binding. It is also a well settled law that the order passed by the insolvency Court shall be treated as judgment in rem. In this circumstance the creditor is required to prove his debt before the insolvency Court. In this connection reference was made to a decision in Fraser Ex Parte Central Bank of London ((1892) 2 QB 633). In that case Lord Esher M. R. held as follows;

"The court of Bankruptcy can go behind the judgment and can enquire whether notwithstanding the judgment, there was a good debt."

It is therefore clear that apart from the judgment and decree in Title Suit No. 166 of 1969 the insolvency court is entitled to hold an enquiry as to whether there was a real debt or not. This proposition of law has also been supported by the decision of the Supreme Court in the case of Official Receiver v. Abdul Shakoor (AIR 1965 SC 920). In that case the Supreme Court held (at p. 924):

"The Court has power, however to insist upon proof of the debt apart from the judgment of the negotiable or other instrument."

In my opinion the insolvency Court is not bound by the decision of the Civil Court. A complete machinery has been set up by the Act to hold an enquiry about existence of the debt. The Act also provides that the decision of the insolvency Court shall be final between the parties. It is therefore clear that even if there is a decree, the insolvency Court is entitled to hold enquiry as to whether there exists a real debt or not between the parties. The same principle has been reiterated in State of Punjab v. Rattan Singh (AIR 1964 SC 1223).

8. By virtue of the impugned order the insolvency Court has added the respondent as a creditor. In my opinion there is no provision in the Act which provides insolvency Court to add any person as creditor without holding any enquiry as envisaged u/s. 33 of the Act. A creditor can come to the insolvency Court before adjudication and after adjudication as well as before the discharge of the insolvent. In any event, the enquiry will be held under S. 33 of the Act only after the adjudication has been made and not before that. The creditor is entitled to come at any stage but he will not be adjudged as creditor unless an adjudication has been made and enquiry as envisaged under S. 33 has been made. In the present case there has been no enquiry under S. 33 and as such the impugned order is not in accordance with law.

9. Learned counsel for the respondent contends that the application filed by the respondent is a petition under O. 1, R. 10 of the C. P. C. and not under S. 33 of the Act. Learned counsel for the respondent concedes that if the application is treated as under S. 33 then no enquiry was made as envisaged under S. 33 of the Act and as such the impugned order is bad in law. The petition did not suggest that it was filed under O. 1, R. 10. C. P. C. In the prayer portion it has also not been prayed that he should be added in the list of creditors. The prayer was that he should be included in the list of the creditors. On the basis of the prayer portion of the petition I hold that it is a petition under S. 33 of the Act. If it is a petition under S. 33 of the Act then an enquiry should be made in respect of these facts (1) that the respondent is a creditor in respect of such debt and (2) that about the quantum of the debt. Thereafter he will prepare a schedule of the creditors and the amount of debt. In my opinion the Court has to hold enquiry and give its finding one way or the other in respect of the above mentioned facts. In view of these infirmities in the order I set aside the order and direct the Court below to proceed in accordance with law as well as on the basis of the observations made above.

10. In the result, the appeal is allowed and the impugned order dated 12-9-1977 is set aside and the case is remitted back to the trial Court for a fresh consideration on the basis of the observations made. The parties will bear their own costs.

B. S. SINHA, J.:—I agree to the order proposed. The appellant has not been able to state whether an order of adjudication has been made in this case. By going through the impugned order I am inclined to take the view that it is an innocuous order inasmuch as it has been held that it would be for the insolvency Court to determine such amount as is payable to the applicant-creditor. The impugned order only shows that the case of the applicant-creditor will be considered subsequently. Mr. Tarakant Jha, appearing for the respondent conceded that it was not an order under S. 33 of the Provincial Insolvency Act, 1920. It is true that an insolvency Court can go behind the judgment of a Civil Court and can enquire whether notwithstanding the judgment, there was a good debt and although the Court does not ordinarily go behind the judgment against the debtor, but can do so, provided there are circumstances prima facie justifying an enquiry.

Appeal allowed.

AIR 1979 PATNA 202

B. P. JHA J.

Anant Lal Shaw and another, Petitioners v. Gauri Prasad Yadav and others, Opposite Party.

Civil Revn. No. 129 of 1978, D/- 8-12-1978*

Limitation Act (36 of 1963), Arts. 136, 137 — Ejectment decree — Appeal — Death of original decree-holder — Heirs substituted in place of original decree-holder — Appeal dismissed — Application by heirs for permission to prosecute execution granted — Art. 136 applied and not Art. 137 — No jurisdictional error in granting permission — (Civil P. C. (5 of 1908), S. 99-A).

An ejectment decree under Rent Act, was passed on 30-9-1966. The judgment-debtors, preferred appeal. During the pendency of appeal, C, the original decree-holder died leaving behind the opposite parties as heirs. The opposite parties were substituted in appeal as heirs of C. The appeal was dismissed on 15-11-1975. On account of the death of C, the opposite parties applied to the executing Court on 5-5-1977 for permitting them to prosecute the execution of the decree and the permission was granted by an order dated 11-1-1978. The judgment-debtors (defendants) applied in revision to set aside the order dated 11-1-1978.

Held that there was no question of application of Art. 137 in the case. The relevant Article was Article 136 which provides period of 12 years as limitation for executing the decree when the decree becomes enforceable. The decree became enforceable on 15-11-1975 as the decree of the trial court dated 30-9-1966 merged in the appellate court decree. In view of the fact that these opposite parties were the decree-holders by the decree of the appellate court they were entitled to prosecute the decree after the death of C. While the execution petition was pending these opposite parties

*(Against order of P. K. Sarkar 1st Addl. Sub. J., Deoghar, D/- 11-1-1978.

moved an application for permitting them to prosecute the decree within 12 years from the date of the decree. In the circumstances Article 137 of the Act did not apply to the facts of the case. AIR 1929 Pat. 565 (FB), Disting.

Held further, that no prejudice had been caused to the defendants judgment-debtors by the impugned order as contemplated by S. 99A, Civil P. C. The finding of ejectment was in favour of the decree-holders and as such the decree had to be executed in accordance with law. The court below exercised the jurisdiction which was vested in it by law and it was not the question of jurisdictional error. Hence there was no ground to interfere with the impugned order in question. (Para 8)

Anno: AIR Comm. Lim. Act, (5th Edn.,) Art. 136 N. 20, 30; Art. 137 N. 10.

Cases Referred: Chronological Paras

AIR 1929 Pat 565 (FB) 7

Kailash Roy and Binod Kumar Roy, for Petitioners; Manilal, for Opposite Party.

ORDER:— The judgment-debtors preferred this Civil Revision Petition against the order dated 11th Jan. 1978. By this order the court below held that the provisions of O. 22 Rr. 3, 4 and 8 do not apply in view of O. 22 R. 12 of the Civil P. C. (hereinafter referred to as the 'Code').

2. O. 22 R. 12 of the Code provides that Rr. 3, 4 and 8 of O. 22 shall not apply to the proceedings in execution of a decree or order. In this case an ejectment decree under S. 11 of the Bihar Buildings (Lease, Rent and Eviction Control) Act, 1947 (hereinafter referred to as the Act) was passed by the trial court on 30th Sept. 1966. The judgment-debtors, who were defendants in the trial court, preferred Title Appeal No. 48 of 1966. During the pendency of appeal the original plaintiff Chaturbhuj Mahto died leaving behind the opposite parties as heirs. These opposite parties were substituted in appeal as heirs of Chaturbhuj Mahto.

2-A. By the judgment and decree dated 15th Nov. 1975 the 3rd Additional District Judge dismissed the appeal.

3. On account of the death of Chaturbhuj Mahto, the heirs of Chaturbhuj Mahto (opposite parties) applied to the executing court on 5th May, 1977 for permitting them to prosecute the execution of the decree.

4. On these facts the court below permitted these opposite parties to prosecute the execution of decree by an order dated 11-1-1978. Against this order the judgment-debtors (defendants) have moved this court to set aside the impugned order dated 11th Jan. 1978.

5. The question for consideration is whether the provisions of abatement apply to the execution proceedings or not? It is conceded by the learned counsel for the petitioners that in view of O. 22 R. 12 the provisions of Rr. 3, 4 and 8 of O. 22 do not apply to the proceedings in execution of a decree. Hence it is conceded that there is no question of abatement.

6. Learned counsel for the petitioners contends that the petition for prosecuting the execution application ought to have been filed within three years when the right to apply accrued. In other words, he contends that Art. 137 applies to the facts of this case. In my opinion there is no question of application of Art. 137 of the Limitation Act in the present case. Relevant Article is Art. 136 of the Limitation Act, 1963 which provides period of 12 years as limitation for executing the decree when the decree becomes enforceable. According to the learned counsel for the petitioners the decree became enforceable on 15th Nov. 1975 as the decree of the trial court merged in the appellate court decree. The trial court decreed on 30-9-1966. In view of the fact that these opposite parties were the decree-holders by the decree of the appellate court they are entitled to prosecute the decree after the death of their father. By virtue of the application, these opposite parties are seeking permission to execute the decree in place of their father. While the execution petition was pending these opposite parties moved an application for permitting them to prosecute the decree within 12 years from the date of the decree. In the circumstances I hold that Art. 137 of the Act does not apply to the facts of this case. The relevant Article is Art. 136. By virtue of Art. 136 any decree-holder can move for executing decree within 12 years when the decree order becomes enforceable.

7. In this connection learned counsel for the petitioners relies on a Full Bench decision in Hakeem Syed Mohd. Taqi v. Fateh Bahadur Singh (AIR 1929 Pat 565) (FB). In that decision the majority judges suggested that an application can be made by the heirs within the period of limitation as prescribed by Art. 181 of the Indian Limitation Act. It was the

suggestion of their Lordships. The point raised was not specifically decided by their Lordships in that decision. It is relevant to quote the opinion of the majority judges which runs as follows:-

"Such application can be made at any time within the period of limitation provided by the residuary Art. 181, Lim. Act, viz. 3 years from the time when the right to apply accrues".

In that decision their Lordships had not to consider Art. 136 of Limitation Act 1963 or Section 99-A of the Civil P. C. Hence I hold that the ratio decided in that case does not apply to the present case.

8. There is another aspect of the matter and that is this. By virtue of S. 99-A of the Civil P. C. no order under S. 47 shall be reversed or substantially varied, on account of any error, defect or irregularity in any proceeding relating to such order, unless such error, defect or irregularity has prejudicially affected the decision of the case. In my opinion, no prejudice has been caused to the defendants judgment-debtors by the impugned order. The finding of ejectment is in favour of the decree-holders and as such the decree has to be executed in accordance with law. Hence I hold that the court below exercised the jurisdiction which was vested in it by law and it is not the question of jurisdictional error. Hence, I do not intend to interfere with the impugned order in question.

9. In the result, the revision application is dismissed. The parties will bear their own costs.

Application dismissed.

AIR 1979 PATNA 204

B. P. JHA AND S. K. JHA, JJ.

Badri Narain Prasad, Appellant v. Anil Kumar Gupta and another, Respondents.

A. F. O. O. No. 309 of 1972, D/- 8-9-1978.*

(A) Motor Vehicles Act (4 of 1939), S. 110-B — Enquiry into claim — Rash and negligent driving of tempo by driver — Unimpeachable evidence.

At the time the accident had taken place there was no sufficient light; the tempo was being driven at a rather high speed without any light on and without its horn having been blown at the time of the accident by the driver. The cyclist with whose cycle the tempo collided was coming from the west to the east and the cyclist was driving his cycle on the northern side of the road which means he was travelling on his left side. He was hit by the tempo with its right hand side mudguard. Judicial notice can be taken of the fact that there are only 3 mudguards in a tempo having three wheels. If the cyclist was hit with the right hand side mudguard of the tempo, it was clearly on the wrong side of the road where the tempo was being driven by its driver; in spite of the cyclist having been knocked down on account of the impact of the collision between that particular tempo and the cycle, the tempo driver did not choose to stop his vehicle notwithstanding entreaties by the passengers travelling therein. Rash and negligent driving of that tempo by the driver at that particular time is writ large on this state of unimpeachable evidence. (Para 10)

Anno: AIR Comm., M. V. Act (1st Edn.), S. 110-B, N. 3.

(B) Motor Vehicles Act (4 of 1939), S. 110-B — Enquiry into claim — Judgment of Criminal Court — Acceptable for limited purpose.

For the purpose of trial on merits of claim petition before a Motor Accident Claims Tribunal the judgment of a Criminal Court is admissible to prove only who the parties to the dispute were and what order was passed therein. The judgment would merely be acceptable for the limited purpose of showing that the driver of a particular tempo had been prosecuted for rash and negligent driving resulting in accident in question. There can thus be no escape from the conclusion that the defence that this tempo was lying idle in a garage and was not on the road at the time of the accident is palpably false. AIR 1956 Pat 49, Foll. (Para 11)

Anno: AIR Comm., M. V. Act (1st Edn.), S. 110-B, N. 3.

(C) Motor Vehicles Act (4 of 1939), S. 110-B — Award of the Claim Tribunal — Vicarious liability — Liability of owner, driver and Insurance Company joint and several — Claim application against owner without joining driver maintainable. (Torts, Vicarious liability). (Para 13)

*(Against decision of Gauri Kant Thakur, Motor Accidents Claims Tribunal (3rd Addl. Dist. J.), Patna, D/- 31-7-1972).

Anno: AIR Comm., M. V. Act (1st Edn.), S. 110-B, N. 4.

(D) Motor Vehicles Act (4 of 1939), S. 110-B — Damages under — Assessment of — Principles stated.

The well settled mode and manner of ascertainment of damages in fatal accident cases are (i) first estimate what was the deceased man's expectation of life if he had not been killed when he was and (ii) what sums during those years he would have probably applied to the support of the dependents. And, in fixing the expectation of life of the deceased regard has been had not only to his age and bodily health but also to a premature termination of his life by a later accident, i.e. 'deduction towards chances.' AIR 1970 SC 376, Foll. (Para 14)

Anno: AIR Comm., M. V. Act (1st Edn.), S. 110-B, N. 2.

Cases Referred: Chronological	Paras
AIR 1970 SC 376	14
AIR 1956 Pat 49	11
1951 AC 601 : (1951) 2 All ER 448, Nance v. British Columbia Electric Rly. Co. Ltd.	14

Bishwanath Agarwal, for Appellant; S. C. Ghose and R. C. Sinha, for Respondents.

S. K. JHA, J.: — This is an appeal under S. 110-D of the Motor Vehicles Act (hereinafter to be referred to as the Act) against the order of the Motor Accidents Claims Tribunal, Patna, dismissing the application for compensation of the appellant. The appellant had preferred a claim under S. 110-A of the Act for the award of compensation to the tune of Rs. 1,00,000 on account of the death of his son Dharamdeo Prasad aged about 19 years caused by the impact of a tempo (taxi) bearing registration No. BRP 7809. The aforesaid accident took place at about 7 p.m. on the 27th Feb., 1968 near the State Police Radio Headquarters within Gardanibagh Police Station in the town of Patna.

2. The appellant's case was that while his son Dharamdeo Prasad was coming on a bicycle from the side of aerodrome towards his residential place in mohalla Laljitola, the above mentioned tempo owned by Anil Kumar Gupta, respondent No. 1. and insured with the Insurance Company, respondent No. 2, dashed against him causing injuries. He was removed to the Rajendra Surgical Block of the Patna Medical College, for treatment but he died there. It was further claimed that a sum of Rs. 500 had been spent over the treatment of the deceased son of the appellant during the period of five hours between the time of the occurrence and his death. The further case of the appellant was that the deceased was a student in the local B. N. College and was also earning a sum of Rs. 200 per month from part-time jobs. The appellant had filed the application for compensation as being the legal representative of the deceased.

3. Separate objection petitions were filed by each of the two respondents, namely, the owner of the tempo in question and the insurer. Respondent No. 1 challenged the maintainability of the claim case and contended that the same was barred by limitation and further that the appellant had no cause of action as he was neither the legal representative of the deceased nor any relation of his. The further case of the owner, respondent No. 1, was that the tempo in question was never involved in the alleged accident. It was, as a matter of fact, lying for repairs in the New Janta Electric Works between the 14th Feb., 1968 and the 1st of March 1968. It was further alleged that the deceased himself was guilty of double riding on the bicycle and so, if he sustained any injury resulting in his death, it was due to his own negligence and illegal double loading. The claim was alleged to be highly exaggerated and false—merely to extort money.

3-A. Respondent No. 2, the insurer, in its objection put forth a plea that the mother of the deceased, who was his sole heir and legal representative, was still alive and that the appellant had no right to claim any compensation on account of the death of his son. The Insurance Company also denied its knowledge regarding the earning of Rs. 200 a month by the deceased by doing any part-time job on the date of the alleged accident. It was admitted that the vehicle (tempo in question) was insured with it and that respondent No. 1, Anil Kumar Gupta, was its owner. But it was denied that the tempo in question was ever involved in the alleged accident. Like respondent No. 1, respondent No. 2 also came forward with a plea that the tempo in question was not on the road on the alleged date of accident since it remained inside the garage as its owner was busy in connection with the marriage ceremony of his brother. Liability

was disowned in respect of the alleged accident.

4. The Tribunal framed the following five issues:

"1. Is the claim petition maintainable?

2. Is the claim barred by limitation?

3. Has the applicant right to sue as the legal representative of the deceased Dharamdeo Pd.?

4. Did the accident occur by impact of rash and negligent driving of the tempo bearing No. BRP 7809?

5. Is the applicant entitled to any relief as claimed by him and if so to what relief and against whom?"

5. With regard to issue No. 2 it was held that the application had been filed well within the prescribed time and was not barred by limitation. Apropos issue No. 3, it was held that the appellant had proved that he was the father of the deceased and further that even assuming that the mother of the deceased was alive and had not joined, the application could not be said to be not maintainable simply because the father of the deceased had filed it in view of the provisions of S. 110-A of the Act. The Tribunal further held that an accident had taken place on 27-2-68 and that Dharamdeo died on account of that accident. The appellant, therefore, was held to have a cause of action to file the application. The claim was, therefore, also held to be maintainable at the instance of the appellant as the legal representative of the deceased. Thus issue Nos. 3 and 1 were also decided in favour of the appellant. Regarding issue No. 4, it was held that it had not been proved that the accident was by the impact of the tempo in question due to its rash and negligent driving. In view of the finding adverse to the appellant on issue No. 4, the Tribunal refrained from going into the question of the quantum of the relief to which the appellant may have been entitled and against whom. With regard to issue No. 5, it was merely held that in view of the finding on issue No. 4 it was needless to probe into the matter of the quantum of just compensation.

6. Learned counsel for the appellant, therefore, challenged the finding of the Tribunal on issue No. 4 and advanced his arguments on the question of quantum of just compensation to be awarded to the appellant in case issue No. 4 were decided in his favour.

7. The main point for consideration in this appeal, therefore, is as to whether it had been proved by the materials on record that an accident had taken place on 27-2-68 in the evening hours by the impact of tempo (taxi) registered as BRP 7809 on account of its being rashly and negligently driven and in course of which accident the deceased Dharamdeo died.

8. Before I proceed to discuss the evidence on record I want to make it clear that Anil Kumar Gupta, respondent No. 1, has admitted that he is the owner of the tempo taxi cab bearing registration No. BRP 7809 and that the said vehicle is insured with respondent No. 2. As already stated above, the liability is denied by the respondents mainly on the grounds that on the date and at the time of the accident that vehicle was lying idle in a garage and was not on the road and further that the deceased Dharamdeo Prasad met with the accident on account of his own negligence and not on account of the rash and negligent driving of the driver of the tempo concerned.

9. The two important witnesses examined on behalf of the applicant (appellant) on the point of the accident having taken place on account of the rash and negligent driving of the driver of the tempo bearing registration No. BRP 7809 are Sarwadanand (witness No. 4) and Shri Prakash Gupta (witness No. 7). A. W. 4 Sarwadanand has pledged his oath to say that on 27-2-68 at about 6 p.m. the accident had taken place on account of the collision between tempo bearing registration No. BRP 7809 and the cycle on which the deceased was coming. This witness was going in that tempo from Patna to Danapur. When the tempo reached near the Wireless Radio Station on the Bailey Road, the accident took place. At that time the tempo was going from east towards west and a cycle was coming from the opposite direction, i. e., from the west. The tempo was travelling neither at a very fast speed nor slowly at the time when the accident took place. The driver of the tempo did not blow any horn at the time of the occurrence. This witness has also stated that he had been examined in connection with this accident before the police officers and the Magistrate. The person coming on the cycle became injured on account of the collision between the tempo and the cycle. The tempo, however, did not stop at the place at that time. The witness claims to have known the driver of the tempo by the

name of Lala, who resides in the village of this witness where the driver's sister is married. The driver did not stop the tempo after the collision in spite of his being told by this witness to stop and he fled away with the tempo. The driver himself told this witness the next day that the person driving the cycle who had been injured was dead. In his cross-examination the witness has stated that the place where the accident had taken place was metalled road. The road is sufficiently wide at that place, being 13 or 14 feet wide with two flanks of kutcha road each 8 or 9 feet wide. The tempo was going at that time on the middle of the road and the cycle driver was thrown towards the southern side of the kutcha flank by the impact of the collision. He has further stated that the cycle was hit by the tempo by the right side mudguard of it. This is his entire evidence. On a scrutiny of this evidence, it is clear that the cycle driver who was coming from the west towards east was hit with the rear mud-guard of the tempo and the impact was sufficient to have thrown the deceased to the southern flank of the road, which would go to show not only that the tempo was running, more or less, on the wrong side of the road but also that it hit the cycle causing such an impact as was sufficient to have thrown the deceased cycle driver to the opposite direction, which would be towards the left of the tempo. It is further clear that the tempo driver had neither put on the light nor had blown the horn of the tempo at the time of the accident. It is also clear that in spite of having been told by the passengers of the tempo like, A. W. 4 the driver did not deliberately stop the tempo but fled away with it. No suggestion has been thrown to this witness in cross-examination on behalf of either of the respondents as to why he should falsely pledge his oath. He was one of the passengers in the tempo. He is completely a disinterested and non-partisan witness. There does not seem to be absolutely any reason as to why his statement on oath should not be accepted.

Witness No. 7 for the applicant, Shri Prakash Gupta was another co-passenger in the same tempo bearing registration No. BRP 7809. He has also deposed to the effect that the accident had occurred on the Bailey Road at the place where the Police Radio Wireless Station is situated to be more precise, the accident had taken place a little to the east of be wireless station. At that time the tempo was going from the east to the west. A cycle was coming from the west to the east at the time. The cyclist was driving his cycle on the northern side of the road. This would show that the cyclist was on his left side of the road. The tempo on which this witness was travelling was being driven at a very high speed. The driver did not blow any horn nor was the light of the tempo put on at the time of the accident. There was a collision between the tempo and the cycle on the northern side of the road and the cyclist was thrown off. This witness also asked the tempo driver to stop. He, however, did not stop the vehicle and fled away along with the tempo. This witness has also stated that he had been examined by the police and the Magistrate in connection with the accident previously, and he had been informed by the police officer examining him that the cyclist had died as a result of that accident. In cross-examination this witness has stated that he had seen how the collision had taken place. He was sitting on the right side of the rear seat of the tempo. There were three wheels of the tempo which had also mudguards. He has asserted that even in his statement before the Magistrate he had stated that the tempo driver had not blown the horn nor had put on the light of the tempo. He has further stated that he had noted down the number of the tempo at the time when he got down from it near his house. He has further stated to have seen the accident with his own eyes. He has frankly admitted that he was not known to the cyclist from before. In his cross-examination it has further been taken from him that at the time when the accident had taken place there was insufficient light. He has denied the suggestion that he had not seen any occurrence and had come to depose falsely. Nothing has been brought out of his cross-examination to discredit him. Again this witness seems to be a completely disinterested witness. Nothing has been elicited from him to show that he had any connection with the deceased Dharamdeo or his family. On the contrary, in cross-examination he has clearly denied to have had any introduction with the deceased from before. I do not find any valid ground for not accepting his statement on oath.

10. The evidence of these two witnesses, namely, A. Ws. 4 and 7 is sufficient to show that at the time the acci-

dent had taken place there was no sufficient light; the tempo bearing registration No. BRP 7809 was being driven at a rather high speed without any light on and without its horn having been blown at the time of the accident by the driver. The cyclist with whose cycle the tempo collided was coming from the west to the east and the cyclist was driving his cycle on the northern side of the road which means he was travelling on his left side. He was hit by the tempo with its right hand side mud-guard. Judicial notice can be taken of the fact that there are only three mud-guards in a tempo having three wheels. If the cyclist was hit with the right hand side mud-guard of the tempo, it was clearly on the wrong side of the road where the tempo was being driven by its driver; in spite of the cyclist having been knocked down on account of the impact of the collision between that particular tempo and the cycle, the tempo driver did not choose to stop his vehicle notwithstanding entreaties by the passengers travelling therein. Rash and negligent driving of that tempo by the driver at that particular time is writ large on this state of unimpeachable evidence.

11. The appellant had also filed the certified copy of the judgment of G. R. Case No. 802/68/Tr. 177/72 and an order passed in Criminal Appeal No. 138 of 1972. These documents have been marked exhibits 8 and 10 respectively. Ext. 8 is the judgment of the trial Court in the criminal case started against the driver of tempo bearing registration No. BRP 7809 on account of his rash and negligent driving resulting in the accident in which Dharamdeo died. The driver of that vehicle was convicted therein. The Claims Tribunal has taken the view that the findings in Ext. 8 in the present case by the applicant was of no consequence since findings as to the guilt or otherwise of the driver in a criminal case are wholly irrelevant for the purpose of trial on merits of claims petition before a Motor Accidents Claims Tribunal. It is true that the judgment of the Criminal Court is not at all binding on the Motor Accidents Claims Tribunal and a judgment of a Criminal Court is admissible to prove only who the parties to the dispute were and what order was passed therein — vide Ramadhar Chaudhary v. Janki Chaudhary (AIR 1956 Pat 49). The judgment would merely be acceptable for the limited purpose of showing that driver of tempo bearing registration No. BRP 7809 had been prosecuted for rash and negligent driving resulting in the accident in question. The evidence of the two witnesses, as I have stated above, is sufficient for holding that tempo taxi BRP 7809 was involved in an accident on 27-2-68 in the evening and that the accident had occurred on account of the rash and negligent driving of its driver Chandrika Lal. Ext. 8 merely lends support to this oral evidence on the particular that the driver of this very tempo was criminally prosecuted for an offence of rash and negligent driving resulting in the accident in question. There can thus be no escape from the conclusion that the defence of the respondents that this tempo was lying idle in a garage and was not on the road at the time of the accident is palpably false. And, although the fact of conviction of the driver in that criminal case in Ext. 8 shall not be admissible in so far as the present proceedings are concerned, judging independently the evidence of the two witnesses discussed above leaves no room for doubt that it was on account of the rash and negligent driving of the driver of this particular tempo that the accident had taken place on account of which Dharamdeo died. The Claims Tribunal has rightly held that the maxim — res ipsa loquitur — is not a principle of liability but a rule of evidence. But as Winfield on Tort, 7th Edition, at page 196, says,

"it 'possesses no magic qualities'; nor has it any added virtue, other than that of brevity, merely because it is expressed in Latin. When used on behalf of a plaintiff it is generally a short way of saying: 'I submit that the facts and circumstances which I have proved establish a prima facie case of negligence against the defendant'. It must depend upon all the individual facts and the circumstances of the particular case whether this is so."

As I have already shown above, the evidence of A. Ws. 4 and 7 does justify in the instant case an inference establishing a prima facie case of negligence against the driver of tempo bearing registration No. BRP 7809.

12. I accordingly hold that the appellant has succeeded in establishing that his son Dharamdeo died on account of the accident arising from the collision of his cycle with the tempo taxi bearing Reg. No. BRP 7809 by reason of the rash and negligent driving of its driver. There can

thus be no escape from the vicarious liability of respondent No. 1 for the act of the driver who was in his regular employment nor can respondent No. 2 with which the vehicle was admittedly insured at the time of the accident avoid such liability.

13. It was argued rather vehemently by Mr. S. C. Ghose, learned counsel for respondent No. 1, that the application before the Claim Tribunal was not maintainable as the driver of the tempo in question had not been a party to the case. It was submitted that if respondent No. 1 was to be saddled with the liability for the rash and negligent driving on the part of the driver who was in his employment, such liability could be fastened only when the driver concerned had been made a party to the proceeding, who would have been at liberty to refute the case made out against him in absentia. The non-joinder of the driver Chandrika Lal, according to learned counsel for respondent No. 1, was fatal to the appellant's claim application before the Tribunal. This argument proceeds, in my view, upon a misconception of the law with regard to vicarious liability or in relation to the law of joint tortfeasors. The complete answer to the point raised by Mr. Ghose can well be given in the words of Winfield on Tort, 7th Edition, Chap. 29, at page 762—

"Thus, I am liable for the torts of my servant committed in the course of his employment, and generally I alone am sued because I alone am worth suing, but of course he is in general personally liable and he can be sued separately; or, as the law regards us as joint tortfeasors, we can be sued jointly. It is no excuse for me that I may have forbidden him to do the act; so long as he does it in the course of his employment we are joint tortfeasors."

And again, at page 764 it has been said—

"The liability of joint tortfeasors is joint and several, each may be sued alone, or jointly with some or all the others in one action; each is liable for the whole damage, and judgment obtained against all of them jointly may be executed in full against any one of them."

It is thus futile to argue that in the absence of the driver Chandrika Lal, the claim application of the appellant is not maintainable.

14. This then brings us to the question of quantum of damages to which the appellant can be said to be entitled. A. W. 3, Badri Narain, who is the appellant himself, has deposed that at the time when his son died as a result of the accident in question Dharamdeo was reading in B.A. final year and he was a student of the local B. N. College. Apart from prosecuting his own studies, he used to derive an income of Rs. 200 per month by doing some tuition work. He has further stated that he had to incur an expenditure of about Rs. 500 on the treatment of Dharamdeo after the accident. He has, however, stated in course of his cross-examination that he had no written proof regarding the income of Rs. 200 per month of the deceased Dharamdeo. He has further said that he had no cash memos, etc., for the expenses over the treatment and medicines of Dharamdeo after the accident. A. W. 8, who is an Assistant in the office of B. N. College, has proved that a student named Dharamdeo Prasad was studying in B.A. Part II of the college. A. W. 10, Om Prakash, has pledged his oath to say that Dharamdeo Prasad used to teach his sons and daughter and he was paying him a sum of Rs. 40 per month. He has also stated that Dharamdeo used to tell him that he was doing tuition work at other places also. He has denied the suggestion in the cross-examination that he had come to depose falsely at the instance of the applicant Badri Narain. There is nothing in his cross-examination to suggest as to what interest this particular witness had to support any false claim of the applicant. I see no reason not to accept the evidence that at the time of his death on account of the accident Dharamdeo was aged about 20 years. Here, it may be taken note of that the applicant Badri Narain Prasad was aged 47 years on the date of the accident 1968 as, in course of his deposition, i. e., 1st of July, 1972 his age was 51 years. I also see no reason to disbelieve the evidence that on the date of death of his son, Badri Narain was aged about 47 years and further that at that time Dharamdeo was earning from tuition about Rs. 200 per month. Although the life expectancy of the deceased Dharamdeo, who was a healthy young man can well be taken to be 40 years since he would have normally been expected to live up to the age of 60, so far as Badri Narain is concerned, his life expectancy can be taken to be only 13 years as he was aged 47 at that time. It can normally be expected that out of the sum

of Rs. 200 that the deceased Dharamdeo was earning, he would have been saving at least half of the sum, namely, Rs. 100 per month, so that for the 13 years of the loss on the basis of expectancy of life of Badri Narain at the rate of Rs. 1,200 per annum (i.e., Rs. 100 per month), the amount of compensation can well be calculated at Rs. 15,600/-. Giving a discount of 10 per cent. as deduction towards chances, Rs. 1,560 may well be deducted from out of the sum of Rs. 15,600. That will bring a net amount of Rs. 13,040. The quantum of damages of compensation to be awarded to the appellant can, therefore, safely be taken to be Rs. 13,040 which the appellant has shown to be a reasonable probability of pecuniary advantage that he has lost. I have taken into account the well settled mode and manner of ascertainment of damages in fatal accident cases which have been summed up by Viscount Simon in the case of Nance v. British Columbia Electric Rly. Co. Ltd. (1951 AC 601). The tests which have been taken into consideration for the ascertainment are (i) first estimate what was the deceased man's expectation of life if he had not been killed when he was and (ii) what sums during those years he would have probably applied to the support of the dependent. And, in fixing the expectation of life of the deceased regard has been had not only to his age and bodily health but also to a premature termination of his life by a later accident, which has been termed by me as 'deduction towards chances'. This is the test which has been accepted as valid by the Supreme Court in the case of C. K. Subramonia Iyer v. T. Kunhikuttan Nair (AIR 1970 SC 376). I do not propose to award any compensation on account of the alleged expenses incurred over the treatment and medicines of the deceased Dharamdeo, for it is doubtful in the absence of any cash memos or papers of the hospital to show with any amount of certainty as to what amount, if at all, had been so expended by the appellant over the treatment of and medicines for his son Dharamdeo who died shortly after the accident in the Rajendra Surgical Block of the Patna Medical College Hospital.

15. I would accordingly allow this appeal, set aside the judgment and order of the Motor Accidents Claims Tribunal and decree the claim of the appellant (applicant) for a sum of Rs. 13,040. The liability of the owner (respondent No. 1) and the insurance company (respondent No. 2) with regard to the amount awarded in favour of the appellant will be joint and several and the appellant would be at liberty to proceed against either or both of them to realise the said amount. In the circumstances of the case, I shall, however, make no order as to costs.

B. P. JHA, J.:— I agree.

Appeal allowed.

AIR 1979 PATNA 210

BIRENDRA PRASAD SINHA, J.

Palat Sahni and another, Petitioners v. Ram Padarath Singh and others, Respondents.

Civil Writ Jurisdiction Case No. 2091 of 1978, D/- 20-2-1979.

Bihar Panchayat Election Rules (1959), Rule 31 — Right to vote — Does not include right to exercise franchise at particular booth of voters choice. (Constitution of India, Article 326.)

A person residing in an area of a Gram Panchayat has surely right to become an elector. The rules provide that if his name is not included in the electoral roll he may file objection before the prescribed authority, but after becoming voter there is no such right that the elector must have particular place or booth of his choice. A right to vote and right to vote at particular place are two different things. The former is substantive and statutory right, whereas the latter is a question of convenience and it does not confer a right on voter. Sufficient safeguards have been provided by Rule 31 to see that the convenience of the voters is taken into consideration by the authorities empowered to select the booths. Therefore election held on the basis of polling station selected under Rule 31 could not be held to be illegal and without jurisdiction on the ground that no opportunity was given to the voter and the candidates to file any objection in the matter of selection of booths. AIR 1965 Pat 459 and AIR 1957 SC 304, Disting. (Para 4)

Anno: AIR Comm., Constitution of India (2nd Edn.), Art. 326, N. 1.

Cases Referred: Chronological	Paras
AIR 1965 Pat 459 : 1965 BLJR 344	3
AIR 1957 SC 304	3

EW/EW/C371/79/BBB/DVW

Kanhaiya Prasad Verma and R. N. Roy, for Petitioners; Kapileshwar Prasad Yadav and Akhileshwar Pd. Singh, for Respondents.

ORDER :— By this application under Articles 226 and 227 of the Constitution of India, the entire election of Dandari Gram Panchayat in the district of Begusarai has been challenged. Respondents 1 to 10 were elected to various offices of the Gram Panchayat on 28-5-1978.

2. The only point, which has been urged by Mr. K. P. Verma, learned counsel appearing on behalf of the petitioners, is that Rule 31 of the Bihar Panchayat Election Rules, 1959, (hereinafter to be referred to as 'the Rules') is ultra vires Article 14 of the Constitution and any election held on the basis of the polling stations selected under Rule 31 must be held to be illegal and without jurisdiction. It has been stated that for four wards of the Panchayat only two booths were selected and no opportunity was given to the voters and the candidates to file any objection in the matter of selection of booths.

3. Rule 31 of the Rules reads as under :—

"(1) The Election Officer, and not an officer to whom he delegates his powers under Cl. (g) of Rule 2 shall select one or more polling stations, as may be considered by him, for each Panchayat and shall obtain the approval of the District Magistrate thereon. Once approved, the polling stations shall not be changed. The Election Officer shall publish the list of the polling station on his own notice board as also on that of the Panchayat at least two weeks before the date of actual poll.

(2) The Election Officer shall, in writing appoint a Presiding Officer and such number of Polling Officers to assist the Presiding Officer as he thinks necessary."

According to this, the Subdivisional Officer, who is the Election Officer under the Rules and not his delegate, is required to select one or more polling stations as may be considered necessary by him. The list is thereafter sent to the District Magistrate for approval. After it is approved by the District Magistrate it becomes final and is finally published on the notice board of the Election Officer and the Panchayat. The contention of Mr. Verma is that in a democratic State wherever right of a voter is affected, he should be given an opportunity of raising an objection. In support of his argument learned counsel relied upon a Bench decision of this Court in Umakant Singh v. Binda Choudhury (1965 BLJR 344) : (AIR 1965 Pat 459). In that case the question was whether Rule 3 of the Bihar Panchayat Samities and Zilla Parishad (Elections, Co-options and Election Petitions) Rules, 1963, was constitutionally valid. According to the Rules, the whole and sole basis of a person being elector for the purposes of the said election was the list of Secretaries obtained by the Returning Officer from the Assistant Registrar, Co-operative Societies. No procedure was prescribed for filing of any objection before any authority for the purpose of challenging the correctness of the list supplied by the Assistant Registrar, in respect of which various kinds of disputes could and did crop up. The disputes could be whether a particular Co-operative Society and its Secretary were included in the list or not; whether the person as the Secretary of the particular Co-operative Society was the Secretary or not or whether somebody else was its Secretary. No manner and forum were prescribed for the raising of any kind of dispute, which was bound to creep in in regard to the list of electors. Relying upon a decision of the Supreme Court in the case of the Chief Commissioner of Ajmer v. Radhey Shyam Dani (AIR 1957 SC 304) it was argued that R. 3 of the Rules was defective and invalid. In the case of the Chief Commissioner of Ajmer (Supra) the Supreme Court held that it was the essence of the elections that proper electoral rolls should be maintained and in order that a proper electoral roll should be maintained it is necessary that after the preparation of the electoral roll opportunity should be given to the parties concerned to scrutinise whether the persons enrolled as electors possessed the requisite qualifications. Unless that was done the obligation cast upon the authorities was not discharged and the elections held on such imperfect electoral rolls were invalid.

4. I do not understand how these cases are applicable to the present case. A person residing in an area of a Gram Panchayat has surely right to become an elector. The rules provide that if his name is not included in the electoral roll he may file objection before the prescribed authorities but after becoming a voter there is no such right that the elector must have a particular place or a booth of his choice. A right to vote and a right to vote at a particular place are two different things. The former is a substantive and statutory right whereas the latter is a question of convenience and it does not confer a right on a voter. It is true that convenience of the voters must be taken into consideration by the authorities empowered to select the poll-

ing booths. For that purpose, I think, sufficient safeguards have been given in Rule 31 itself. It is not a delegate Election Officer but the Subdivisional Officer himself who is required to select the polling booths. The matter does not become final there. That list goes for scrutiny before the District Magistrate and the District Magistrate is required to approve that list. When the District Magistrate is required to approve the list submitted by the Sub-divisional Officer, it implies that the District Magistrate will apply his mind and also may take into consideration any objection or suggestion placed before him. The function of the District Magistrate is not in the nature of Judicial or quasi judicial function but before approving the list he has to apply his mind. This, is my opinion, is sufficient safeguard so far as the convenience of the voters of a Gram Panchayat are concerned, but, as I have said above, it cannot be the elector's right to vote at a particular booth of his choice. His right is to become an elector and to exercise his franchise. If in the matter of exercising the franchise there is any obstruction from any quarter that will again become a question of fact which cannot be decided in a writ application. That question will have to be pleaded and proved in appropriate proceeding to show that the result of the election has been materially affected on account of such obstruction or interference.

5. Having given my anxious consideration to the facts of this case and the questions raised by learned counsel appearing for the petitioner I do not find any merit in this application. This application, accordingly, fails and is dismissed with costs. Hearing fee Rs. 100/-.

Application dismissed.

AIR 1979 PATNA 212

LALIT MOHAN SHARMA AND S. SHAMSUL HASAN, JJ.

Mathura Singh, Appellant v. Mathura Pd. Singh and others, Respondents.

A. F. O. O. No. 6 of 1975, D/- 7-2-1979.*

(A) Civil P. C. (5 of 1908), O. 9, R. 13 — Prevented by sufficient cause — On the date fixed defendant personally present in court — Defendant not going inside court room as there was strike of advocates and hence he could not get legal assistance — Held, defendant was prevented from appearing by sufficient reason. (Para 3)

Anno: AIR Comm., C. P. C. (9th Edn.), O. 9, R. 13, N. 19.

(B) Civil P. C. (5 of 1908), Order 9, Rule 13 — Application under — Existence of ex parte order is enough for maintainability of application.

For the application of the provisions of Order 9, Rule 13, what is necessary is that there should have been passed an ex parte decree, irrespective of the question as to whether the ex parte decree could in law have been passed or not. (Para 4)

Anno: AIR Comm., C. P. C. (9th Edn.), Order 9, Rule 13, N. 6.

Mukteshwar Singh, for Appellant; Pashupati Pd. Sinha, for Respondent No. 1; T. C. Nandi, D. R. Guardian, for Minor Respondents Nos. 3 and 4.

JUDGMENT:— The appellant has, in this appeal, challenged the decision of the court below rejecting his application under Order 9, Rule 13 of the Code of Civil Procedure. The suit was filed in Barh court by respondent No. 1 for a money decree amounting to Rs. 30,000/- and odd on the allegation that a sum of Rs. 24,000/- had been borrowed by the defendant No. 1 as the karta of his family in 1966. Other members of his family were impleaded as defendants 2 to 5, out of whom defendants 4 and 5 are minor and were placed by the court under the guardianship of a lawyer. The suit was taken up for hearing on 30-11-1972, when, the parties and their counsel were present in court. However, as the case had been called out late in the day, no evidence was led and the case was put down for further hearing next day. On the 1st of December, 1972, admittedly there was a strike by the advocates for the court in support of a certain political demand and no lawyer attended the court. The plaintiff, however, appeared in person and examined himself as a witness. Two other witnesses were also examined on his behalf without the assistance of a lawyer. Nobody appeared on behalf of the defendants and the court recorded an order in the order sheet, which is included in the paper book at page 13, that in the circumstances the proceeding had to be heard ex parte. Thereafter, the court below decreed the suit ex parte with costs against the defendants by a short judgment recorded in the order sheet. On the very next day, the defendant No. 1 filed, through his counsel, an application under Order 9, Rule 13 and Section 151 of the Code of Civil Procedure which was registered as a miscel-

*(From Order of A. B. Prasad, Sub. J., Barh, D/- 24-9-1974).

luneous case and has been, after contest, dismissed by the impugned order.

2. The court has stated in paragraph 9 of its judgment that admittedly there was a strike by the lawyers but held that in the circumstances the defendant cannot be said to have been prevented by any sufficient cause within the meaning of Rule 13 from appearing in the suit.

3. We have gone through the entire evidence led in the case by the parties. The appellant has examined seven witnesses including himself and their evidence fully established that not only the lawyers of Barh were on strike but their clerks also did not attend the court and did not do any pairavi in their cases. Several of the witnesses examined are lawyers' clerks themselves. The statement made by O. W. 2 Nawal Kishore Pd. Singh who is also an advocate's clerk that some of the clerks were taking steps by way of pairvi in their cases does not inspire confidence. According to the oral evidence of the plaintiff, the defendant No. 1 was personally present in court but still did not go inside the court room with the object of delaying the hearing of the suit. From the evidence it appears that the defendant was present at Barh on that date and it must be assumed that he attended the court. However, if he was not able to get assistance of his lawyers it cannot be said that he was not prevented by sufficient cause in not taking part in the trial of the suit in which a decree for such a large amount of money has been claimed. It is not suggested that defendant No. 1 is well versed in legal matters and could have conducted the trial of the suit by himself. In this circumstance we accept the evidence of A. Ws. and hold that defendant No. 1 was prevented from appearing and contesting the suit on 1-12-1972 by sufficient reason and on merits his application should be allowed.

4. Mr. Sinha, appearing for the plaintiff-respondents has contended that since the parties appeared on the 30th November, 1972, when the suit was taken up for hearing, the decree which has been passed in the case cannot be called an ex parte decree and consequently it must be held that the application under Order 9, Rule 13 is not maintainable. It is not possible to accept this argument, inasmuch as, the learned Subordinate Judge treated the proceeding on 1-12-1972 as ex parte proceeding and said so in express terms in the order sheet. In the judgment again the Court in express terms observed that an ex parte decree was being passed. The relevant portion of the judgment is at page 15 of the paper book. The argument of the learned counsel for the plaintiff leads to the conclusion that the court was in error in considering the proceeding ex parte on 1-12-1972 and in passing an ex parte decree on that account. For the application of the provisions of Order 9, Rule 13, what is necessary is that there should have been passed an ex parte decree, irrespective of the question as to whether the ex parte decree could in law have been passed or not. Since the court did in fact pass an ex parte decree it has to be held that the application under Order 9, Rule 13 was maintainable. Besides, the court failed to appreciate that the suit should not have been heard and decided ex parte against the minor defendants in absence of their guardian-ad-litem. It was the duty of the court to have appointed a fresh guardian if the guardian already appointed was negligent in his duty in representing the minors.

5. For the reasons mentioned above the appeal is allowed, the judgment of the court below is set aside, and the application of the appellant under Order 9, Rule 13 filed in the court below is allowed. The suit having been filed in 1968 should now be taken up for hearing expeditiously. There will be no order as to costs.

Appeal allowed.

AIR 1979 PATNA 213

S. ALI AHMAD, J.

Kedar Mahto and others, Appellants v. Chhathoo Singh and others, Respondents.

A. F. A. D. No. 514 of 1976, D/- 18-1-1979.*

Limitation Act (9 of 1908), Article 142 — Suit for declaration of title and recovery of possession — Plaintiff must prove his possession within statutory period.

In a suit for declaration of title and recovery of possession the plaintiff must prove his possession within the statutory period and cannot succeed on the basis of possession beyond the maximum limit prescribed by Article 142 of the Limitation Act. To take a contrary view will only mean violation of the provision as contained in Article 142 of the Limitation Act. AIR 1921 Pat 237 (FB), Rel. on. (Para 6)

Anno: AIR Comm., Lim. Act (1963) (5th Edn.), Arts. 64-65, N. 4.

*(From decision of Purushottam Jha 7th Addl. Sub. J., Patna, D/- 10-5-1976).

Cases Referred: Chronological	Paras
AIR 1957 Pat 92	5
AIR 1954 SC 355	5
AIR 1947 Pat 475	6
AIR 1921 Pat 237 (FB)	6

Kailash Roy and Kamla Pd. Roy, for Appellants; S. S. Asghar Hussain, Jagarnath Jha and Abhijit Sinha, for Respondents.

JUDGMENT:— This second appeal is by the plaintiffs, whose suit for declaration of title and recovery of possession with respect to 73 decimal of land fully described in the plaint has been dismissed by the lower appellate Court.

2. Shortly stated the case of the plaintiff-appellants was that plot No. 229 under Khata No. 22 was recorded in the name of Chuni Dhanuk, who was described as occupancy raiyat Bhawali in the Khatian. Chuni Dhanuk had two sons Mahadeo and Sheodhari. These two sons of Chuni Dhanuk came in possession of plot No. 229 on the death of their father. It is further said that on a partition between two brothers, plot No. 229 was allotted to the share of Mahadeo, who remained in exclusive possession till his death and after that his son, plaintiff No. 1 came in possession. With regard to plot No. 228, it is said that this plot was a ditch and was recorded as Garha ghairmazarua in the khatian. According to plaintiffs' further case, this plot was adjacent west to plot No. 229. The case of the plaintiffs further is that he and his ancestor filled up 19 decimal of plot No. 228 and amalgamated it with plot No. 229 and remained in possession till 13-8-1963 when they were dispossessed from 19 decimal of plot No. 228 and 54 decimal of plot No. 229. The suit, therefore, for declaration of title and recovery of possession with mesne profit was filed.

3. The defendants appeared and contested the suit. Their case, in short, was that plot No. 229 was the Bakast of the family of Jagdip Narain Singh of Daili, who, in the year 1314. Fs. gave plot No. 229 along with other lands to Chuni Dhanuk on Bhawali rent. Chuni Dhanuk abandoned the land which again came in possession of the landlord. With respect to plot No. 228 the case of the defendants was that the landlord filled up 25 decimals of this plot which was a ditch and amalgamated it with plot No. 229 and brought it under cultivation. Further the defendants say that in the year 1350 Fs., the Maliks settled the whole of plot No. 229 and 25 decimal of plot No. 228 in their favour and realised rent up to four annas kist of 1368 Fs. whereafter the intermediary interest of the Maliks vested in the State of Bihar. The defendants also said that after the vesting of the zamindari, they are paying rent to the State of Bihar and are in cultivating possession of the land in question.

4. The trial court on a consideration of the evidence adduced in the case held that the entry in respect of plot No. 229 was correct and Chuni Dhanuk was occupancy raiyat of the holding. It also held that the plaintiffs and the ancestor were in possession of the disputed land from the time of the survey until they were dispossessed on 13-8-1963. With respect to plot No. 228, the trial court was of the view that 19 decimal of this plot was in possession of the plaintiffs for the last 25 to 30 years. On these findings, the trial court held that the defendants' story of settlement was not correct and that they had also failed to prove acquisition of their title by adverse possession. The suit was accordingly decreed. The lower appellate court affirmed the findings that the survey entry with respect to plot No. 229 was correct and that the defendants failed to prove their case with regard to abandonment by Chuni Dhanuk. The court of appeal below, however, allowed the appeal and dismissed the suit holding that the plaintiffs had failed to prove their possession over the suit land within 12 years of the institution of the suit and that the defendants had proved their title by adverse possession.

5. Mr. Kailash Roy, learned counsel for the appellants first submitted that the court of appeal below was wrong in holding that the defendants had proved their title by adverse possession. In support of his contention learned counsel has referred to paragraph 26 of the Judgment wherein the court of appeal below has recorded the findings of adverse possession on the ground that admittedly the defendants are in possession and the plaintiffs have failed to prove their possession within 12 years. The inference of adverse possession drawn on the aforesaid fact is obviously wrong and Mr. Kailash Roy is absolutely right in saying that the finding of adverse possession is erroneous in law, but that really does not solve the difficulty of Mr. Roy. The suit was filed in the year 1963 and as such it will be governed by Art. 142 of the old Limitation Act, 1908. Mr. Roy, perhaps, being conscious of this Article 142 contended that admittedly plaintiff's ancestors were in possession of the disputed land at the time of the revisional survey. He, therefore, urged that in cases like this the principle of Article 142 will not be applicable as there is a presumption with regard to continuity of possession. The defendants, according to

him, therefore, should prove that the plaintiff was not in possession of the suit lands within 12 years. To support his contention, learned counsel referred to the case of Nathoo Lal v. Durga Pd. (AIR 1954 SC 355) and placed great reliance on the expression "the law presumes in favour of continuity of possession". This observation of their Lordships of the Supreme Court, in my opinion, was made in an entirely different situation. The trial court, the lower appellate court and the High Court had unanimously held that on the death of Laxmi, the plaintiff in that case, continued in possession of the house and the suit was within the period of limitation. This finding was challenged before the Supreme Court. Their Lordships rejected the argument and held that the unanimous finding could not be assailed and in that connection also observed, perhaps, to give strength to the finding of possession, that the law presumes in favour of continuity of possession. Mr. Roy also referred to the case of Tapesara Kuer v. Kalap Rajwar (AIR 1957 Pat 92) wherein Raj Kishore Prasad, J. (as he then was) noticed the observations made by their Lordships of the Supreme Court in the case reported in AIR 1954 SC 355 (Supra) and applied the principle to the facts of the case. So far as the case in hand is concerned, in my opinion, the presumption of continuity of possession cannot be of any assistance to Mr. Roy. If his argument is to be accepted then it will have to be presumed that the appellants remained in possession till 13-8-1963. Mr. Roy could not cite any case wherein presumption with respect to the date of the dispossession has been made in favour of a person, who alleged that while in possession he was dispossessed on a particular day.

6. Mr. S. S. Asghar Hussain, on the other hand, has referred to the decision in the case of Ghoghar Raut v. Jagarnath Prasad Singh (AIR 1947 Pat 475). Meredith, J. (as he then was) rejected a similar argument in these words :—

"The general presumption of continuance of an existing state of affairs would not help him, and he would have independently to prove his possession within the statutory period. How then can he be in a more favourable position where he relies merely on the presumption of the Record of Rights to show that he was in possession in 1896? The general presumption, if it could carry him to success, would equally carry him to success in both cases, but when the Full Bench says that it cannot carry him to success even if he has fully established his possession outside the statutory period, then how can it avail merely because he relies upon the Record of Rights. The actual presumption of correctness which the Record of Rights carries is merely that he was in possession at the time the record was made. Anything further depends on the general rule of evidence, to which I have referred, and I can only interpret the Full Bench decision as holding that general rule of evidence in favour of presuming the continuity of things shown to exist at a prior date cannot be availed of in suits for ejectment."

I may only add that Meredith, J. came to the aforesaid conclusion on the basis of the case of Raja Shiva Pd. Singh v. Hira Singh (AIR 1921 Pat 237) (FB). With respect, I entirely agree with all that has been said by Meredith, J. In my view also, the plaintiff must prove his possession within the statutory period and cannot succeed on the basis of possession beyond the maximum limit prescribed by Article 142 of the Limitation Act. To take a contrary view will only mean violation of the provision as contained in Art. 142 of the Limitation Act.

7. Mr. Roy also urged that the findings regarding possession is against the weight of the evidence. It is not possible to reappraise the evidence in second appeal. No such illegality has been pointed out which may justify my interference with this finding.

8. I, therefore, see no merit in the appeal, which is dismissed, but in the circumstances of the case, there will be no order as to costs.

Appeal dismissed.

AIR 1979 PATNA 215

BIRENDRA PRASAD SINHA, J.

Umeshwar Sharma, Petitioner v. The Special Secretary, Education Department, Govt of Bihar and others, Respondents.

Civil Writ Jur. Case No. 1156 of 1977, D/-11-1-1979.

Bihar Madhyamik Shiksha Board Act, Section 63 (7) — Appeal under — Natural justice — Non-compliance with — Effect of — (Constitution of India, Art. 226).

Where in appeal by A under Section 63 (7) against the order reinstating B (the discharged clerk of a school), the appellate authority allowed A's appeal and directed termination of B while reinstating A and this appellate order was passed without giving any hearing to B (even though noticed), the appellate

order was, on the face of it, void as the same was passed in violation of natural justice. (Para 4)

Fundamentals of fair play require that the person concerned should be given an opportunity to represent his case before any order is passed against him. Even if the ultimate decision is substantially right, if the party has a right to be heard and he has been denied that right, a writ would go and the proceeding would be quashed. The authorities at least should be aware of the principles of audi alterem partem while hearing appeals as statutory bodies. (Para 6)

Anno: AIR Comm., Constn. of India (2nd Edn.), Art. 226, N. 59.

Cases Referred: Chronological	Paras
AIR 1974 SC 1471 : 1974 Cri LJ 1054	4
(1615) 77 ER 1271 Bagg's Case	4
(1605) 77 ER 326, Boswels' Case	4
88 ER 111, Dr. Bentley's Case	4

Balbhadra Prasad Singh, Nagendra Rai and Ram Pravesh Sharma, for Petitioner; Dayanand Singh (Standing Counsel No. 4) and Shekhar Srivastava (Jr. Counsel to Standing Counsel No. 4), for Respondents.

ORDER:— In this application under Articles 226 and 227 of the Constitution of India, a prayer has been made for the issue of a writ of certiorari quashing Annexure 1 to this application. Annexure 1 is an order dated 13-6-1977 passed by respondent No. 1, the Special Secretary, Education Department, Government of Bihar.

2. The facts relevant for the decision of this case are stated hereunder. On 11-2-1961, the petitioner was appointed as a clerk in High School, Pitwans, in the district of Patna. On 14-5-1971 he was discharged from his service by the acting Head Master of the School. It appears that he filed appeals and representations before the authorities concerned and ultimately he was reinstated in his post on 31-1-1977 by respondent No. 2, Adhyaksha, Bihar Madhyamik Shiksha Board, Patna (vide Annexure 8). Respondent No. 6, Bijay Narain Sharma, one of the affected persons filed an appeal against the order of respondent No. 2 before respondent No. 1. Such an appeal is provided under Section 63 (7) of the Bihar Madhyamik Shiksha Board Act. The petitioner was impleaded as respondent No. 2 in the said appeal. He also received notice from respondent No. 1 and appeared before him. On 7-5-1977 respondent No. 1 passed the following order which I would like to quote:—

"Lawyer on behalf of the appellant appeared. Sri H. N. Prasad, Assistant Secy. of the Board also appeared. Lawyer on behalf of the respondent party No. (2) Sri Umeshwar Sharma also came to present his case. He said that notice has been sent to him. Checking of the notice I find that contrary to the practice followed by this court notice had wrongly been sent to the Respondent No. (2) by my P. A. (Sri Madhav Pande) on behalf of this court, for which he was cautioned. Since it is an appeal against the Board's order, the notice is sent only to the Board, which in any case has to justify and defend its own order. Thereby the interests of the respondent No. 2 is automatically protected. It is not, therefore, necessary to complicate the matter before this court by involving all interested persons and thereby lengthen the proceeding. The main issue to be decided by this court is to see how far the Board has been just and proper in taking the decision so far as the appellant's case is concerned. I am therefore, not entertaining the petition on behalf of respondent No. 2."

Ultimately, without hearing the petitioner, respondent No. 1 allowed the appeal of respondent No. 6 and directed the Madhyamik Shiksha Board to terminate the service of the petitioner and reinstate respondent No. 6, Bijay Narain Sharma.

3. Mr. Balbhadra Prasad Singh, learned counsel appearing for the petitioner, has raised the following two points:—

(i) that the order at Annexure 1 has been passed against the principles of natural justice and is vitiated by the decision of respondent No. 1 himself at Annexure 9 not allowing the petitioner to be heard in the matter although the order under appeal related to the restoration of the petitioner in the post. The petitioner alone was vitally interested in the matter and no order could be passed without giving him a hearing;

(ii) that the order of the Chairman of the Madhyamik Shiksha Board was final and there was no provision of appeal to the Secretary in respect of such orders passed by the Chairman.

4. The doctrine of natural justice is the result of a natural evolution. This phrase is used in a popular sense and must not be taken to mean that there is any justice natural among men. It is the result of civilization and not barbarism, refinement and not savagery. It is not only the common law world that pays it respect, but all civilized people. In English law, its necessity was recognised and insisted upon in the famous cases of Boswel (1605-77 ER 326), Bagg (1615-77 ER 1271) and Dr. Bentley (88 ER 111). In the case of Dr. Bentley (Supra) Fortes J. observed. "I heard a learned civilian

say, that God himself would not condemn Adam for his transgression until he had called him to know what he could say in his defence." Today the fear that writ of certiorari invokes in public administration much depends upon the doctrine of natural justice. In the case of Nawabkhan Abbaskhan v. State of Gujarat (AIR 1974 SC 1471), Krishna Iyer, J. speaking for the court aptly summarises it in the following words (at p. 1475)—

"In Indian constitutional law, natural justice does not exist as an absolute jural value but is humanistically read by courts into those great rights enshrined in Part III as the quintessence of reasonableness. We are not unmindful that from Sneca's Medea, the Magna Carta and Lord Coke to the constitutional norms of modern nations and the Universal Declaration of Human Rights it is a deeply rooted principle that 'the body of no free man shall be taken, nor imprisoned, nor disseised, nor outlawed, nor banished nor destroyed in any way' without opportunity for defence and one of the first principles of this sense of justice is that you must not permit one side to use means of influencing a decision which means are not known to the other side."

Here, respondent No. 1 who is the special Secretary in the Education Department having a jurisdiction over the matter seems to have exercised it disregarding the obligation to give a hearing before passing an order which vitally affects the petitioner. Such an order is, on the face of it, void. The petitioner has the fundamental right of being heard and it is needless to emphasise that before any order is passed affecting his rights, he should be given due hearing. If any person was vitally interested in this matter before respondent No. 1, it was the petitioner. Respondent No. 1 was entirely wrong in saying that the interest of the petitioner was automatically protected by the Board which also was appearing before him. It is not a question of lengthening the proceeding by hearing the parties concerned. It is a question of doing justice. Justice must not be only done, it also must appear to have been done. Fundamentals of fair play require that the person concerned should be given an opportunity to represent his case before any order is passed. Even if the ultimate decision is substantially right, if the party has a right to be heard and he has been denied that right, a writ would go and the proceeding would be quashed. The authorities at least should be aware of the principles of audi alteram partem while hearing appeals as statutory bodies.

5. Learned counsel appearing for the State has fairly not supported the impugned order.

6. In view of my decision on point No. 1, I do not propose to decide point No. 2 raised by learned counsel for the petitioner. It will be open to the petitioner to raise this point before the appropriate authorities.

7. In the result, this application succeeds. The order dated 13-6-1977 passed by respondent No. 1 (Annexure 1) is accordingly quashed. The case is sent back to the appellate authority, respondent No. 1, for rehearing the appeal after giving opportunity to the petitioner to be heard. In the facts and circumstances of this case, there shall be no order as to costs.

Application allowed.

AIR 1979 PATNA 217

S. K. JHA AND SIVANUGRAH NARAIN JJ.

M/s. Ashok Industries and others, Petitioners v. State of Bihar and others, Respondents.

Civil Writ Jur. Case No. 496 of 1977, D/- 4-1-1979.

(A) Bihar Agricultural Produce Markets Act (16 of 1960), Ss. 27 (3) and 2 (1) (a) — Whole pulses (Dalhan) processed into split Dal — Levy of market fee on purchase of whole pulses — Sale of split dal, held, not liable to market fee again.

Any of the pulses or grains, as distinct agricultural produce, enumerated in the Schedule, if once charged to market fee, which has been levied thereon at one stage or the other within a market area, cannot be subjected to levy of market fee twice over in the same market area even if the same has undergone a change after processing. The matter will certainly be different if in one form a foodgrain is notified as a distinct agricultural produce while in another form, after its being processed, it is enumerated as another distinct notified agricultural produce. (Para 5)

Thus if gram or Arhar or Masur, etc. falling under the caption 'pulses', be it either in the processed or non-processed form, at one stage has been subjected to levy of market fee, merely its undergoing a change after processing will not

make it liable to a further charge of the market fee within the same market area. (Paras 5 and 8)

(B) Constitution of India, Art. 226 — Guidelines for assessment of market fee found to be illegal — Writ petition challenging such guidelines — Maintainable — Actual assessment orders not relevant.

Illegal guidelines in the matter of assessment laid down by the Director of the Bihar State Agricultural Marketing Board for the Marketing Committee functioning under the Bihar Agricultural Produce Markets Act (16 of 1960) — Writ petition challenging such guidelines, held, maintainable even though no assessment orders produced — Petitioners need not wait till assessment orders by the market committee which is bound to follow the guidelines, are actually passed. (Paras 6 and 9)

Anno: AIR Comm. Const. of India (2nd Edn.), Art. 226 N. 144 (B).

Cases Referred: Chronological Paras

AIR 1971 SC 870 : 1971 Tax LR 391 9

AIR 1954 SC 403 9

Braj Kishore Prasad No. 2 and G. C. Bharuka, for Petitioners; Ram Balak Mahto, Govt. Advocate, for Respondents.

S. K. JHA, J.:— In this application under Arts. 226 and 227 of the Constitution of India the petitioners have prayed for appropriate writ/order/direction quashing the communication dated 25-9-76 from the Director Marketing, Bihar State Agricultural Marketing Board, Patna, (respondent No. 2). A copy of the impugned communication has been marked Annexure '2' to the writ application.

2. The facts are uncontroverted. On the materials on the record the established facts are that petitioners 1, 2 and 3 are the partnership firms owning Dal mills and petitioner Nos. 4 to 6 are the respective partners of the aforesaid firms. The petitioners are carrying on milling business in pulses within the local limits of the Barh Agricultural Produce Market Area. The Agricultural Produce Market Committee, Barh, through its Secretary, has been impleaded as respondent No. 3. The petitioners are all licensees under the provisions of the Bihar Foodgrains Dealer's Licensing Order, 1967, as well as under those of the Bihar Agricultural Produce Markets Act 1960, (hereinafter to be referred to as 'the Act') and the Rules framed thereunder.

3. The petitioners purchase whole pulses (Dalhan), inter alia, from within the market area concerned and after processing the same into split Dal they sell the same. In Para. 4 of the petition it has been asserted that the respondent market committee through its Secretary under the threat of penalty, seizure of stocks and books of account, and prosecution, is realising market fee from the petitioners' firms on the purchase of whole pulses (Dalhan) as well as on sale of pulses processed by them, which means the split pulses and after the Dalhan has been processed. On 28-8-75 the petitioners Nos. 2 and 3 along with some other firms of the area in question filed an application before the Chairman of the Market Committee objecting to the realisation of market fee on the whole grains as well as split pulses produced out of whole grains. The matter was heard at length several times by the Chairman but no final decision was given in the matter and the Secretary of the Committee (respondent No. 3) was regularly realising market fee on both whole grains and split grains. Under these circumstances an application was filed on 31-8-76 by the Secretary, Vanijya Parishad, Barh, on behalf of the Dal Mill owners of the area, including the petitioner firms, before the Chairman of the Bihar State Agricultural Marketing Board, Patna, requesting him to clarify the legal position as to whether market fee is payable both on whole grains as well as on split grains. A copy of the application has been marked Annexure 1. In response thereto by the impugned letter dated 25-9-76 (Annexure 2) respondent No. 2 wrote back saying "if notified agricultural produce like Arhar, Gram, Paddy, Khesari, Masur and oil seeds are purchased within the market area and are processed and even if it is sold in the same market area, market fee is payable on both the points.

4. The grievance of the petitioners is that in view of the provisions of S. 27 (3) of the Act read with S. 2 (a) thereof and item 2 of the Sch. II appended to the Act, the whole pulses or the whole grains in question once having been subjected to market fee under the Act could not be so subjected to twice over in the same market area on account of the clear inhibition given in Sec. 27 (3) of the Act. That at once necessitates a reference to the relevant provisions of S. 27 of the Act. S. 27, which is the charging section, lays down in sub-s. (1) that the market committee shall levy

and collect market fees on the agricultural produce bought or sold in the market area at a certain rate. Sub-sec. (2) enjoins that the market fee chargeable under sub-sec. (1) shall be payable by the buyer, in the manner prescribed by the Rules. Sub-sec. (3), which is the most relevant for our purpose in the instant case, runs thus:—

"The fee chargeable under sub-s. (1) shall not be levied more than once on a notified agricultural produce in the same notified area."

The language of sub-sec. (3) is plain enough and there can be no other inference but that the fee chargeable under sub-sec. (1) on a notified agricultural produce cannot be levied more than once in the same notified area. This then brings us to the definition of the expression "agricultural produce" first. The term "agricultural produce" has been defined in S. 2 (1) (a) of the Act, which reads as follows:—

"'agricultural produce' includes all produce, whether processed or non-processed of agriculture, horticulture, animal husbandry and forest specified in the Schedule."

It is not in dispute that the notified agricultural produce, referred to in Section 27 (3) of the Act means an agricultural produce as defined in S. 2 (1) (a) of the Act, which, in its turn, means "in a form of processed or non-processed agricultural produce specified in the Schedule." So far as the Schedule is concerned, item No. II captioned 'Pulses' enumerates the pulses which can be treated as notified agricultural produce in so far as the pulses are concerned. The objects enumerated under the caption 'Pulses' in item II of the Sch. are (1) Gram (2) Arhar (3) Masur (4) Urd or Kalai (5) Khesarf (6) Mung (7) Dry peas (Matar or Karao) (8) Kulthi (9) Cowpea seed (dry). In so far as the Schedule is concerned, under the heading 'Pulses' no distinction has been drawn between whole pulses, namely, Dalhan and the split pulses, which, we ordinarily treat as the objects for direct human consumption. From the definition of 'agricultural produce' in S. 2 (1) (a) of the Act, already extracted above, it is clear that all the pulses enumerated under item II referred to above, whether whole or processed must be treated as notified agricultural produce. To give a concrete example, when the item 'gram' is mentioned at serial No. 1 of item No. II in the Sch. it means gram as a whole with its shells which will be merely a form of Dalhan. It will also mean processed gram, which we ordinarily call 'gram pulse' or 'Chana Dal'. Both the objects — gram as a whole or split gram after being processed and made fit direct for human consumption as an item of pulse — are covered under the same notified agricultural produce, namely, gram; so also with regard to the other pulses enumerated under the caption 'Pulses', like Arhar, Masur, etc. There can be no doubt, therefore, that the market committee is vested with the power under the charging S. 27 of the Act to levy and collect market fees within the same notified area only once for any of the pulses enumerated under item II of the Sch. If, for instance, Arhar in its original shape with its shells is already subjected to levy of market fee in a market area, after its being processed into Arhar Dal it remains the same notified agricultural produce within the meaning of S. 2 (1) (a) of the Act. Manifestly, therefore, S. 27 (3) of the Act is a clear bar to the charging or levying of any market fee chargeable under sub-sec. (1) more than once in the same notified area. The stand of respondent No. 2 or for that matter, the market committee that "if notified agricultural produce like Arhar, Gram, Paddy, Khesari, Masur and oil seeds are purchased within the market area and are processed and even if it is sold in the same market area, market fee is payable on both the points" cannot, therefore, be countenanced in law. Such a construction will be in clear contravention of the express statutory provision contained in S. 27 (3) of the Act. Annexure '2', therefore, has to be held to be illegal and based on a wrong construction of the relevant statutory provisions.

5. The Government Advocate, who appears for all the three respondents, could not combat the position in law that any of the pulses or grains, as distinct agricultural produce, enumerated in the Schedule, if once charged to market fee, which has been levied thereon at one stage or the other within a market area, cannot be subjected to levy of market fee twice over in the same market area even if the same has undergone a change after processing. The matter will certainly be different if in one form a foodgrain is notified as a distinct agricultural produce while in another form, after its being processed, it is

enumerated as another distinct notified agricultural produce. For instance, under the heading 'Cereals' in Caption I of the Schedule we find paddy, rice and Chura as having been specified as three distinct agricultural produces; so also wheat, wheat Ata and Maida, have been distinctly enumerated and so notified. Similar is the case with the gram Besan, gram Sattu, etc. But that is not the question here. The petitioners have asserted that the same notified agricultural produce, which has been subjected to levy of market fee within the Barh Market Area, has been and is being sought to be subjected to levy of market fee twice over after it has been processed, although in the processed form it is not identified in the Schedule as a distinct agricultural produce. There can thus be no scope for the argument that if gram or Arhar or Masur, etc. falling under the caption 'pulses', be it either in the processed or non-processed form, at one stage has been subjected to levy of market fee, merely its undergoing a change after processing will make it liable to a further charge of the market fee within the same market area.

6. The learned Government Advocate raised a technical objection to the maintainability of this application. He submitted, rather half-heartedly, that the petitioners should not be given any relief in this writ application since they have not produced any illegal assessment order passed by the market Committee. This is a point stated merely to be rejected. As already referred to earlier, in para. 4 of the petition there is a clear statement and assertion by the petitioners that the market committee under the threat of penalty, seizure of stocks and books of account and prosecution is realising market fee from the petitioners on the purchase of whole grains as well as on sale of pulses processed by them. There is no counter-affidavit controverting this fact. Furthermore, the Director Marketing, Bihar State Agricultural Marketing Board, Patna, has already laid the guideline, which, I am sure, cannot be overruled by the market committee which makes the assessment. The test in such cases is not to see as to whether any illegal assessment order has been passed before the writ jurisdiction of this Court can be invoked, but, as to whether the foundation on which the jurisdiction of the assessing authority rests, is to be found in the statute or not, and, if that is not so, then even if there is real or imminent threat to the petitioners' deprivation of right to property under part III of the Constitution, the writ jurisdiction of this Court will not be shut to such a person aggrieved for the purpose of going into protracted litigation, suffering harassment and then coming to this Court for redressal of the wrong done to him. It is well settled that though a writ of prohibition or certiorari would not issue against an executive authority at all, the High Court has power to issue, in a fit case, an order prohibiting an executive authority from acting without jurisdiction. Where such action of an executive authority acting without jurisdiction is likely to subject a person to lengthy proceeding and unnecessary harassment, the High Court would issue appropriate writ or direction to prevent such consequences by way of a writ. It cannot be doubted that the market committee while assessing market fee is acting quasi-judicially. It also cannot be doubted that it performs executive functions and the performance of such executive functions far outweighs the judicial approach in the matter of assessment, only more so in the instant case, since no less a person than the Director of the Bihar State Agricultural Marketing Board seems to have laid down a clear but illegal guideline for the market committees to follow. If such guideline on a clearly wrong interpretation of the provisions of the statute is to be sustained it would be subjecting the petitioners to suffer by way of wrong assessment, harassment and protracted litigation, and then only permit them to invoke the writ jurisdiction of this Court. The petitioners have been subjected in past and are being subjected in the present, and as Annexure 2 would show, they are likely to be deprived of their property without any authority of law in future. This Court, in my view, shall not sit idle to watch the harassment to which the petitioners or persons of that category are put before this Court can come to the rescue of such aggrieved persons whose fundamental rights are in jeopardy both in substance and in reality as well as in imminence.

7. For the foregoing reasons, I think, the petitioners' application is well merited and it must succeed and it is, accordingly, allowed, and the correspondence, issued to the petitioners by Respondent No. 2, as contained in Annex-

are "I giving a wrong exposition of the charging section of the Act is quashed, and the respondents are hereby commanded to forbear from levying or charging market fee twice over on a distinct identifiable notified agricultural produce as given in the Schedule. If once levy has already been made on such a commodity in one form or the other, then the respondents are directed not to do so over again after such agricultural produce although having undergone a change by being processed, still falls within the same category of the distinct notified agricultural produce as pulses as enumerated in Caption II of the Schedule. There shall, however, be no order as to costs.

S. NARAIN, J.:— 8. I agree. But as the question of law raised is one of first impression, I wish to add few words of my own. Sub-sec. (3) of Section 27 of the Bihar Agricultural Produce Markets Act 1960, (hereinafter to be referred to as 'the Act') in clear and unambiguous terms prohibits the levy of fee chargeable under sub-sec. (1) thereof "more than once on a notified agricultural produce in the same notified area." There is no doubt that if the averments in the petition, which are not controverted, are accepted, the fee chargeable under sub-sec. (1) has been levied or is threatened to be levied more than once in the same notified area. The crucial question, therefore, is whether it is being levied more than once on a notified agricultural produce within the meaning of the expression as used in S. 27 (3) of the Act. It is obvious that a notified agricultural produce in sub-sec. (3) means the same notified agricultural produce. What has, therefore, to be determined in the present case is whether pulses, like gram, Arhar, etc. in its original state are the same pulse after being processed into split pulse is the same agricultural produce. In my opinion, the answer must be in the affirmative. The words used are 'agricultural produce'. There can be no doubt that considered as agricultural produce, pulse in the natural state and the same pulse split after being processed are the same agricultural produce. This conclusion is re-enforced by the provisions of the Act itself, which, as has been pointed out by my learned brother, merely mentions the different kinds of pulses in Item II of the Schedule to the Act and the expression 'gram, Arhar, etc. in that Schedule, includes gram, Arhar, etc. either whole or split after processing.

9. As regards the preliminary objection raised, that also is completely untenable. It is true that so far as the fee assessed is concerned, the petitioners could have taken recourse to the procedure provided in the Act itself. But it is well settled that a threat to realise a tax without authority of law from a person is a sufficient infringement of his fundamental right under Art. 19 of the Constitution and gives him a right to invoke the jurisdiction of this Court under Art. 226 of the Constitution. See the decision in Himmatlal Harilal Mehta v. State of Madhya Pradesh (AIR 1954 SC 403) in which the Supreme Court reversing the judgment of the Nagpur High Court directed the issue of an appropriate writ restraining the authorities from imposing or authorising imposition of sales tax on the appellant in exercise of its authority under the provisions of the taxing statute, which was ultra vires the Constitution even though no proceeding for assessment had been initiated. A similar view was expressed in Coffee Board, Bangalore v. Joint Commercial Tax Officer, Madras (AIR 1971 SC 870) in which it was observed that demand of tax not backed by valid law is a threat to property and this gives rise to a right to move the Supreme Court under Art. 32 and the person threatened is not compelled to wait or go through the lengthy procedure of appeals, reference, etc. In the present case on the averments in the petition, which have to be accepted as they have not been controverted, the petitioners have been compelled to pay market fee twice on the same notified agricultural produce within the same market area. And in view of the letter (Annex. 2 to the writ petition) of the Director, Bihar State Agricultural Marketing Board, Patna, upholding the right of the market committee to levy such fee, it must be held that there is a real and imminent threat of levy of market fee more than once on the same notified agricultural produce in the same market area. It is true that the proceedings for assessment have not yet been initiated but that they will be is not in doubt and in view of the exposition of law given by the Director of the Bihar State Agricultural Marketing Board, in response to the letter addressed by the Vanijya Parishad to the Chairman, Bihar State Agricultural Marketing Board, who un-

der S. 27C of the Act is vested with the plenary powers of revision of the order passed by any authority under the Act, it will be idle to expect the assessment sub-committee to refuse to make assessment in accordance with the exposition of law contained in that letter, which, in essence, may be said to represent the opinion of the Chairman of the Board also, as the exposition was given in reply to the letter addressed to the Chairman of the Board itself.

Petition allowed.

AIR 1979 PATNA 222

B. P. JHA AND S. K. JHA, JJ.

Ahmad Raza Khan, Petitioner v. Bhola Prasad, Opposite Party.

Civil Revn. No. 408 of 1977, D/- 24-8-1978.*

Bihar Buildings (Lease, Rent & Eviction) Control Act (16 of 1977), Sec. 1 (3) Second Proviso — Proceeding for eviction taken under Act of 1947 — Order under S. 11A of the Act of 1947 passed on 12-2-1977 — Order held to be valid — (Bihar Buildings (Lease, Rent and Eviction) Control Act (3 of 1947), S. 1 (3)). AIR 1978 Pat 207, Overruled.

The plaintiff-landlord filed a suit for eviction of defendant-tenant. During the pendency of the suit, the plaintiff filed an application on 4-6-1974 under S. 11A of the Bihar Buildings (Lease, Rent and Eviction) Control Act, 1947 (Bihar Act III of 1947) for directing the defendant to deposit arrears of rent. On 12-2-1977 the Court directed the defendant under S. 11A of the 1947 Act to deposit arrears of rent in respect of the suit premises. The 1947 Act expired by virtue of sub-sec. (3) of S. 1 on 31st March, 1976. The 1977 Act came in force on 8th Sept., 1977. Between 1st April, 1976 and 7th Sept., 1977 no Act was in force.

Held that by virtue of the saving clause as laid down in proviso (b) to sub-sec. (3) of S. 1, of the Act of 1947, even after the expiration of the 1947 Act it shall not affect any liability incurred under that Act. Hence if an order under S. 11-A had been passed on 12-2-77, it did not affect the liability of the tenant to pay the rent as directed under S. 11A of the 1947 Act. Cl. (c) of the proviso to sub-sec. (3) of S. 1 of the 1977 Act was also relevant in this connection. It provided that if any legal proceeding has already been instituted then that shall continue even after the expiration of the 1947 Act. In the present a case a legal proceeding in respect of S. 11A of the 1947 Act was instituted on 4th June, 1974 and as such it shall continue in respect of a liability even after expiration of the 1947 Act. On this basis also, the liability of the defendant shall continue even if the order was passed on 12-2-77. It was not a case of repeal of the statute but it was a case of continuance of a temporary law. Bihar Act III of 1947 was a temporary law which was in force up to 31st March, 1976. By virtue of Bihar Act 16 of 1977 the provisions of the 1947 Act shall be deemed to continue. AIR 1978 Pat 207 Overruled. 1978 BBCJ (HC) 297, Rel. on. (Paras 6, 7, 8, 9)

Cases Referred : Chronological Paras

AIR 1978 Pat 207 : 1978 BBCJ (HC) 214 4, 9, 11, 17
1978 BBCJ (HC) 297 4, 9, 11, 17
AIR 1975 Pat 283 16
AIR 1962 SC 663 14
AIR 1959 SC 352 14
AIR 1953 SC 244 : 1953 Cri LJ 1094 14
1952 AC 109 : (1951) 2 All ER 587, East End Dwellings Co. Ltd. v. Finsbury Borough Council 14

Naseem Ahmad and H. Anzar, for Petitioner; Arun Chandra Mitra, for Opposite Party.

B. P. JHA, J.:— Defendant (tenant) preferred this civil revision application against an order dated 12-2-77 passed by the Additional Munsif, 4th Court, Patna, in Title Suit No. 67/26 of 1973/76.

2. The plaintiff-opposite party filed a suit for eviction of defendant-tenant. During the pendency of the suit, the plaintiff filed an application on 4-6-74 under S. 11A of the Bihar Buildings (Lease, Rent and Eviction) Control Act, 1947 (Bihar Act III of 1947) (hereinafter to be referred to as the '1947 Act') for directing the defendant to deposit arrears of rent at the rate of Rs. 85/- per month. The defendant filed a rejoinder to that petition on 17-1-77. On 12-2-77 the court directed the defendant under Section 11A of the 1947 Act to deposit arrears of rent in respect of the suit premises from 17-4-73 till January, 1977 at the rate of Rs. 85/- per

*(Against order of M. P. Sinha, Addl. Munsif 4th Court, Patna, D/- 12-2-1977.)

month within 15 days from the date of the order. The defendant was also directed to deposit current as well as future rent of the suit premises at the same rate by the 15th day of the next following month.

3. This revision was referred to Division Bench by Birendra Prasad Sinha, J., on the ground that there are two contradictory decisions in respect of an interpretation of Sec. 1 (3) and second proviso thereto of the Bihar Buildings (Lease, Rent and Eviction) Control Act, 1977 (Act 16 of 1977) (hereinafter to be referred to as the "1977 Act").

4. S. K. Choudhuri, J., is of opinion that if an order is passed between 1st April, 1976 and before 8th Sep., 1977, the order passed by the trial Judge is non est (see (Dr.) Sailendranath Roy v. (Dr.) (Miss) Geeta Mazumdar, 1978 BBCJ (HC) 214 : (AIR 1978 Pat 207)). A contrary view was taken by Madan Mohan Prasad, J., in Prabhat Kumar Das v. Santhal Paharia Sewa Mandal (1978 BBCJ (HC) 297). It is for this reason that the learned single Judge referred this revision by an order dated 4th Jan., 1978.

5. The 1947 Act expired by virtue of sub-section (3) of S. 1 on 31st March, 1976. The 1977 Act came in force on 8th Sep., 1977. Between 1st April, 1976 and 7th Sep., 1977 no act was in force.

6. The simple point for consideration in this revision is: what is the effect of an order passed in between 1st April, 1976 and 7th Sep., 1977 in a suit which was legally instituted before 31st March, 1976 under the provisions of the 1947 Act? In this connection it is relevant to refer to sub-section (3) of S. 1 and the relevant proviso thereto under the 1947 Act, which runs as follows:

"(3) It shall remain in force up to and including the 31st March, 1976 provided that the expiration of this Act under the operation of this sub-section shall not—

x x x x x x

(b) affect any liability incurred under this Act or any punishment incurred in respect of any contravention of this Act or any order made thereunder; or

"(c) affect any investigation or legal proceeding in respect of any such liability or punishment as aforesaid; and any such investigation or legal proceeding may be instituted, continued or enforced and any such punishment may be imposed, as if this Act had not expired."

On a perusal of Cl. (b) of the proviso to sub-section (3) of Sec. 1 of the 1947 Act, it is clear that even after the expiration of the said Act (1947 Act) it shall not affect any liability incurred under that Act. In the present case, the plaintiff filed an application under Sec. 11A of the 1947 Act on 4th June, 1974 and the order was passed by the court on 12-2-1977. Admittedly on 12-2-1977, the 1947 Act was not in force. By virtue of the saving clause as laid down in proviso (b) to sub-section (3) of Sec. 1, it is clear that even after the expiration of the 1947 Act it shall not affect any liability incurred under that Act. Relying on the saving clause, I hold that, if an order under Section 11-A has been passed on 12-2-1977, it shall not affect the liability of the tenant to pay the rent as directed under S. 11-A of the 1947 Act.

7. Clause (c) of the second proviso to sub-section (3) of S. 1 of the 1977 Act is also relevant in this connection. It provides that if any legal proceeding has already been instituted then that shall continue even after the expiration of the 1947 Act. In the present case a legal proceeding in respect of Sec. 11-A of the 1947 Act was instituted on 4th June, 1974 and as such it shall continue in respect of a liability even after expiration of the 1947 Act. On this basis also, I hold that the liability of the defendant shall continue even if the order was passed on 12-2-1977.

8. On 8th Sep., 1977, Bihar Act 16 of 1977 came into force. It is relevant to quote here sub-section (3) of S. 1 of the 1977 Act and the relevant second proviso to that section:

"(3) Section 25 shall come into force at once and the remaining provisions of this Act shall be deemed to have come into force on the 1st of April, 1976 and the Act shall remain in force up to and including the 31st March, 1981:

x x x x x x

Provided further that the expiration of the Bihar Buildings (Lease, Rent and Eviction) Control Act, 1947 (Bihar Act III of 1947), between the period commencing from 1st of April, 1976 and the commencement of this Act shall not

x x x x x x

(b) affect any liability incurred under that Act or any punishment incurred in respect of any contravention of this Act or any order made thereunder; or

(c) affect any investigation or legal proceeding in respect of any such liability or punishment as aforesaid: and any such investigation or legal proceeding

may be instituted, continued or enforced and any such punishment may be imposed as if that Act had not expired."

On a perusal of sub-section (3) of Sec. 1, it is clear that except Sec. 25 all the remaining provisions of the 1977 Act shall be deemed to have come into force on 1st April, 1976. It is, therefore, manifest that all the provisions of the 1977 Act except Sec. 25 came into force on 1st April, 1976. If the court passed an order under S. 11-A on 12-2-1977, it would be deemed that the order under Sec. 11-A was passed under the provisions of the present Act (Act 16 of 1977). Clause (b) of the second proviso clearly provides that even after the expiration of the 1947 Act, i. e. between 1st April, 1976 and 7th Sep., 1977, it shall not affect any liability incurred under the said Act (Act III of 1947). By a legal fiction if any order has been passed between 1st April, 1976 and before the commencement of the 1977 Act, this Act (1977 Act) validates the action taken under the provisions of 1947 Act. If that is so, the order passed on 12-2-1977 by the court below is validated by Cl. (b) of the second proviso to sub-section (3) of S. 1 of 1977 Act. Clause (c) of the second proviso is also relevant. It provides that if any legal proceeding has been instituted, it shall continue in spite of the expiration of the 1947 Act. Relying on the proviso to subsec. (3) of S. 1 of 1947 Act read with subsection (3) of S. 1 along with Cls. (b) and (c) of the second proviso thereto under the 1977 Act, it is clear that if ony liability has been incurred or any legal proceeding has been instituted, that shall continue even after the expiration of Bihar Act III of 1947. In other words, if any liability has been incurred or any legal proceeding has been instituted after the expiry of the 1947 Act, i. e., between 1st April, 1976 and 7th Sep., 1977, that liability shall continue and the legal proceeding shall also continue.

9. It is not a case of repeal of the statute but it is a case of continuance of a temporary law. Bihar Act III of 1947 was a temporary law which was in force up to 31st March, 1976. By virtue of Bihar Act 16 of 1977 the provisions of the 1947 Act shall be deemed to continue. The 1977 Act was enacted because thousands of cases were pending under the provisions of the 1947 Act and, therefore, in the interest of the general public the provisions of the 1947 Act will be deemed to continue by virtue of 1977 Act. In this connection Craies states at page 409 of Statute Law, 7th Edition:

"There is a difference between temporary statutes and statutes which are repealed; the latter (except so far as they relate to transactions already completed under them) become as if they had never existed; but with respect to the former, the extent of the restrictions imposed, and the duration of the provisions, are matters of construction."

In the present case, 1947 Act continued in force for a specified period, i. e. up to 31st March, 1976 and as such it was a temporary Act. It is the practice of the Legislature to pass continuance Act in respect of an expired law. The expired law continues in force by virtue of the Continuance Act. In this view of the matter, I hold that 1947 Act continued in force by virtue of passing of 1977 Act. If it is so, by virtue of the provisions of 1977 Act, the provisions of 1947 Act continued to be in force between the expiry of the 1947 Act and the commencement of the 1977 Act. In this view of the matter, I hold that if any liability has been incurred or legal proceeding has been instituted between the expiry of the 1947 Act and the commencement of the 1977 Act, the liability shall not be affected and the legal proceeding shall continue by virtue of the proviso to sub-section (3) of S. 1 of 1947 Act read with subsection (3) of S. 1 and Cls. (b) and (c) of the second proviso thereto under the 1977 Act. In this view of the matter, I agree with the view of Madan Mohan Prasad, J., in Prabhat Kumar Das (1978 BBCJ (HC) 297) (supra). I respectfully disagree with the opinion of S. K. Choudhuri, J., in Sailendra Nath Roy's case 1978 BBCJ (HC) 214 : (AIR 1978 Pat 207) (supra).

10. I, therefore, dismiss the revision petition without costs.

S. K. JHA, J. :— 11. I respectfully agree that this civil revision application be dismissed without costs and the point of law referred for decision to this Bench be answered against the petitioner. In deference, however, to the divergence of views expressed by two of the learned Judges of this Court, namely, S. K. Choudhuri, J., in the case of (Dr..) Sailendra Nath Roy v. (Dr.) (Miss) Geeta Mazumdar (1978 BBCJ (HC) 214) : (AIR 1978 Pat 207) and Madan Mohan Prasad, J., in the case of Prabhat Kumar Das v. Santhal Paharia Sewa Mandal (1978 BBCJ (HC) 297) I feel obliged to say a few words on the question involved.

12. There is no dispute as to the applicability of the particular statutory provisions, in so far as the question which falls for our determination is concerned, but the construction of those provisions is the subject of acute controversy.

13. My learned Brother has already referred to the particular statutory provisions, the construction of which falls for our consideration in this case. Even at the cost of repetition, however, I may point out the provision of law which admittedly falls for construction. It is Cl. (c) of the proviso to sub-section (3) of S. 1 of the 1947 Act which, for the sake of convenience, may be reproduced hereunder:

"(3) It shall remain in force up to and including the 31st March, 1976.

Provided that the expiration of this Act under the operation of this sub-section shall not —

x x x x x x

(c) affect any investigation or legal proceeding in respect of any liability or punishment as aforesaid; and any such investigation or legal proceeding may be instituted, continued or enforced and any such punishment may be imposed, as if this Act had not expired."

The liability referred to in Cl. (c) extracted above is with regard to any liability incurred under the 1947 Act which is clear from the language of Cl. (b) of proviso to sub-section (3) of Sec. 1 of that Act. I shall deal with the construction of this particular statutory provision after I make a reference to the relevant statutory provision of the 1977 Act. The main provision with which we are concerned is sub-section (3) of S. 1 of the 1977 Act which it would be useful to quote in extenso along with all the provisos —

"(3) Section 25 shall come into force at once and the remaining provisions of this Act shall be deemed to have come into force on the 1st of April, 1976 and the Act shall remain in force up to and including the 31st March, 1981:

Provided that the expiration of this Act shall not —

(a) render recoverable any sum which during the continuance thereof was irrecoverable or affect the right of a tenant to recover any sum which during the continuance of this Act was recoverable by him thereunder; or

(b) affect any liability incurred under this Act or any punishment incurred in respect of any contravention of this Act or any order made thereunder; or

(c) affect any investigation or legal proceeding in respect of any such liability or punishment as aforesaid;

and any such investigation or legal proceeding may be instituted, continued or enforced and any such punishment may be imposed, as if this Act had not expired.

Provided further that the expiration of the Bihar Buildings (Lease, Rent and Eviction) Control Act, 1947 (Bihar Act III of 1947) between the period commencing from the 1st of April, 1976 and the commencement of this Act shall not —

(a) render recoverable any sum which during the continuance thereof was irrecoverable or affect the right of a tenant to recover any sum which during the continuance of that Act was recoverable by him thereunder; or

(b) affect any liability incurred under that Act or any punishment incurred in respect of any contravention of that Act or any order made thereunder; or

(c) affect any investigation or legal proceeding in respect of any such liability or punishment as aforesaid;

any such investigation or legal proceeding may be instituted, continued or enforced and any such punishment may be imposed as if that Act had not expired."

These are the only statutory provisions which fall for consideration and are the subject-matter of acute controversy, as I have termed it at the outset. S. K. Choudhuri, J., has expressed the view that the liability incurred which has been talked of in Cl. (b) to the second proviso to sub-section (3) of S. 1 of 1977 Act relates to a liability incurred under the 1947 Act. The learned Judge has also taken the view that the determination of any liability under the provisions of Sec. 11-A of the 1947 Act is not saved by Cl. (b) of the second proviso to sub-section (3) of S. 1 of the 1977 Act, and it is for the simple reason that during the period of interregnum, as I would call it, namely, from the 1st of April, 1976 to the date when the 1977 Act was brought on the Statute Book, i. e. the 8th Sep., 1977, there was no 1947 Act in existence. The 1947 Act having been in law non est during the aforesaid period of interregnum, there could not have been any liability incurred under the provisions of

the 1947 Act by any tenant by virtue of any order passed between the 31st March, 1976 and the 7th Sep., 1977. On the contrary, Madan Mohan Prasad, J. is of the view that the retrospective operation of sub-section (3) of S. 1 of the 1977 Act read with Cl. (c) of the proviso to sub-section (3) of S. 1 of the 1947 Act, saves all legal proceedings, investigations pending as well as orders purported to have been made under the 1947 Act. For the reasons to be given hereinafter, I respectfully agree with the view expressed by Madan Mohan Prasad, J.

14. As already noticed at the outset, the 1947 Act, which, for the sake of brevity, may be termed as the temporary Act, itself provided a clause, namely, cl. (c), more or less in the nature of a saving clause in the proviso to sub-section (3) of S. 1 thereof. Cl. (c) expressly stipulates and in no vague terms lays down that notwithstanding the expiration of the temporary Act after the 31st March, 1976 any investigation or legal proceeding in respect of any liability incurred under that temporary Act shall be continued as if the Act had not expired. If the construction put forward by Mr. Naseem Ahmad, learned Counsel for the petitioner, be accepted as found favour with S. K. Choudhuri, J., although without noticing this provision of 1947 Act, the whole effect and purport of Cl. (c) of the proviso to sub-sec. (3) of S. 1 of the 1947 Act shall be rendered nugatory and otiose. It is a well-settled principle of construction that no part of a statute shall be so construed as to convict the Legislature of having engrafted a statutory clause which would be of no purpose or avail to anyone. That is the first limb of my reason. Let us now look to the express language of sub-section (3) of S. 1 of the 1977 Act which I shall call the Continuance Act. In the Continuance Act it has been expressed in no mean terms that S. 25 shall come into force at once. It means that there shall be no retrospective operation of the provision of Sec. 25 of the continuance Act. With regard to the remaining provisions of the Act it introduces a legal fiction and says that all of them shall be deemed to have come into force on the 1st of April, 1976. This legal fiction assumes that a law, although not physically brought on the Statute Book at the relevant time, should be presumed to be thereon during all the relevant time. The effect of such retrospective operation by virtue of legal fiction has been noticed times without number and the oft quoted passage of Lord Asquith in East End Dwellings Co. Ltd. v. Finsbury Borough Council (1952 AC 109 at pp. 132-33) has received the approval of the Courts not only abroad but of highest court of this land. The law Lord has succinctly laid down the effect of such legal fiction in these words:

"If you are bidden to treat an imaginary state of affairs as real, you must surely, unless prohibited from doing so, also imagine as real the consequences and incidents which, if the putative state of affairs had in fact existed, must inevitably have flowed from or accompanied it..... The statute says that you must imagine a certain state of affairs; it does not say that having done so, you must cause or permit your imagination to boggle when it comes to the inevitable corollaries of that state of affairs."

Instead of multiplying the decisions of the Supreme Court, wherein this authoritative passage from Lord Asquith's judgment has been quoted, I may merely make a passing reference to some of them. They are State of Bombay v. Pandurang Vinayak (AIR 1953 SC 244 at p. 246), Commr. of Income-tax v. S. Teja Singh (AIR 1959 SC 352) and Additional Income-tax Officer v. E. Alfred (AIR 1962 SC 663) and a number of others. It is the well-settled rule of interpretation, said T. L. Venkatarama Aiyar, J., that in construing the scope of a legal fiction it would be proper and even necessary to assume all those facts on which alone the fiction can operate (vide AIR 1959 SC 352). The case of E. Alfred (supra), is more apposite and direct on the point. There the effect of such fiction was brought into play by the Supreme Court even in the matters of assessment under taxation law. In paragraph 7 at p. 665 of the AIR 1962 SC case, it has been said:

"No doubt, the fiction made the respondent an assessee for the purpose of assessing the total income of Ebenezer. But the question is whether the fiction came to an end after the assessment, so that he remained a mere debtor thereafter to the Department. The answer to this question would determine the further application of the other sections of the Act. When a thing is deemed to be something else, it is to be treated as if it is that thing, though, in fact, it is not ....."

And at p. 666 the learned Judges go to say:

"A legal representative who, by fiction, is deemed to be an assessee, therefore, comes within this definition, because he is a person by whom income-tax is payable, though out of the assets left by a deceased person..... Nor can the fiction in that sub-section (sub-section (2) of S. 24B of the Income-tax Act, 1922) be limited by provisions of law for a totally different situation."

No exception can be taken to this well-settled rule of interpretation of a legal fiction created by the retrospective operation being given to any statutory provision. Mr. Ahmad admits that, if the provision of sub-section (3) of S. 1 of the Continuance Act were left at that, he would have no case, but he seeks to rely on the provisions of Cl. (b) of the second proviso of sub-section (3) of Sec. 1 of the Continuance Act. This, I say with all respect to the reasoning of S. K. Choudhuri, J., is a submission wholly fallacious and based upon a misconception of the true construction of the proviso to be applied in case like the instant one. The question is whether the provisions of Cls. (b) and (c) of the second proviso to S. 1 (3) of the 1977 Act extend or limit and cut down the operative portion of the retrospective provision engrafted in sub-section (3) of Section 1. The general rule certainly is that inconsistencies can be avoided by applying the rule that the words of a proviso are not to be taken absolutely in their strict literal sense, but that a proviso is of necessity limited in its operation to the ambit of the section which it qualifies (vide Maxwell on the Interpretation of Statutes, 12th Edition, at p. 189). But there is another well-settled rule of construction, which is this —

"If, however, the language of the proviso makes it plain that it was intended to have an operation more extensive than that of the provision which it immediately follows, it must be given such wider effect."

(vide Maxwell, 12th Edn., at p. 190).

To the same effect has the principle been summed up by Craies on Statute Law, 5th Edn., at p. 203, in these words —

"But sections, though framed as provisos upon preceding sections, may exceptionally contain matter which is in substance a fresh enactment, adding to and not merely qualifying what goes before."

And, it is this principle which, in my view, should appropriately apply while construing the provision of Cls. (b) and (c) of the second proviso to S. 1 (3) of the Continuance Act. Thus, in my reasoning, if the intention of the Legislature were to cut down the retrospective operation of the 1977 Act as given in sub-section (3) of S. 1, it could have very well said so in so many words. A reference to the first proviso to sub-section (3) of S. 1 would make the position wholly clear. The first proviso to sub-section (1) lays down that notwithstanding the expiry of the 1977 Act after the 31st of March, 1981, certain consequences shall follow and be saved. This can in no way be said either to limit or cut down the operative portion of sub-section (3) of S. 1. This is in the nature of and in substance, as Craies calls, a fresh enactment, adding to and not merely qualifying what has been provided in sub-section (3) of S. 1 and if that be the only construction of the first proviso to sub-section (3) of S. 1, there is no reason why the second proviso be considered on any different plane or footing. On the contrary, the second proviso is in the nature of a more substantive enactment not only saving the liability incurred under the temporary Act or the punishment imposed in respect of contravention of that Act, but it further reinforces, as has already been contained in the retrospective, substantive provision of sub-sec. (3) of S. 1, that any investigation or a legal proceeding in respect of any liability incurred under the temporary Act shall be continued or enforced or any legal proceeding instituted. Whether a proceeding under the provisions of S. 11A of the 1947 Act (temporary Act) can be treated as an investigation or a legal proceeding, will be of no consequence in so far as this question is concerned. Indeed, it is not the petitioner's case even before us that the proceeding in relation to the application filed by the plaintiff landlord under S. 11A of the temporary Act was not in the nature of a legal proceeding or investigation of a particular fact under that Act. Whatever view be taken, one thing about which I am quite certain is that the effect of the two provisos to sub-sec. (3) of S. 1 of the 1977 Act is not in any way either to limit or cut down the general nature of the operative portion of the retrospective provision contained in S. 1 (3) of the Continuance Act (1977 Act).

15. If once it is held, as it must be held, that the 1977 Act (excepting Sec-

tion 25 thereof) came into force with effect from 1st April, 1976 then the provisions of S. 13 of this Act which is a reproduction of S. 11A of the 1947 Act were in existence on and from 1-4-1976. The order which has been passed under S. 11A of the temporary Act will in any event be deemed to have been passed under S. 13 of the Continuance (1977) Act. In my view, mere change of the label with regard to the provision of law will make no difference in substance. It will be heaping unreason upon technicality to take any other view of the matter. That being the position, whether the impugned order be taken to be one under S. 11A of 1947 Act or S. 13 of the 1977 Act will make no difference in so far as the validity of the order is concerned.

16. That being so, and as I have unhesitatingly taken that view, I see no equities to be worked out between the parties on the language of the statutory provisions concerned S. K. Choudhari, J. has taken into consideration an aspect which, with great respect I venture to say, has got no relevance on the point to be considered. The learned Judge has held that the temporary Act (1947 Act) having been made for the betterment and protection of the tenants and the 1977 Act (Continuance Act) being for the same purpose, the construction more favourable to the tenants should be adopted in preference to the other view. It has been observed that the mischief to be remedied has to be looked into and the equities between the parties to be worked out. Therefore the statutory provisions be construed in such a manner as to ensure that the tenant is not left at the mercy of the oppressing landlord. In all humility, I say that this reason is also not free from fault. As has been observed by me in the Full Bench decision of this Court in the case of Ram Nandan Sharma v. Mt. Maya Devi (AIR 1975 Pat 283) (at p. 294):

"It is in my view plain that the subject-matter of S. 11-A was the right or privilege therefore not enjoyed by the landlord except by way of a protracted litigation for recovery of damages for use and occupation. It is equally clear that the object of S. 11-A was to confer on the landlord a right to enjoy the income of his building by a summary adjudication under S. 11-A while the course of litigation took its own time."

The provisions of S. 11A were not at any point of time meant for the benefit of a tenant. It was, on the contrary, a provision by way of a solatium to the landlord who was left at the mercy of the tenant either to be paid his due share of rent or to get vacant possession of his premises in spite of default within the meaning of the Act by the tenant till the result of the suit. The other reasons which impresses me equally is that which can be gathered from the Statement of Objects and Reasons of the 1977 Act, which reads—

बिहार बिल्डिंग (लीज, रेन्ट ऐण्ड एविक्शन) कन्ट्रोल एक्ट, १९४७ (बिहार ऐक्ट ३, १९४७) की अवधि ३१ मार्च, १९७६ को समाप्त हो गयी । राज्य में मकान की समस्या अभी तक पहले जैसी उग्र बनी हुई है । किराये के मकान जितने मिलते हैं उनकी मांगे उससे कहीं ज्यादा है और निकट भविष्य में स्थिति सुधरने की कोई आशा नहीं दीखती । राज्य के विभिन्न न्यायालयों में उक्त अधिनियम के अन्तर्गत दायर किये गये हजारों मुकदमें निर्णय हेतु लम्बित है तथा लोगों को कठिनाई का सामना करना पड रहा है । अतः जनहित को दृष्टि में रखते हुए उक्त अधिनियम के उपबन्धों को भूतलक्षी प्रभाव से अधिनियमित करना नितान्त आवश्यक है । सम्प्रति इस अधिनियम की अवधि ३१ मार्च, १९८१ तक बढाई गई हैं ।

The very object of this Continuance Act was to save the pending litigations in the courts of law during the period of so-called interregnum between the 1st of April, 1976 and the 7th of Sept., 1977.

17. Having given my anxious consideration to all the aspects and in all its ramifications of the matter, I have no hesitation in holding that the view expressed by Madan Mohan Prasad J., in the case of Prabhat Kumar Das (1978 BBCJ (HC) 297) (supra) is the correct view. The law as laid down by S. K. Choudhuri J. in the case of Sailendra Nath Roy (AIR 1978 Pat 207) (supra) does not lay down the correct legal position and must be overruled.

Revision dismissed.

AIR 1979 PATNA 229

B. P. JHA AND VISHWANATH MISHRA, JJ.

Deosagar Singh and others, Petitioners v. State of Bihar and others, Respondents.

C.W.J.C. Nos. 1064, 1065, 1066 and 1070 of 1977, D/- 26-3-1979.

Bihar Land Reforms (Fixation of Ceiling Area and Acquisition of Surplus Land) Act (12 of 1962), S. 5 (1) (ii) and (iii) — Enquiry under — Scope — Surplus area — Computation — Transfer of land after 9-9-1970 cannot be ignored unless enquiry is made under cl. (iii) and Collector is satisfied that transfer was made for defeating provisions of law — Enquiry under cl. (iii) is necessary even in respect of transfer coming within cl. (ii). (Paras 5, 6)

Sankat Haran Singh, for Petitioners; B. P. Gupta, Subodh Kumar Singh, Hazari Lal, T. Dayal, S. N. Sahay, Dayanand Singh, Ashok Kumar, J. K. Prasad and K. K. Tiwary, for Respondents.

VISHWANATH MISHRA, J.:— All these four writ petitions are being disposed of by one order as the points involved in all the cases are the same.

2. All the writ petitions arise out of land ceiling cases under the Bihar Land Reforms (Fixation of Ceiling Area & Acquisition of Surplus Land) Act, 1961 (hereinafter referred to as 'the Act'). Ramjas Singh and Laxmi Singh are two brothers. Ramjas Singh had sold some lands to Deosagar Singh, Ramsagar Singh and Mahendra Singh, who are petitioners in C.W.J.C. No. 1064 of 1977, through a registered sale-deed dated 29th July, 1972. He also sold some lands to Bijay Kumar Singh the petitioner in C.W.J.C. No. 1065 of 1977 through a registered sale-deed dated 18th Jan. 1973. A ceiling case was started against Ramjas Singh; its number being Ceiling Case No. 155 of 1973-74. In the draft statement that was prepared, and published under S. 10 (2) of the Act, the lands covered by the above two sale-deeds were included in the lands of Ramjas Singh. Objections under Section 10 (3) of the Act were filed by the vendees, which were dismissed by the Additional Sub-Divisional Officer, Garhwa by his order dated 20th July, 1976 contained in Annexure 1 to C.W.J.C. Nos. 1064 and 1065 of 1977. An appeal was preferred being appeal case No. XV/122 of 1977 by Deosagar Singh and his co-vendees (petitioners in C.W.J.C. No. 1064 of 1977) and another appeal being appeal case No. XV/120 of 1977 was also preferred by Bijay Kumar Singh (petitioner in C.W.J.C. No. 1065 of 1977), Annexure 2 is the order dated 23-8-1976 dismissing the appeals at the time of admission itself. This order was passed in one case and the same was made applicable in the other cases also. A revision before the Board of Revenue was filed by Bijay Kumar Singh; being Board Case No. 1617 of 1976 and another by Deosagar Singh being Board Case No. 1619 of 1976 and both the revisions were dismissed on 29-1-1977 by a common order (Annexure 3 to writ petitions Nos. 1764 and 1766 of 1977).

3. Like Ramjas Singh, his brother Laxmi Singh also transferred some lands to Bigan Singh (petitioner in C.W.J.C. No. 1070 of 1977) through a registered sale-deed on 21-11-1972) and to Ashok Kumar Singh (petitioner in C.W.J.C. No. 1066 of 1977) through another registered sale deed on 7-9-1973. A ceiling case No. 152 of 1973-74 was, however, started against Laxmi Singh alone in which all the lands transferred in favour of Ashok Kumar Singh and Bigan Singh were also included. After the draft publication, objections were filed by the vendees. Both the objections were rejected by the Additional Sub-Divisional Officer, Garhwa (vide Annexure 1). Ashok Kumar Singh then filed land ceiling appeal No. 121 of 1976-77 whereas Bigan Singh preferred land ceiling appeal No. 119 of 1976-77. Both the appeals were heard together and dismissed at the time of admission itself by the order contained in Annexure 2. Ashok Kumar Singh preferred Board Case No. 1618 of 1976 and Bigan Singh preferred Board Case No. 1616 of 1976, before the Board of Revenue. Both these revisions were also dismissed by the order as contained in Annexure 3.

3-A. It may be repeated that Annexure 2 which is the order of the Additional Collector and Annexure 3 which is the order of the Additional Member, Board of Revenue, cover all the four cases. Being aggrieved by the order of the Additional Member, Board of Revenue these writ petitions have been filed.

4. Annexure 1 which is the order of the learned Additional Sub-Divisional Officer, Garhwa in all the cases shows

that the only ground on which the cases were dismissed was that the transactions related to the period after 9-9-1970, and as such under Sec. 5 (1) (iii) of the Act no importance could be attached to it. The order of the Additional Collector contained in Annexure 2 also confirmed the same after taking the same view of the law as taken by the Additional S.D.O., and the appeals were not admitted by him. The learned Additional Member, Board of Revenue in paragraph 5 of his resolution (Annexure 3 in all the writ petitions) also relied upon the same provision and held that "the four sale-deeds have rightly been ignored by the learned lower courts."

5. There is no dispute on the point that all the sale-deeds which are the subject-matters for decision before us were executed after 9-9-1970. A question arises as to whether the transaction would be good or bad in the eye of law, and the manner in which it can be declared as such. In this connection it will be relevant to examine S. 5 (1) (ii) & (iii) of the Act, which run as follows:—

"(ii) No land-holder holding land in excess of the ceiling area shall, from the commencement of the Bihar Land Reforms (Fixation of Ceiling Area and Acquisition of Surplus Land) (Amendment) Act, 1972, and till the publication of notification under Section 15, transfer any land held by him except with the previous permission in writing of the Collector, who may refuse to give such permission if he is satisfied for the reasons to be recorded in writing that the transfer is proposed to be made with a mala fide intention of defeating the object of this Act.

(iii) The Collector shall have power to make enquiries in respect of any transfer of land by a land-holder whether made by a registered instrument or otherwise, made after the 22nd day of October, 1959, and if he is satisfied that such transfer was made, with the object of defeating, or in contravention of the provisions of this Act or for retaining, benami or farzi, land in excess of the ceiling area, the Collector may after giving reasonable notice to the parties concerned to appear and be heard, annul such transfer and thereupon the land shall be deemed to be held by the transfer for the purposes of determining the ceiling area he may hold under this section."

A reading of cl. (ii) shows that if a person holds land in excess of the ceiling area then there is a ban on him to transfer such land without obtaining written previous permission of the Collector. The Collector under the law may, however, refuse to give such permission if he is satisfied for the reasons to be recorded in writing that the transfer proposed to be made is with a mala fide intention for the purposes of defeating the object of the Act. If, however, the transferor holds not land in excess of the ceiling area the ban imposed under Cl. (ii) has no application at all. It is, therefore, always a question of fact in each case as to whether the ban operates or not, and for this an enquiry has to be made in respect of each and every transaction which has taken place after 9-9-1970. The matter comes to this that simply because a transaction has been affected after 9-9-1970, it cannot be struck down or ignored. After all it is not possible for a vendee to know always, and that exactly, whether the vendor has any land in excess of the ceiling area or not, because it all depends upon so many factors. Hence investigation before ignoring the sale-deed or annulling the sale-deed is called for, before the revenue authority can say finally whether the transaction is good or bad in the eye of law, and unless this is done, I think, the revenue authority cannot be said to have discharged its duties.

6. At the time of argument learned counsel for respondent No. 4 stated that when a particular case comes under cl. (ii) of S. 5 (1) of the Act, an enquiry under cl. (iii) of that section is ruled out. Actually the enquiry is made under cl. (iii) only. This clause calls for an enquiry in respect of any transfer of land, whether made by a registered instrument or otherwise, after 22nd day of October 1959. In course of this enquiry, if the Collector is satisfied that the transfer was made for the purpose of defeating the provisions of the Act, he may annul that transfer and after annulling that transaction the lands will be deemed to have been held by the transferor. The wordings of cl. (iii) are wide enough to include even the transferred land under cl. (iii). With respect to the transfers made after 9-9-1970, there will be something more to be seen as to whether previous written permission of the Collector was taken or not and whether the land-

holder had land in excess of the ceiling area at the time of the transfer or not. It would not, however, be necessary in cases of transfer made after 22-10-1959, and before 9-9-1970. It is also important to note that in cl. (ii) it has not been provided as to what would be the effect if the permission has not been taken. It only says that the land-holder holding land in excess of the ceiling area shall not transfer any land without prior written permission of the Collector, but if it is done what will be the consequence thereof? The clause is silent on the point. Therefore, reading cls. (ii) and (iii) together, there is no doubt left that even in respect of transfer coming within cl. (ii), an enquiry under cl. (iii) is necessary, and that enquiry has to be made before saying one way or the other in respect of the transfer made even after 9-9-1970.

7. In all the above cases, objections had been filed by the transferees after the draft publication was made under S. 10 (2) of the Act. All these objections were made under S. 10 (3) of the Act, but all the same the enquiry that was made was under S. 5 (1) (iii) of the Act. If the enquiry is made either under S. 10 (3) or under S. 5 (1) (iii) of the Act, the scope of the enquiry would not change.

8. As I have already said the impugned orders (Annexures 1 and 3) have not at all considered the questions that arose for decision in an enquiry under S. 5 (1) (ii) and (iii) or under Section 10 (3) of the Act. All the cases have, therefore, to be sent back to the Additional S.D.O. for proper and thorough enquiry in which the parties must be given proper opportunity for proving their own claims.

9. In the circumstances, the writ petitions are allowed, Annexures 1, 2 and 3 are quashed and the cases are remanded to the Additional S.D.O. Garhwa for disposal in accordance with law and in the light of the observations made above. Parties will bear their own costs.

B. P. JHA, J.:— 10. I agree. The provisions of S. 5 (1) (iii) of the Act apply to a sale made on or after 9-9-1970 where no proper permission was obtained under S. 5 (1) (iii) of the Act for the simple reason that it is a sale made after 22nd October, 1959.

Order accordingly.

AIR 1979 PATNA 231

HARI LAL AGRAWAL, J.

Bishnu Pada Bhattacharya, Applicant v. Dwarka Prasad Bhagat and another, Opposite Parties.

Civil Revn. No. 1259 of 1976, D/- 16-3-1979.*

Civil P. C. (5 of 1908), O. 21, R. 58 (As Amended by Patna High Court) — Execution of mortgage decree — Powers of executing Court — It can decide question of paramount title raised in claim case under O. 21, R. 58. (Para 5)

Cases Referred: Chronological Paras

AIR 1944 Pat 24 6

S. R. Ghosal and S. B. Pathak, for Applicant; Narbadeshwar Pandey, for Opposite Parties.

ORDER:— This is a decree-holder's application in revision against the order of the 3rd Additional Subordinate Judge, Dumka allowing an application under Rule 58 of Order 21 of the Code of Civil Procedure (hereinafter referred to as 'the Code'). Mr. Ghosal appearing in support of this application raised a question that the application under R. 58 itself was not maintainable and therefore, the executing Court has committed an apparent error of jurisdiction.

2. The short facts for appreciating the question raised, for my consideration may be briefly stated. The property involved in this case is a piece of land with a house measuring 1 kathas 16 dhurs appertaining to plot No. 1900 situate within Pakur town. It was recorded in the name of one Lakshminia Bhagatwain, widow of late Thakur Prasad Bhagat. Lakshminia died leaving behind three sons namely, (1) Bhaglum (2) Jamuna and (3) Ganesh. The second son namely, Jamuna executed a mortgage bond in the year 1968 with respect to the said property in favour of the decree-holder describing himself as the sixteen annas' owner of the land in question. On the basis of that mortgage bond, the petitioner brought a mortgage suit in the year 1970, in which a compromise decree was passed in his favour which is under execution.

In this execution proceeding the opposite party, who are both sons of the aforesaid Bhaglu, filed a claim case under Rule 58, Order 21 of the Code, on

*(Against order of K. S. Saran, 3rd Addl. Sub-J., Dumka, D/- 7-8-1976.)

the ground that Jamuna Bhagat could not have mortgaged the entire property inasmuch as his share was only 12 dhurs and that the mortgaged decree was not binding on them. That application was registered as a miscellaneous case and evidence was gone into by the parties. The learned subordinate Judge has recorded a finding of fact that the applicants, before him, namely, the opposite party "Succeeded to prove their possession on two-third portion of the suit house whereas the possession of Jamuna Bhagat on two-third share appears to be very much doubtful." He accordingly allowed the application.

3. Mr. Ghosal, as already indicated above, contended that the nature of the decree being a mortgage decree, the application of the opposite party under Rule 58 itself was not maintainable as there was no question of attachment in a mortgage decree. He further contended that there being a mortgage decree with regard to the properties in question in favour of the petitioner, the executing court could not have gone behind the same by entertaining the application of the opposite party.

4. Both the contentions are entirely erroneous and must be rejected. The first contention is based on the ignorance of the amendment of Rule 58 by this Court. The Patna High Court has amended Rule 58 and has substituted its own Rule in place of the Central Rules 58 and that reads as follows:—

"When any claim is preferred to any property the subject-matter of the execution proceeding or any objection is made to the attachment thereof on the ground that the applicant has an interest therein which is not bound under the decree..... the court shall proceed to investigate the claim or object....."

The relevant part of Rule 58 as substituted by the Patna High Court amendment, just quoted, clearly indicates that the Patna amendment widens the scope of Rule 58.

5. Similar amendment has been made to Rules 59 and 60 of the Code as well by this Court, and on examining the scope and effect of the amendments it becomes obvious that Rule 58 applies not merely to the question of attachment of any property in execution of a decree but also to all properties, which are subject-matter of the execution proceeding. Consequently a claim to the mortgaged property directed to be sold in execution of the mortgage decree comes within the purview of Order 21, Rule 58 and the question of paramount title can be decided if it is raised in a claim case under Order 21, Rule 58 within the mischief of the amended provisions of this Court.

6. Once this proposition is accepted and for which I have got no doubt in my mind, the second contention of Mr. Ghosal also falls flat; as in that event, the executing court is clothed with the jurisdiction to examine the question of paramount title and therefore, it will not lead to going behind the decree. I find all support for this view from the Bench decision of this Court in the case of Sarju Prasad Singh v. A. James (AIR 1944 Pat 24) where it was observed by Manohar Lall, J. who gave his separate judgment that;

"Here, however, the Legislature intends by the amendment that the paramount title must be decided I do not see any hardship in the matter at all as it is desirable that the final rights of the parties to sell the mortgaged properties so as to pass full title to the auction purchaser should be decided in presence of the real parties concerned as early as possible."

I find myself in full agreement with the above observation of the learned Judge.

7. The result of the above discussions is that this application must fail and it is accordingly dismissed with costs. The hearing fee is however, assessed at Rs. 55 only.

Application dismissed.

AIR 1979 PATNA 232

HARI LAL AGRAWAL, J.

Hira Sharma, Applicant v. Hakim Habibullah, Opposite Party.

Civil Revn. No. 1879 of 1978, D/- 20-2-1979.*

Civil P. C. (5 of 1908), S. 115, O. 2, R. 2 (3) — Leave of Court under O. 2, R. 2 (3) granted — Interference with exercise of discretion in revision — Simply because the subsequent suit would cause harassment to a defendant and will give rise to multiplicity of suits cannot be a ground to interfere with that discretion in the revisional juris-

*(Against order of Krishna Murari Agrawal, Sub-J., Sasaram, D/- 26-8-1978.)

EW/FW/C798/79/MDH/VBB

diction — The fact that a different view in the matter could have been taken cannot be a ground to hold that the exercise of jurisdiction itself was without jurisdiction. (Para 6)

Cases Referred: Chronological Paras

AIR 1955 Cal 402 5

Gorakh Nath Singh and S. P. Singh, for Applicant; Sadaquat Hussain and Mahfooz Ahmad, for Opposite Party.

ORDER:— In this application in revision by the defendant a question arises as to whether the Subordinate Judge was right in granting leave to the plaintiff-opposite party under O. 2, R. 2 (3) of the Civil P. C. (hereinafter referred to as 'the Code') to institute another suit for the relief of possession of the suit properties, the present suit being merely for declaration of his title.

2. The plaintiff instituted the present suit only for a declaration of his title with respect to a house property on the basis of a sale deed executed by Sarjoo Sah, defendant No. 1. The sale deed was executed in his favour on 17-7-1976 for Rs. 20,000 leaving with him a sum of Rs. 7,000 out of the consideration for redeeming a mortgage bond of the house in favour of defendant No. 2. In these circumstances, he instituted the suit for a relief of declaration of his title only on the basis of the sale deed.

Defendant No. 2 in his written statement, inter alia, raised a plea that the suit was barred under the provisions of the Specific Relief Act. However when the suit became ready for hearing the plaintiff filed a petition for grant of leave to bring another suit subsequently in terms of O. 2, R. 2 (3) of the Code as stated earlier. The plaintiff stated in that petition that he was entitled to seek a further relief, namely, a decree for possession, the cause of action for the said relief being the same. This prayer has been granted by the court below.

3. On the facts stated above, two facts emerge which are undisputed, namely, that (i) the plaintiff was entitled to claim a further relief, namely, the relief for possession and (ii) that relief was founded on the same cause of action. Question arises as to whether on the facts of the present case, the learned Subordinate Judge committed any error of jurisdiction in granting the relief to the plaintiff under the provisions of O. 2, R. 2 (3) of the Code.

4. The Scheme of O. 2, R. 2 of the Code as would appear from its very beginning is that every suit should include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action unless of course, he chooses to relinquish any portion of the same in order to bring the suit within the jurisdiction of any Court, and omission to sue in respect of the whole of the claim, debars him to sue in respect of the said omitted or relinquished portion the defendant afterwards. Then comes sub-rule (3) which empowers the court to grant leave to a person to sue for a further relief afterwards in respect of the same cause of action. The scheme of O. 2, R. 2, therefore, is obvious that splitting of the claim is not permissible unless it is a case of a relinquishment, but in appropriate cases leave can be granted to reserve a right to institute a suit afterwards available to a person on the same cause of action. It need not be said that if the cause of action in the subsequent suit is different from that in the first suit, the provisions of O. 2, R. 2 will not be attracted and the subsequent suit will not be barred. The bar wil apply only if the cause of action is the same, and as already said earlier, it is not disputed that the cause of action for the relief of possession is the same.

5. Reliance in support of this application has been put on a single Judge decision of the Calcutta High Court in the case of Sm. Bimal Kumari v. Ashoke Mitra (AIR 1955 Cal 402). That was a suit on the original side of the Calcutta High Court for specific performance of an agreement for sale of a property situate outside the jurisdiction of that Court. There also leave under O. 2, R. 2 (3) of the Code in respect of possession of the premises was sought for and the learned Judge on taking the view on reference to certain decisions that the cause of action for the relief for possession was same, refused the prayer on the observation that he was not prepared to hold that the discretion of the Court should be exercised in favour of the plaintiff in giving leave under O. 2, R. 2 of the Code.

6. No other authority was cited at the Bar. It is no doubt true that the learned single Judge of the Calcutta High Court refused to exercise his discretion under sub-rule (3) of O. 2, R. 2 of the Code: in my opinion, that cannot he cited as a precedent that in such cases the Court has got no power to

grant leave and for that matter, leave should not be granted. In my considered opinion, the whole purport of sub-rule (3) is to empower a Court to grant leave to sue afterwards for a relief which might be available to a person at that very stage in the same suit, the cause of action for the suit being the same. The discretion, therefore, has been conferred to the Court to be exercised in appropriate cases in this regard and once a Court in its wisdom grants such relief, (sic) (leave) simply because the subsequent suit would cause harassment to a defendant and will give rise to multiplicity of suits, in my opinion, cannot be a ground to interfere with that discretion in the revisional jurisdiction of this Court. The framers of the Code must be presumed to have thought well of all these consequences and still the power has been given to a court in this regard. It may well be, that a different view in the matter could have been taken and another officer in place of the present Subordinate Judge would have declined to exercise the discretion in favour of the plaintiff. In my opinion, that cannot be a ground to hold that the exercise of jurisdiction itself was without jurisdiction.

7. For the reasons, discussed above, I do not find any error of jurisdiction in this case and would accordingly dismiss the application. In the circumstances, however, I shall make no order for costs.

Application dismissed.

AIR 1979 PATNA 234

K. B. N. SINGH, C. J. AND LALIT MOHAN SHARMA, J.

Ramjee Prasad and others, Petitioners v. State of Bihar and others, Respondents.

Civil Writ Jur. Case No. 1454 of 1978, D/- 9-1-1979.

(A) Bihar Agricultural Produce Markets Act (16 of 1960), Ss. 18, 21 — Section 52 Rules under — R. 66 — Powers of Secretary, Market Area Committee — Competent to appear on behalf of Market Committee and to instruct its lawyer to present its case before the Court. (Para 7)

(B) Bihar Agricultural Produce Markets Act (16 of 1960), S. 4 (1) and (2) — Notification under — Effect — Prohibition as to purchase, sale, storage, or processing of notified agricultural produces flows from the publication of the notification itself without waiting for any other steps to be taken by anybody else — Operation of S. 4 (2) is not kept in abeyance till market is transferred to the Market Committee. (Para 8)

(C) Bihar Agricultural Produce Markets Act (16 of 1960), S. 4 (2) — 'Other person' — Includes State Government — Language used in S. 4 (2) is wide in terms. (Words & Phrases — 'Person' — Meaning of). (Para 9)

(D) Constitution of India, Arts. 277, 372 (1) — Bihar Agricultural Produce Markets Act (16 of 1960) — Validity — Provisions of Act so far as they purport to take away rights of Municipalities are not ultra vires State Legislature on ground of inconsistency — Article 277 not applicable — Protection under Art. 372 also not available as Municipal Act stands impliedly amended. (Para 12)

Cases Referred: Chronological Paras

AIR 1968 SC 360 9

AIR 1967 SC 997: 1967 Cri LJ 959 9

Jai Narayan, Kapildeo Singh and Mrs. Ansuiya Jaiswal, for Petitioners; K. N. Singh (Standing Counsel No. 4) and J. D. Singh (Jr. Counsel) (for Nos. 1 and 3); B. C. Ghose and Satish Chandra Surya (for No. 5); Janardan Prasad Singh (for No. 2); Basudeo Prasad and Dhananjoy Kumar (for No. 4) and R. B. Mahto and Narendra Prasad (for No. 6), for Respondents.

LALIT MOHAN SHARMA, J.:— In the present writ application, under Articles 226 and 227 of the Constitution of India, the petitioners have stated that in April, 1978, they purchased several commodities from some grain merchants in Siwan town and paid, in addition to the price, sales tax as well as fee payable under the provisions of the Bihar Agricultural Produce Markets Act, 1960 (hereinafter referred to as 'the Markets Act'). Subsequently, the respondents 4 and 5 acting on behalf of the respondents 2 and 3 respectively realised additional toll from them. The petitioners have challenged the right of the respondents 2 and 3 or their agents to collect any fee, toll or tax, on transactions of sale and purchase of agricultural produce within the area notified under the Act as Siwan Agricultural Produce Market area and have prayed for a writ against them restraining

them to make any collection. The respondent No. 2 is the Siwan Municipality and the respondent No. 3 is the Land Reforms Deputy Collector, Siwan, under the respondent No. 1 and the respondents 4 and 5 claimed to be their respective lessees in regard to the Siwan market.

2. The preamble of the Markets Act indicates that the Legislature passed this Act with the object of providing better regulation of buying and selling agricultural produce and for establishment of markets for that purpose and Chap. II of the Act deals with the constitution of markets and Market Committees. In Section 5, it is mentioned that the State Government may, by notification, declare its intention of regulating the purchase, sale etc. of specified agricultural produce in a particular area, invited (sic) any objection or suggestion within the specified period. After expiry of the specified period and consideration of disposal of any objection or suggestion received, the State Government may, by a notification under S. 4 of the Act, declare the area mentioned in the notification under S. 3 (or any portion thereof) to be a market area for the purposes of the Act; and sub-section (2) of the Sec. 4 declares that on the publication of the said notification, no Municipality or other local authority or other persons notwithstanding anything contained in any law for the time being in force shall within the market area or within a distance thereof, so notified set up, establish or continue any place for purchase, sale, etc. of the notified agricultural produce. According to the case of the petitioners, such a market has been established for Siwan town which is collecting the fees payable under Section 27 of the Act and the respondents 2 and 5 have no right whatsoever to collect any toll.

3. This application has been mainly contested on behalf of the respondents 4 and 5. The respondent No. 5 has stated that he is a lessee in respect of the market held by the State Government in Siwan town and collects tolls, taxes etc. on the strength of a lease for the year 1978-79, which was granted to him after holding a public auction. It has been further stated that the Sub-Divisional Officer, Siwan, is the Chairman of the Agricultural Produce Market Committee, Siwan and it was he who held the auction for the settlement of Siwan market in which the respondent No. 5 was the highest bidder. The right of the Agricultural Produce Market Committee to realise any toll or tax has been seriously challenged on the ground that the market has not been transferred by the State Government to the Committee. The allegations in the writ application about payment of the fees by the petitioners to the Market Committee have been denied and it has been pointed out that this question does not arise since no Market Committee is functioning in the area.

4. The case was taken up for hearing on 18th July, 1978 when a preliminary objection was taken by Mr. B. C. Ghose, appearing for the respondent No. 3 that the writ application was not maintainable in absence of the Agricultural Produce Market Area Committee, Siwan. The petitioners, therefore, filed an application for adding the Market Area Committee as a party respondent and after hearing the learned counsel of the parties, we added the Market Area Committee as the respondent No. 6 by our order dated 20th July, 1978. Mr. Rambalak Mahto, Government Pleader No. 4, appeared in court and stated that he has got instruction on behalf of the Area Committee to appear in the case and that he will be filing a Vakalatnama and, in that view, it was not necessary to issue a notice to the added respondent. The hearing of the case was later adjourned several times on the prayer of one party or the other and was resumed in September, 1978, after a Vakalatnama executed by the Secretary of Market Area Committee was filed by Mr. Mahto. The Market Area Committee also filed its show cause supporting the case of the petitioners. Mr. Mahto further relied upon the statements made in the writ application, the rejoinder dated 7-7-1978 (pages 40 to 50 of the brief) filed on behalf of the petitioners in reply to the petition of the respondent No. 5, and the petitioner's application for addition of the respondent No. 6 as a party respondent filed on 20-7-1978 (at pages 64 to 86 of the brief). A counter affidavit on behalf of the respondents 1 and 3, that is, the State and the Land Reforms Deputy Collector Siwan was filed for the first time on 31-7-1978 which is at pages 87 to 93 of the brief stating that in 1974 the Revenue Department of the State Government had

issued a general order for the transfer of such markets throughout the State of Bihar which were covered under the provisions of the Market Act; but by its letter dated 12-7-1975, a copy whereof has been annexed to the counter-affidavit as Annexure 'A', it reviewed its earlier direction and stayed the transfer of the markets to the different Agriculture Produce Market Committees. It is further stated that the Revenue Department had been settling the Siwan market, the subject matter of the present case, since the date of the vesting of the zamindari under the provisions of the Bihar Land Reforms Act and continues to do so. Proceeding further, it is asserted that since the Siwan Market had not been transferred to the Market Committee, the Revenue Department continues to settle the same. During the course of the argument, Mr. Standing Counsel No. 4 appearing for the respondents Nos. 1 3 stated that he does not want to say anything further than placing the said counter affidavit.

5. Mr. Janardan Prasad Singh asserted on behalf of the Siwan Municipality that it has got the right to collect the tolls since the Market Committee is not functioning.

6. The main contention of the petitioners and the respondent No. 6 is that both the State Government and the Siwan Municipality were deprived of the right to maintain any market within the notified area by mere declaration of the area to be market area under Section 4 of the Market Act. No other step is necessary for the establishment of the market area and since there has been issued such a notification in the present case, the respondents 2 and 3 have lost their previous rights in this regard. The answer to the question depends on a construction of Section 4 of the Act. But before I proceed to consider this aspect, it is desirable to decide another objection mentioned below raised on behalf of the respondent No. 5.

7. Mr. Ghose challenged the right of the Secretary of the respondent Market Area Committee to authorise Mr. Rambalak Mahto to appear on behalf of the committee. He urged that Mr. Mahton's appearance and arguments are fit to be ignored. In reply Mr. Mahton relied upon several provisions of the Market Act and Bihar Agricultural Produce Market Rules 1975 (hereinafter referred to as 'the Rules'). Sec. 6 of the Act states that a Market Committee shall be established for a market area and Section 8 deals with the constitution of the first Market Committee. The procedure in regard to the constitution of the second and subsequent Market Committees is dealt with in Section 9. Section 18 declares that it shall be the duty of a market committee to implement the provisions of the Act, the Rules and by-laws and to provide facilities for marketing of the agricultural produce and to do such other acts as may be required in that connection. The sub-section (2) of the Section 18 has by way of illustration enumerated some of the works of the Market Committee including the duty to defend any legal proceeding. Section 17 enjoins that every Market Committee shall be a body corporate which may sue or be sued and further declares that subject to the Act, Rules and by-laws, it shall be competent for it to do all other things necessary for the purposes for which it is established. Section 21 provides that the Secretary of the Market Committee shall exercise such powers and perform such duties as are conferred or imposed on him by or under the Act and the rules. Rule 66 of the Rules, which has been framed under Section 52 of the Act deals with the powers and functions of the Secretary who has been described as Chief Executive Officer of the Market Committee. Clause (xiv) of Rule 66 says that the Secretary shall conduct legal proceedings in all courts and Tribunals on behalf of the market committee. In view of these provisions, it has to be held that the Secretary is empowered to appear on behalf of the Market Committee and to instruct its lawyer to present its case before the court. It is relevant at this stage to mention that there is nothing on the records of the case to suggest that Siwan Market Committee or its Chairman has taken a decision contrary to the steps which are being taken by the Secretary in the present case. I, therefore, overrule the objection raised on behalf of the respondent No. 5.

8. Before coming to the main question argued on behalf of the parties, it may be necessary to examine the provisions of Section 4 of the Markets Act

in some detail, which is in the following terms:

"4. Declaration of market area — (1) After the expiry of the period specified in the notification issued under Section 3 and, after considering such objections and suggestions as may be received before such expiry and after holding such enquiry as it may consider necessary, the State Government may by notification, decree the area specified in the notification under Section 3 or any portion thereof to be a market area for the purposes of this Act in respect of all or any of the kinds of agricultural produce specified in the notification under Section 3.

(2) On and after the date of publication of the notification under sub-sec. (1), or such later date as may be specified therein, no municipality or other local authority, or other person, notwithstanding anything contained in any law for the time being in force, shall, within the market area, or within a distance thereof to be notified in the Official Gazette in this behalf, set up, establish, or continue, or allow to be set up, established or continued any place for the purchase, sale, storage or processing of any agricultural produce so notified, except in accordance with the provisions of this Act, the rules and bye-laws.

Explanation.— A municipality or other local authority or any other person shall not be deemed to set up, establish or continue or allow to be set up, established or continued a place as a place for the purchase, sale, storage, or processing of agricultural produce within the meaning of this sectio, if the quantity is as may be prescribed and the seller is himself the producer of the agricultural produce offered for sale of such place or any person employed by such producer to transport the same and the buyer is a person who purchases such produce for his own use or if the agricultural produce, is sold by retail sale to a person who purchases such produce for his own use.

(3) Subject to the provisions of Section 3, the State Government may, at any time, by notification, exclude from a market area any area or any agricultural produce specified therein or include in any market area any area or agricultural produce included in a notification issued under sub-section (1).

(4) Nothing in this Act shall apply to a trade whose daily or annual turnover does not exceed such amount as may be prescribed."

The effect of a notification under Section 4 (1) of the Markets Act is dealt with in sub-section (2) and it will be observed that the mandate of law prohibiting purchase, sale, storage, or processing of notified agricultural produces flows from the publication of the notification itself without waiting for any other steps to be taken by anybody else. If any person is maintaining a market from before such notification, the operation of sub-s. (2) is not kept in abeyance till that person transfers the market to the Market Committee or takes any other steps in that regard. In that view, the affidavit filed on behalf of the respondents 1 to 3 to the effect that the Siwan bazar has not been transferred to the Market Committee is of no consequence. If the necessary conditions mentioned in Section 4(2) of the Markets Act are proved to have been satisfied, it has to be held that any other market which was in existence from before, if covered by the provisions of the Markets Act, must cease to continue. It has been asserted in paragraph 3 of the show cause of the respondent No. 6 that a notification under Section 4 dated 10-10-1975 was made, as evidenced by Annexure 'A' to the show cause and that there has been further extensions of the area covered by the notification subsequently. The notifications have been published in Extraordinary issues of the Bihar Gazette. The admitted position now is that the notified area covers that area in respect of which the present writ application has been filed. It must, therefore, be held that the effect mentioned in sub-section (2) of Section 4 of the Markets Act has come into play.

9. Mr. B. C. Ghose contended on behalf of the respondent No. 5 that Section 4 (2) of the Markets Act cannot, in any event, affect the right of the State Government and consequently its agent, respondent No. 5, as the language thereof although referring to municipalities, other local authorities or other persons, does not refer to the State Government. However, I should mention here that no such interpretation has been pressed by Mr. Kameshwari Nandan Singh, appearing for the State. The question, therefore, arises as to whether the State Government can be included in the expres-

sion other 'person' within the meaning of the sub-section. It is true that the popular use of the term 'person' is in regard to human beings, but the meaning of the word given in the Dictionary also include 'personality' in the larger sense of the term. It cannot be laid down as a general rigid proposition that the word 'person' can never include the State and it may be useful to refer to the decision in the Superintendent and Remembrancer of Legal Affairs, West Bengal v. Corpn. of Calcutta (AIR 1967 SC 997). Under Section 218 (1) of the Calcutta Municipal Act, 1951, it is enjoined that every person who carried on certain business in Calcutta should take out a licence and in default thereof he is liable to fine. The question arose as to whether the State of West Bengal was included within the said sub-section and the answer was given by the Supreme Court in the affirmative. It is, therefore, a question of the interpretation of Section 4 of the Markets Act which will decide the issue. The object of the Markets Act is to provide for a regulated system of markets for agricultural produce, and in furtherance thereof S. 4 has abolished double control of the markets which could understandably lead to confusion and in many cases inconsistency. The Market Committees which are established under S. 6 of the Market Act (in the present case also a market committee has been established by notifications which are on the record of this case) have been authorised under Section 27 of the Markets Act to levy and collect market fees and Section 4 (2) takes care that nobody is subject to double fee. The language used in the sub-section is wide in terms. In view of the object of the legislature, the scheme of the Act and the language of the section, it is hardly likely that any discrimination between the State on the one hand and the citizens and other authorities on the other is being made in the present context. This is specially so because if such a discrimination is to be brought about through a construction suggested by Mr. Ghose, it may result in an anomalous situation in many cases. Applying the guide line for the purpose of interpretation, as indicated by the Supreme Court in paragraph 12 of the judgment in Union of India v. Jubbi (AIR 1968 SC 360). I am of the view that the Section 4 of the Market Act includes in its terms the State of Bihar.

10. Mr. Ghose also faintly suggested that the provisions of Section 4 (2) of the Markets Act are ultra vires the Constitution of India. But since the vires of the Act has been considered in great detail by several decisions of this court, both reported and unreported, I do not propose to deal with the question except by following the earlier decisions upholding the Act.

11. Another argument attempted on behalf of the respondent No. 5 has been that the petitioners have not proved that they have been adversely affected so as to maintain the writ application and the allegations of fact are too vague about the realisation of the fee by the Market Committee. During the course of the hearing, certain prayers were also made by the respondents for orders directing for the production of certain documents and examination of certain authorities of the State. Having regard to my view on the question agitated, I do not consider it either expedient or desirable to direct production of any evidence and the application made by the respondent No. 5 is rejected. The petitioners have asserted that they were made to pay the fee realisable under Section 27 of the Markets Act and the allegations have not been denied in the show cause of the Market Committee. The Committee, instead, asserted that it has been realising market fee within the notified area and details of the collections have been given in paragraph 10 of the show cause. During the pendency of this application, while dealing with the question of stay, this court permitted the Market Committee to continue to collect fees on the condition that proper accounts should be maintained so that in case of dismissal of the writ application, materials could be available for the successful respondents to claim damages. I, therefore, hold that there is no substance in the objection raised to the maintainability of the writ application.

12. Appearing on behalf of the respondent No. 4 who claims authority to realise tolls on behalf of the Municipality, Mr. Basudeva Prasad contended that in view of the power bestowed on the Municipality by Section 82 (1) (ff) and Section 275 of the Bihar and Orissa Municipal Act, 1922, read with

Article 277 of the Constitution of India, the provisions of the Markets Act so far as they purport to take away the right of the Municipalities are ultra vires. The Article is in the following terms:

"Any tax, duties, cesses or fees which immediately before the commencement of this Constitution, were being lawfully levied by the Government of any State or by any Municipality or other local authority or body for the purposes of the State, Municipality, district or other local area may, notwithstanding that those taxes, duties, cesses or fees are mentioned in the Union List, continue to be levied and to be applied to the same purposes until provision to the contrary is made by Parliament by law."

It is manifest that the Article, covers only such cases in which the fees are mentioned in the Union List and not to other cases and it has been firmly established that the Markets Act is within the legislative competence of the State Legislature and deals with matters covered by the State List. It must, therefore, be held that Article 277 of the Constitution has no application in the present context. So far as clause (1) of Art. 372 of the Constitution is concerned, it said that all the laws in force immediately before the commencement of the Constitution would continue in force. "Until altered or repealed or amended by a competent Legislature or other competent authority."

The protection to the earlier law given by the Article 372 is, therefore, available only so long there is no amendment of the law itself. It is well settled that besides express amendment of a statute, it may be modified by necessary implication by competent legislature and it can be so done even by a separate enactment. When two Acts are clearly inconsistent with or repugnant to each other, the former will be deemed to be altered, repealed or amended, as the last expression of the will of the Legislature must prevail. It is of course essential to show that the two provisions are really irreconcilable before an inference of implied repeal can be drawn. In the present case, Mr. Basudeva Prasad rightly contends that the power of the Municipality under Sections 82 (1)(ff) and 275 of the Municipal Act and the interpretation which I have put on Section 4 of the Markets Act are, consistent (sic). In that view, it must be held that the power of the Municipality under the Municipal Act has been cut down to the extent which is covered by S. 4 of the Markets Act. It must be held that to that extent the provisions in the Municipal Act are impliedly amended by the Markets Act and there is no question of the Markets Act being held ultra vires on the ground of inconsistency with the Municipal Act. The additional objection raised on behalf of the respondent No. 4 is also, in the circumstances, rejected.

13. It may further be observed that no claim by any of the respondents has been made on the basis of sub-section (3) or (4) of the Section 4 of the Markets Act.

14. In the result, I hold that the State of Bihar and the Siwan Municipality have been deprived of the power to realise any tax or fee on the purchase, sale etc. of any agricultural produce notified in the notifications mentioned above within the areas specified in the said notifications to the extent covered by the provisions of the Bihar Agricultural Produce Markets Act, 1960 and the respondents 1 to 5 are restrained from realising any such tax or fee. The writ application is accordingly allowed, but in the circumstances of the case, without costs.

K. B. N. SINGH, C. J.:— I agree.

Petition allowed.

AIR 1979 PATNA 239

B. P. JHA AND HARI LAL AGRAWAL, JJ.

Rajnath Sahgal and others, Petitioners v. Shiva Prasad Sinha and others, Opposite Parties.

Civil Revn. No. 802 of 1978, D/- 28-11-1978.*

(A) Civil P. C. (5 of 1908), O. 22, R. 4 (4) (as added in 1976) — Substitution of legal heirs of deceased defendants — Courts can dispense such substitution even without setting aside abatement at any stage of suit before delivery of judgment — Conditions for applicability of rule pointed. (1955) 59 Cal WN 304 and AIR 1964 Orissa 39, Diss. from. (Paras 8, 9, 11, 30)

*(Against order of Ram Janam Singh 1st Sub. J., Arrah, D/- 29-3-1978.).

EW/EW/C359/79/SSG

(B) Civil P. C. (Amendment) Act (104 of 1976), S. 97 (2) (r) — Effect of Section pointed — Civil P. C. (5 of 1908), O. 22, R. 4 (4) (as added in 1976) — O. 22, R. 4 (4), is applicable even to a case of deemed abatement — Order of abatement not expressly recorded in pending proceedings — O. 22, R. 4 (4) will be attracted. (Paras 26, 27, 28)

Cases Referred: Chronological Paras

AIR 1977 Kant 20 11, 29
AIR 1975 Cal 12 28
AIR 1964 Orissa 39 7, 28
AIR 1961 Cal 560 : 1961 (2) Cri LJ 617 (FB) 24
AIR 1955 NUC 4500 : 59 Cal WN 304 7, 28
(1948) 52 Cal WN 599 28

K. D. Chatterjee and R. S. Pradhan and Mrs. Nilima Thakur, for Petitioners; Awadh Kishore Prasad and Binod Kumar Sinha, for Opposite Parties.

B. P. JHA, J.:— In a civil revision petition, these petitioners (defendants 12 to 14) have challenged the validity of the order dated 29th March, 1978 passed by the First Subordinate, Judge, Arrah, in Title suit No. 46 of 1977. By virtue of this order, the learned Subordinate Judge was pleased to set aside the abatement and exempted the plaintiffs from substituting the legal heirs of defendants 1 and 10. It is this order which is under challenge before this court.

2. The plaintiffs filed the suit for a declaration that the sale deed dated 15th May, 1972 executed by defendants 1 to 7 in favour of defendants 12 to 14 is void and inoperative so far as the plaintiffs and defendants 8 to 11 are concerned. The common ancestor of the original plaintiffs and defendants 1 to 7 and defendants 8 to 11 was Bhagwan Prasad. He died leaving behind three sons, namely, Mahesh Prasad, Bishwanath Prasad and Mahadeo Prasad. The original plaintiffs belonged to the branch of Bishwanath Prasad, whereas defendants 1 to 7 belonged to the branch of Mahesh Prasad, and defendants 8 to 11 belonged to the branch of Mahadeo Prasad. By virtue of the sale deed dated 15th May, 1972, defendants 1 to 7 sold the suit properties to defendants 12 to 14. The case of the plaintiffs and defendants 8 to 11 was that defendants 1 to 7 had no right to sell the share of the plaintiffs and defendants 8 to 11. The suit was originally filed before the Subordinate Judge at Varanasi. By the order of the Supreme Court, the present suit was transferred from Varanasi to the court of the Subordinate Judge at Arrah.

3. In the present case, the admitted position is that defendant No. 1 Dr. Vishnu Shankar died on 5th August, 1975, and Satyanarain Prasad (defendant No. 10) died on 6th January, 1975. It is also an admitted position that the original plaintiffs did not file any application for substitution within 90 days of the date of death of defendants 1 and 10. Defendant No. 11 Sri S. P. Sinha filed an application for substituting the heirs of Dr. Vishnu Shankar on 29th November, 1975, and this application was filed within 150 days, that is, within statutory period for setting aside abatement.

4. By the order dated 3rd February, 1978, defendant No. 11 Sri S. P. Singh was transposed as a plaintiff. On 13th March, 1978, the transposed plaintiff Sri S. P. Singh filed an application to set aside the abatement and to substitute the heirs of defendant No. 10. Defendant No. 11 (the transposed plaintiff) also filed an application to exempt the plaintiffs from the necessity of substituting the legal representatives of the deceased defendants. Defendant No. 10 Satyanarain Prasad died on 6th January, 1975. The original plaintiffs had filed an application for substitution on 28th April, 1975, but later on the petition for substitution was not pressed.

5. On these facts, the trial court set aside the abatement and also exempted, the plaintiffs from substituting the legal representatives of the deceased defendants under Order 22, Rule 4 (4) of the Civil P. C.

6. The short point for consideration in this civil revision petition is: Whether the court has power to exempt the plaintiffs from the necessity of substituting the legal representatives in a case where the suit abated on account of non-filing of any substitution petition within ninety days of the date of death of the deceased defendant?

7. In the present case, the admitted position is that no application for substitution was filed within ninety days from the date of death of defendants 1 and 10. On 13th March, 1978, an application was filed by the transposed plaintiff, S. P. Singh, for setting aside abatement and for exempting the

plaintiffs from the necessity of substituting the legal representatives of the deceased defendants. Learned counsel for the petitioners contends that the provisions of Order 22, Rule 4 (4) of the Civil P. C. apply before the suit has abated and not after that. In this connection, he relies on two decisions, namely, in Nani Gopal Mukherji v. Panchanan Mukherji, 59 Cal WN 304: (AIR 1955 NUC 4500) and in Lakshmi Charan Panda v. Satyabadi Behera (AIR 1964 Orissa 39). By virtue of the High Court amendment, the Calcutta, Orissa and Karnataka High Courts had already added an identical provision as sub-rule (4) of Order 22, Rule 4. In these two decisions, the Calcutta and Orissa High Courts were of opinion that the court's power to dispense with the substitution under Order 22, Rule 4 (4) can be exercised only before an abatement takes place and not thereafter. In other words, they are rather of opinion that once the suit abates, the court has no power to exempt the plaintiff from the necessity of substituting the legal representatives. They are thus of opinion that the stage for dispensing with the substitution arises before the stage of abatement. In other words, they are of opinion that once the suit abates, no application under Order 22, Rule 4 (4) of the Civil P. C. is maintainable.

8. I respectfully disagree with the opinion expressed by these two High Courts. By virtue of the Code of Civil Procedure (Amendment) Act, 1976, sub-rule (4) of Order 22, Rule 4 has been substituted. The intention of the legislature was to check delay in disposing of the suits. It is for this reason that this provision was amended. The plaintiff can move for dispensing with the substitution of the legal heirs in these circumstances, namely (1) if the deceased defendant had failed to file a written statement, or (2) who, having filed it, had failed to appear and contest the suit at the hearing. In those two circumstances, the plaintiff can move an application for dispensing with the necessity of substituting the legal heirs of the deceased defendants and "the court whenever it thinks fit, may exempt the plaintiff from the necessity of substituting the legal representatives of" the deceased defendant, and the court shall be entitled to pronounce the judgment as if it has been pronounced before the death took place. In my opinion, the wordings of sub-rule (4) of Order 22, Rule 4 are wide enough to include the case even after abatement. The words occurring in sub-rule (4) "whenever it thinks fit" give the jurisdiction to the court to dispense with the substitution at any time before the delivery of the judgment. The intention of the legislature is that the technical difficulty of the abatement should be a bar to the court in pronouncing the judgment and to check the delay in disposing of the suits. In this view of the matter, I hold that the legislature has put no restriction or limitation on the court in dispensing with the substitution of the legal heirs of the deceased defendants. In this connection Section 97 (2) (r) of the Civil P. C. (Amendment) Act, 1976 is relevant, and it runs as follows:

"(r) the provisions of Rule 4 of Order XXII of the first Schedule, as substituted by Section 73 of this Act, shall not apply to any order of abatement made before the commencement of the said Section 73;"

By virtue of Section 97 (2) (r), the only limitation put in giving effect to sub-rule (4) of Order 22, Rule 4 is that if an order of abatement has already been recorded by the Judge in the case, then the provision of sub-rule (4) of Order 22, Rule 4 of the Civil P. C. will not be applicable.

9. In my opinion, the legislature has put two conditions while applying the provisions of Order 22, Rule 4 (4), and they are — (1) that the provision will apply in a case where a defendant has failed to file a written statement, or he having filed it, has failed to appear and contest the suit at the hearing, (2) that this provision will apply where no order of abatement has been recorded in the case.

If the abatement order has been recorded by the court, then the provisions of Order 22, Rule 4 (4) shall not apply. If the aforesaid conditions are fulfilled, the court can apply provisions of Order 22, Rule 4 (4) at any time before delivery of judgment.

In the present case, the admitted position is that defendants 1 and 10 had not filed the written statement. They also did not appear to contest the suit. It is also an admitted position that an abatement order in respect of the death of defendants 1 and 10 had not been recorded by the trial Judge. In the present case, these conditions

have been satisfied and, as such, the court was justified in law in dispensing with substituting the legal heirs of defendants 1 and 10 under sub-rule (4) Order 22, Rule 4 of the Civil P. C.

10. There is another aspect of the matter and that is this:— The Calcutta High Court and Orissa High Court were of opinion that the stage of passing the order under Order 22, Rule 4 (4) is the stage when the abatement has not taken place. These High Courts have not considered the stage of setting aside the abatement if the plaintiff applies for setting aside abatement as well as files an application under sub-rule (4) of Order 22, Rule 4. While setting aside the abatement order, the Court is entitled to pass the order under sub-rule (4) of Order 22, Rule 4 of the Civil P. C. If the court can set aside the abatement order, the court has authority in law to set aside the order of abatement after condoning the delay. This aspect of the matter was not at all examined by those two decisions. Shri K. D. Chatterji, appearing on behalf of the petitioners, concedes that the court can dispense with the substitution after setting aside abatement. In this view of the matter also, we are unable to accept the correctness of the decisions of the Calcutta and Orissa High Courts. In the present case, the court below set aside the abatement and dispensed with the substitution of the heirs of deceased defendants 1 and 10.

11. The Karnataka High Court in S. A. Rahim v. Rajamma (AIR 1977 Kant 20) has supported the view taken by me. I, therefore, accept the view of the Karnataka High Court and respectfully disagree with the opinion of the Calcutta and Orissa High Courts. Agreeing with the view of the Karnataka High Court, we hold that the court can dispense with the substitution of the heirs under Order 22, Rule 4 (4) even without setting aside abatement at any stage of the suit.

12. The court below has set aside the abatement and held that the petition for setting aside abatement which was filed on 13th March, 1978 was within time as it has been filed within the statutory period. The court below was of opinion that as defendant No. 11 was transposed as a plaintiff on 3rd February, 1978, and as such the transposed plaintiff filed the application for setting aside abatement on 13th March, 1978 which was within the statutory period. We agree with the opinion of the trial judge. Learned counsel for the petitioners also did not seriously challenge the validity of the order in connection with setting aside abatement on account of the death of defendants 1 and 10.

12-A. I am unable to interfere with the impugned order in revision for the simple reason that the court below exercised the discretion which was vested in it by law.

13. In the result, the petition is dismissed. The parties will bear their own costs.

HARI LAL AGRAWAL, J.:— 14. I have had the advantage of perusing the judgment of my learned brother B. P. Jha. While agreeing with him that this application must be dismissed, I would like to give my own views also as the questions that have fallen for consideration are of some importance and of first impression.

15. On the facts of the case, precisely stated in the judgment of my learned Brother, two questions of law arise for consideration in this case. Firstly, as to whether the sub-rule (4) added to Rule 4 of Order 22 of the Civil P. C. by the Civil P. C. (Amendment) Act, 1976 (Act 104 of 1976) (hereinafter referred as 'the Amending Act'), will apply to this suit; and secondly, if it applies, then whether the exemption contemplated by this provision could be granted to the plaintiff as more than 90 days had elapsed from the death of the defendants concerned when the application was made.

16. From the facts of the case which have been already stated in the judgment of my learned Brother it would appear that while the suit was pending at Varanasi, Satyanarain Prasad (defendant No. 10) had died on 6-1-1975 and Dr. Bishnu Shekhar (defendant No. 1) on 5-8-1975. Both these defendants had not entered appearance in the suit although they had been served with the summonses and had left behind several legal representatives. Defendant No. 11 had also filed there an application on 26-4-75 for his transposition as a plaintiff. No order, however, was passed on that application by that court and the application remained pending until 3-2-1978 when the Subordinate Judge, Arrah allowed the application and defendant No. 11 was accordingly

transposed to the category of the plaintiffs.

17. During the pendency of the aforesaid transposition application, the original plaintiffs and defendants Nos. 12 to 14 had filed a compromise petition. But this petition also remained pending as the suit had become defective on account of the death of the defendants mentioned above.

18. No step having been taken by the plaintiffs for substituting the heirs and legal representatives of the said defendants Nos. 1 and 10, defendants 12 to 14 filed an application on 10-8-1977 for dismissal of the suit on the ground of abatement. They made a further prayer that the transposition application of defendant No. 11 should be considered only after the abatement matter was decided. Soon thereafter defendant No. 9 also made an application for his transposition as a plaintiff. Both the applications for transposition were, however, allowed by the learned Subordinate Judge on 3-2-1978 in spite of the protests made on behalf of the contesting defendants Nos. 12 to 14 as already indicated above.

19. After defendant No. 11 was transposed as a plaintiff, he made an application on 13-3-1978 for setting aside the abatement of the suit as against the heirs of defendant No. 10. He filed another application praying for an exemption from taking any steps for substitution in pursuance of the amended R. 4 of O. 22 of the Civil P. C. by the Amending Act which came into force on 1-5-1978.

20. The learned Subordinate Judge by the impugned order allowed the prayer of the substituted plaintiff for exemption from substituting the legal representatives of the deceased defendants. He, however, also allowed the substitution petition after setting aside the abatement.

21. In this application we are not concerned with the correctness of the second part of the order setting aside the abatement of the suit inasmuch as this part of the order in my view is apparently innocuous in view of his order granting exemption to the transposed plaintiff from taking any step for substitution itself.

22. Be that as it may, Mr. K. D. Chatterji, learned counsel appearing for the petitioners, has strenuously challenged the order of the learned Subordinate Judge granting exemption to the plaintiff from the necessity of substituting the legal representatives of the defendants on the ground that inasmuch as the abatement had already set in when the sub-rule had been brought on the statute book, the power conferred by sub-rule (4) could not be exercised. It may be mentioned that similar provisions had already been made by different High Courts in India under their amending powers. I will refer to those amendments and the decisions of some of those High Courts hereinafter.

23. By the Amending Act the following sub-rule has been added:—

"4. xx xx xx
xx xx xx

(4) The court whenever it thinks fit, may exempt the plaintiff from the necessity of substituting the legal representatives of any such defendant who has failed to file a written statement or who, having filed it, has failed to appear and contest the suit at the hearing and judgment may, in such case, be pronounced against the said defendant notwithstanding the death of such defendant and shall have the same force and effect as if it has been pronounced before death took place.

(5) xx xx xx
xx xx xx"

Mr. K. D. Chatterji contended that although the amendment was in nature a procedural law and would have retrospective application, — applicable even to the pending proceedings including the suit in question, it can be made applicable only from the stage the suit had reached and could not be applied to confer new rights or undo the rights already accrued to any of the parties to a suit when it came into force.

24. Law is not in doubt that amended law relating to procedure operates retrospectively, but this only means that pending cases although instituted under the old Act but still pending are governed by the new procedure under the amended law. It does not, however, mean that the part of the old procedure already applied and concluded before the amendment came into force, becomes bad or can be reopened under the new procedure after the amendment, as that would make an ex post facto the procedure legal, when applied and concluded, illegal by subsequent law. Such a consequence is not permitted unless, of course, the statute expressly or by

compelling implication provides. In Ajit Kumar Palit v. State (AIR 1961 Cal 560) (FB) it was clearly laid down that where the amendment is only of procedure, even pending cases are governed by the amended law, but only in respect of those stages of procedure that remained to be applied after the amendment comes into force. Mr. Chatterji argued that as on the death of a party to a suit the abatement takes place automatically after the period of limitation if no application for substitution is made in case the right to sue does not survive, as in the case before us, the question of granting exemption to the plaintiff from taking steps for substituting the legal representatives of the deceased defendants did not arise.

25. This is the crux of the issue. Whereas it is no doubt true that on the death of any party to the suit the abatement automatically sets in on the expiry of the period of limitation, if no application is made nonetheless, the court has been empowered under R. 9 (2) of O. 22 of the Code, on sufficient cause being shown, to set aside the abatement. It is thus obvious that notwithstanding the notional abatement of the suit, the court has got the power to set aside the same. This takes us to the consideration of the provisions of 'repeal and savings' contained in S. 97 of the Amending Act. Sub-secs. (2) and (3) of this section read as follows:—

"97 (1) xx xx xx

(2) Notwithstanding that the provisions of this Act have come into force or the repeal under sub-sec. (1) has taken effect, and without prejudice to the generality of the provisions of Section 6 of the General Clauses Act, 1897—

xx xx xx

xx xx xx

(r) the provisions of R. 4 of O. XXII of the First Schedule, as substituted by S. 73 of this Act, shall not apply to any order of abatement made before the commencement of the said S. 73:

xx xx xx

xx xx xx

(3) Save as otherwise provided in sub-sec. (2), the provisions of the principal Act, as amended by this Act, shall apply to every suit, proceeding, appeal or application, pending at the commencement of this Act or instituted or filed after such commencement, notwithstanding the fact that the right, or cause of action, in pursuance of which such suit, proceeding, appeal or application is instituted or filed, had been acquired or had accrued before such commencement."

26. From a perusal of the relevant cl. (r) extracted above, it will appear that the said provision is 'not to apply if any order of abatement has been made before the commencement' of S. 73 of the Amending Act. I have deliberately underlined the relevant expressions in the provision to emphasise my point of view. Section 97 (2) (r) of the Amending Act makes the amended Rule 4 of O. 22 applicable to all such cases where no order of abatement has been made (recorded) by a court. Therefore, once an order of abatement is recorded, only then this new provision will not apply. In the case before us we have seen that no express order of abatement was recorded by the court although a petition was filed by the defendants to that effect. In my opinion, the provisions of sub-rule (4) are not intended to be made applicable in a case where there might have been a deemed abatement of a suit simply by efflux of time prescribed for making an application as contemplated under Rule 3 (2) or Rule 4 (3) of O. 22 of the Code, unless an order to that effect is expressly recorded by the court.

By the provisions contained in Rule 9 of O. 22, an application for setting aside an abatement can be made long after the abatement might have set-in in a case, and the court, if satisfied, that there is sufficient cause for making the application at a late stage, may set aside the abatement. If the court does not accept the sufficiency of the cause for the delay it may reject the application and record an express order of abatement. In my considered view, the expression in cl. (r) to the effect that the words "any order of abatement" have been deliberately used by the Parliament to make the amended provisions of Rule 4 applicable to all such cases where although the deemed abatement might have taken place on the mere expiry of the period of limitation prescribed for making an application from the death of a party, but the court has not recorded any express order of abatement. If the Parliament would have intended that the provisions of sub-rule (4) would not apply where, on the expiry of the period of limitation, the deemed abatement had taken place, then the language employed in cl. (r) of Sec-

tion 97 (2) of the Amending Act should have been different and would not have used the expression therein 'making of any order'.

27. I would accordingly hold that sub-rule (4) inserted by S. 73 of the Amending Act will have application to all pending proceedings in which no order of abatement was expressly recorded by that time.

28. Having recorded my answer to the first question, I proceed to consider the second question, namely, the time within which the court can grant the exemption. I have already said earlier that some of the High Courts had made similar amendments to Rule 4 of O. 22. Those High Courts are Assam, Andhra Pradesh, Calcutta, Madras, Karnataka and Orissa. I may quote the sub-rule as framed by the Calcutta High Court which reads as follows and is almost similar to the central rule:

"(4) The court, whenever it sees fit, may exempt the plaintiff from the necessity of substituting the legal representatives of any such defendant who has failed to appear and contest the suit at the hearing; and judgment may in such case be pronounced against the said defendant notwithstanding the death of such defendant and shall have the same force and effect as if it has been pronounced before death took place."

The rule adopted by the Orissa and Karnataka High Courts is almost exactly similar. A few cases also arose in some of these High Courts which have been cited at the Bar. The view of the Calcutta High Court right from the case of Sree Sankari Prasad Singh Deo v. Kanai Lal Roy ((1948) 52 Cal WN 599) up to Annapurna Devi v. Sm. Harsundari Dassi (AIR 1975 Cal 12) has been the same. In the case of Nani Gopal Mukherji v. Panchanan Mukherji 59 Cal WN 304: (AIR 1955 NUC 4500) and in Lakshmi Charan Panda v. Satyabadi Behera (AIR 1964 Orissa 39) the Calcutta and Orissa High Courts respectively took the view that the power to grant exemption under sub-rule (4) of Rule 4 must be exercised before the deemed abatement takes place. The Orissa High Court has also relied on the abovementioned decision of the Calcutta High Court and has similarly interpreted the expression "whenever the court thinks fit" to mean in the context that the power must be exercised within 90 days from the date of death and before the abatement takes place. It has further observed that within the period of 90 days two courses are open to the party — either to file an application for substitution or to file an application praying for invoking the court's power for exempting him from the necessity of substituting the legal representatives concerned. Strong reliance was placed on the above decisions by Mr. K. D. Chatterji.

29. The Karnataka High Court in the case of S. A. Rahim v. Rajamma (AIR 1977 Kant 20), however, has taken a different view and has held that the power of exemption contained in sub-rule (4) can be exercised by the court "whenever it thinks fit" before the disposal of the suit. In the case before the Karnataka High Court the application for exemption, filed after two years of the death of the fifth defendant, from the necessity of substituting his legal representatives who had not entered appearance in the suit, was allowed by the trial court and this order was upheld. If the view of the Calcutta and the Orissa High Courts are accepted then the amending provision cannot enure to the benefit of the present plaintiffs inasmuch as the deemed abatement had already set in much before sub-rule (4) was inserted and in that case the application of the transposed plaintiff filed on 13-3-1978 claiming exemption from taking steps for substitution was apparently not maintainable.

30. However, with due deference to the learned Judge of the Calcutta and Orissa High Courts who decided the above cases, I find myself unable to reconcile with the view taken by them in the matter and feel inclined to take the view that the amendment has liberalised the provision to a very large extent in the case of dormant defendants, inasmuch as sub-rule (4) of R. 4 of O. 22 is intended to apply to all such cases where even the deemed abatement might have taken place, i.e., the period of 90 days might have expired from the death of a party, but no express order in that regard is recorded. Taking the narrower view, in my opinion, would cause violence to the wider amplitude indicated by the Parliament by using the expression "whenever it thinks fit", and will frustrate the object of the amendment to a very large extent. I would also seek support for this view from the answer given by me to

the first question, i.e., the provision is to apply to all cases where an order of abatement has not been expressly recorded. Taking any other view of the question will render my decision inconsistent.

31. The inevitable result that follows from the above discussions is that no error of jurisdiction has been committed by the learned Subordinate Judge in allowing the application of the transposed plaintiff for granting exemption from taking steps for substitution of the legal representatives. I would accordingly dismiss this application.

Application dismissed.

AIR 1979 PATNA 246
= 1979 Cri. L. J. 1110

FULL BENCH

C. N. TEWARY, NAGENDRA PRASAD SINGH AND P. S. SAHAY JJ.

Gaya Singh and others, Petitioners v. Doman Singh, Opposite Party.

Criminal Misc. No. 2337 of 1975, D/- 19-3-1979.

Criminal P. C. (2 of 1974), S. 146 — Initiation of proceedings under Section 145 — Attachment without hearing parties permissible — Attachment to continue till conclusion of proceedings. 1975 BBCJ 856, Overruled. Case law discussed. (Para 6)

Cases Referred: Chronological Paras

1979 Cri LJ 119 (Punj & Har)	8
AIR 1978 SC 333: 1978 Cri LJ 356	6
1977 Cri LJ 2032 (Bom)	8
1977 Cri LJ 563 (Raj)	8
1976 Cri LJ 209: 1976 All LJ 211	8
1976 Cri LJ 1915 (Delhi)	8
1976 Cri LJ 2014 (Orissa)	8
1975 BBCJ 856	2

Kailash Roy, Binod Kumar Roy and N. K. Sharma, for Petitioners; Jyoti Narain, for Opposite Party.

NAGENDRA PRASAD SINGH, J. : — This case has been referred to a Full Bench for consideration of the questions as to whether under the provisions of the Code of Criminal Procedure, 1973 (hereinafter to be referred to as the new Code), a Magistrate initiating a proceeding under Section 145 of the said Code, can attach the subject matter of the dispute under Section 146 (1) without hearing the parties, and as to whether while the order of attachment continues, he can proceed to dispose of the said proceeding.

2. The petitioners in this application are members of the second party in a proceeding under Section 145, which was initiated on 31-5-1975 on the basis of a petition filed by the first party-opposite party. Learned Magistrate, the same day after hearing only the opposite party, attached the subject matter in dispute under S. 146 (1) saying :—

"It appears to me a case of emergency nature, the land mentioned in the petition at pages six to ten is attached under Section 146 (1) Cr. P. C."

The petitioners questioned the legality of the said order on the ground that the Magistrate concerned had no authority in law to attach the subject matter of the dispute without hearing the petitioners. This argument was advanced on the basis of a Bench decision of this Court in the case of Khedu Mahto v. Smt. Prem Sundari (1975 BBCJ 856). In the aforesaid Bench decision, it was held that under the new Code there is no scope of an interim attachment during the pendency of the proceeding: once the order of attachment is passed it is to continue until a competent court has determined the rights of the parties thereto, unless at some stage the Magistrate is satisfied that there is no longer any likelihood of breach of peace. It was further held that as the order of attachment was to affect a valuable right of one of the parties to the proceeding and likely to continue, in many cases for years till the dispute is decided by the civil Court, the party, which is not before the court, should be heard before such order of attachment is passed.

3. This case was listed for hearing before a Bench presided over by Madan Mohan Prasad and Shivanugrah Narain, JJ. That Bench was of the view that at the time of initiating the proceeding under Section 145 or any time thereafter, a Magistrate can pass an order of attachment under sub-section (1) of Section 146 even without hearing the parties and such order shall not be per se illegal as held by the earlier Bench decision of this Court. It was also observed that having attached the subject matter in dispute, being satisfied about the existence of emergency, it is always open to the Magistrate concerned to withdraw the said attachment after the emergency disappears and then to proceed with the hearing of the case. On that view, this

case was referred to a Full Bench on 25-8-1976.

4. Sections 145 and 146 have a chequered career. They have been undergoing changes from time to time, perhaps with the sole object to find out a procedure by which a dispute regarding the actual physical possession of land can be decided as early as possible so as to avoid any apprehension of breach of the peace prior to the amendment of the Code of Criminal Procedure, 1898 (hereinafter referred to as the old Code) : by Act XXVI of 1955, there was provision for two types of attachments of the subject matter in dispute. One was under proviso to sub-section (4) of Section 145 which was in the nature of an interim attachment and was to continue during the pendency of the proceeding. The other was under Section 146 of the old Code which was to last till the matter is decided by a competent court, meaning thereby the Civil Court. In many cases, this attachment under Section 146 lasted for years, sometime even for a decade. As such, by the aforesaid Amendment Act XXVI of 1955 Section 145 as well as Section 146 were amended. The provision of interim attachment was retained whereas in Section 146 a provision was made to enable the Magistrate to refer the dispute to the Civil Court and then to pass an order in conformity with the finding recorded by the Civil Court. Now under the new Code again there have been substantial changes in Ss. 145 and 146. For the purpose of this case, it may be pointed out that the proviso to sub-section (4) enabling the Magistrate to attach the subject-matter of proceeding pending his decision was deleted and a clause was added in Section 146 vesting power in the Magistrate to attach the subject matter in dispute in case of emergency. The remaining portion of the new Section 146 substantially incorporated Section 146 as it stood prior to the amendment by the aforesaid Act XXVI of 1955. Sub-section (1) of Section 146, as it stood prior to 1955, was as follows:—

"If the Magistrate decides that none of the parties was then in such possession or is unable to satisfy himself as to which of them was then in such possession of the subject matter of dispute, he may attach it until a competent court has determined the rights of the parties thereto, or the person entitled to possession thereof: Provided that the Dist. Magistrate or the Magistrate who has attached the subject of dispute may withdraw the attachment at any time if he is satisfied that there is no longer any likelihood of a breach of the peace in regard to subject of dispute".

On a plain reading, the Magistrate could attach the subject matter of dispute only under two contingencies, (i) if he decides that none of the parties was then in such possession, or (ii) he is unable to satisfy himself as to which of them was then in possession of the subject in dispute. The attachment made was to last until a competent court determined the rights of the parties thereto or the person entitled to possession thereof. New sub-section (1) of Section 146 is as follows:

"If the Magistrate at any time after making the order under sub-section (1) of Section 145 considers the case to be one of emergency, or if he decides that none of the parties was then in such possession as is referred to in Section 145, or if he is unable to satisfy himself as to which of them was then in such possession of the subject of dispute, he may attach the subject of dispute, until a competent Court has determined the rights of the parties hereto with regard to the person entitled to the possession thereof:

Provided that such Magistrate may withdraw the attachment at any time if he is satisfied that there is no longer any likelihood of breach of the peace with regard to the subject of dispute."

This sub-sec. (1) of S. 146 while retaining the other two conditions under which a subject matter in dispute could be attached by the Magistrate concerned, added one more clause saying that when the Magistrate considers the case to be one of emergency, he may attach the subject of dispute. The words "until a competent court has determined the rights of the parties thereto with regard to the person entitled to the possession thereof", on plain reading govern all the three clauses.

5. The proviso of the new sub-section (1) of S. 146 is the same as it was prior to 1955 vesting the power in the Magistrate to withdraw the attachment at any time if he is satisfied that there is no longer likelihood of breach of the peace with regard to the subject of dispute. Madan Mohan Prasad J., in the order of reference, in view of this proviso has observed that in emergency cases the same Magistrate can withdraw the order of attachment and can proceed

with the hearing of the case. With great respect, I may point out that this conclusion would have followed if in the proviso instead of the words "likelihood of breach of the peace" the word would have been 'emergency'. If there is no longer any likelihood of breach of the peace there is no question of hearing the proceeding; because, in view of sub-section (5) of Section 145 the Magistrate has to cancel his order initiating the proceeding under Section 145 itself. Existence of apprehension of breach of the peace with regard to the subject of dispute is the foundation of his jurisdiction to proceed with the case.

6. Now, the questions which have to be answered are as to whether it is open to the Magistrate concerned to proceed with the hearing of the proceeding after having passed an order of attachment on the ground of emergency and as to whether such order of attachment can be passed without hearing the parties. If the first question is answered in affirmative, then the second question has to be answered in negative, because in that case the attachment shall be in nature of an interim attachment which has to continue only during the pendency of the proceeding. Sub-section (1) of new Section 146 does not say in so many words that having attached the subject matter in dispute because of emergency, it is open to the Magistrate to proceed with the case. The question for consideration is as to whether it can be read in that sub-section by necessary implication. In the case of Chandu Naik v. Sitaram B. Naik (AIR 1978 SC 333 : 1978 Cri LJ 356), a proceeding under Section 145 of the new Code had been initiated on 29-7-1975 on the basis of an application filed by respondent No. 1 (before the Supreme Court). On the same date the Magistrate concerned attached the disputed property under Section 146 (1) of the Code. Therefore, written statements were filed and the Magistrate heard the case from time to time. In the meantime, the Maharashtra Vacant Lands (Prohibition of Unauthorised Occupation and Summary Eviction) Act, 1975 came in force. The Act was to prohibit unauthorised occupation of vacant lands in urban area of the State. Section 8 of that Act provided, inter alia, that no court shall have jurisdiction to entertain any suit, prosecution or other proceeding in respect of eviction of any person from any vacant land and if any suit or other proceeding in respect of eviction of any person is pending on the appointed date in any court, it shall abate. In view of this Section 8, the Magistrate concerned passed an order saying that he ceased to have jurisdiction to proceed with the case under Section 145. The Supreme Court quashed the said order holding that the case did not abate and it has to be disposed of by the Magistrate in accordance with the provisions of law contained in Sections 145 and 146 of the new Code. Having said so, it was observed that for the guidance of the Magistrate it was expedient in the interest of justice to indicate briefly as to how the Magistrate is to proceed in such a situation for disposing of the proceeding. Justice Untwalia speaking on behalf of the Court, said (at p. 335 of AIR):

"The Magistrate, in the first instance will try to conclude the proceeding in accordance with the various provisions of Section 145 of the Code. If he is able to declare the possession of either party on consideration of the evidence adduced or to be adduced before him he would do so. In that event the other party will be forbidden from creating any disturbance of the possession (including the deemed possession, in case the application of the proviso to sub-section (4) is found necessary) of the party declared in possession. The Magistrate, then, will have to withdraw the attachment in accordance with the proviso to sub-section (1) of S. 146, because, as per his order declaring a party in possession there would be no longer any likelihood of the breach of the peace with regard to the subject of dispute. The party not found in possession by the Magistrate will have to seek the redress of his grievance, if any, elsewhere: if, however, the Magistrate decides that none of the parties was in possession of the disputed property on the date of the order made under subsec. (1) of S. 145 or if he is unable to satisfy himself as to which of them was then in possession of the subject of dispute he need not lift the attachment until a Competent Court had determined the rights of the parties as provided for in S. 146 (1)".

In view of this pronouncement, it has to be held that even under the new code it is open to the Magistrate while initiating a proceeding under Section 145 to attach the subject matter in dispute without hearing the other side and this attachment is to last till the proceeding under S. 145 is decided in favour of

one party or the other. After that, the attachment has to be withdrawn in accordance with the aforesaid proviso to sub-section (1) of Section 146 of the new Code, because after the decision there would be no longer any likelihood of breach of the peace with regard to the subject of dispute. The attachment according to the aforesaid judgment of the Supreme Court, is to continue till the matter is decided by a competent court only under two contingencies, i. e., (i) when the Magistrate decides that none of the parties was in possession of the disputed property, or (ii) he is unable to satisfy himself as to which of them was in such possession of the subject in dispute.

7. Learned counsel appearing on behalf of the petitioners submitted that in the aforesaid case none of the parties had urged the point that under the provisions of the new Sections 145 and 146, now there is no scope for an interim attachment and those directions had been given in the facts and circumstances of the case in question. It is difficult to accept this contention. From paragraphs 6 and 7 of the judgment, it will appear that the procedure had been indicated for the guidance of the Magistrate whenever after initiation of a proceeding under Section 145 the subject matter in dispute is attached. It will be deemed that all the relevant provisions of the new Code have been taken into consideration for the purpose of expressing the said opinion.

8. There was controversy between the different High Courts on this question. Not only this Court in the aforesaid Bench decision, but a learned single Judge of Allahabad High Court in the case of Chandi Prasad v. Om Parkash, (1976 Cri LJ 209), a learned Judge of Delhi High Court in the case of Hakim Singh v. Girwar Singh, (1976) Cri LJ 1915, a Bench of Orissa High Court in the case of Dandapani Pala v. Madan Mohan Pala (1976 Cri LJ 2014), and a learned Judge of Rajasthan High Court in the case of Mansukh Ram. v. State (1977 Cri LJ 563) had taken the view by interpreting sub-section (1) of Section 146 of the new Code to mean that once a Magistrate attaches the subject matter of dispute in a case of emergency, then proceeding under S. 145 of the new Code terminates and the Magistrate ceases to have any jurisdiction to proceed further in the case. According to the view expressed in the aforesaid decisions, the attachment is to continue till the matter is decided by a competent court. The contrary view was taken by a Bench of Bombay High Court in the case of Cajitan A. D' Souza v. State of Maharashtra (1977 Cri LJ 2032) where it was held that although there is no specific provision for interim attachment during the pendency of the proceeding, but in order to give effect to the real intention of the framers of the Code sub-section (1) of Section 146 of the Code has to be interpreted in such a manner as to vest power in the Magistrate to attach the subject matter of dispute during the pendency of the proceeding. A learned Judge of Punjab and Haryana High Court also took the same view in the case of Jagjit Singh v. Jeet Kaur (1979 Cri LJ 119). This was, of course, after the aforesaid Supreme Court judgment, when the Supreme Court in the aforesaid case has said in so many words that they purport to indicate as to how a Magistrate is to proceed for disposing of a proceeding under Section 145 when he attaches the subject matter of the dispute on the grounds of emergency after initiating a proceeding under Section 145, in my opinion, now there is no scope for any controversy on the point. Once it is held that the attachment is to continue until the conclusion of the proceeding under Section 145 only, then there is no question of hearing the other party before passing an order of attachment, as was held in the aforesaid Bench decision of this Court. That opinion was expressed on the view that the order of attachment is to continue till the dispute is decided by a Court of competent jurisdiction which may take several years, putting the right of the party who was in actual physical possession of the subject matter in dispute, in jeopardy, without hearing him.

9. It was then submitted that even if it is held on the basis of the aforesaid judgment of the Supreme Court that a Magistrate can attach the subject matter in dispute and proceed with the hearing of the proceeding in the fact and circumstances of the present case, the order of attachment having been stayed for about four years, should not be allowed to be revived. It appears that this Court at the time of admission itself stayed the operation of the order dated 31-5-1975, during the pendency of the application. The result will be that during this period, the lands in dispute were not custodia

legis. Although it cannot be held as a question of law that once the operation of the order of attachment is stayed by the superior court, then at the final hearing it should be quashed. It will depend on the facts and circumstances of each case. In the facts and circumstances of the present case, I am of the view that after having allowed one of the parties to remain in possession of the subject matter in dispute, after initiation of the proceeding under Section 145 for about four years and nothing untoward having happened during this period, it will be only just and proper to quash that part of the order attaching the subject matter in dispute and to direct the Magistrate to dispose of the proceeding under S. 145 of Code as early as possible.

10. In the result I allow this application to a limited extent, only so far as the order of attachment is concerned. It is also made clear that if at any time during the pendency of the proceeding, learned Magistrate is satisfied that emergency has arisen then it will be open to him to again attach the subject-matter in dispute.

C. N. TIWARY, J.:— I agree.

P. S. SAHAY, J.: — I also agree.

Orders accordingly.

AIR 1979 PATNA 250
FULL BENCH

SARWAR ALI, Actg. C. J. AND
UDAY SINHA AND
BIRENDRA PRASAD SINHA JJ.*

Ramkrit Singh and others, Petitioners v. The State of Bihar and others, Respondents.

Civil Writ Jurisdiction Case No. 1361 of 1977, D/- 9-3-1979.

(A) Bihar Consolidation of Holdings and Prevention of Fragmentation Act (22 of 1956), Ss. 4 (c), 12-A and 87 — Determination of question of title — Powers vested in authorities under Act — Jurisdiction of civil court ousted — Provisions satisfy test of intelligible differentia and reasonableness and are not violative of Art. 14 of Constitution. (Constitution of India, Art. 14; Civil P. C. (1908) S. 9). (Paras 6, 8, 12,15, 25)

(B) Bihar Consolidation of Holdings and Prevention of Fragmentation Act (22 of 1956), Ss. 15 and 16 — Provisions do not conflict — Assuming conflict S. 15 prevails over S. 16 — S. 15 only relates to proof of title — In respect of matters not covered by S. 15 the confirmed scheme has only presumptive value. (Para 18)

Cases Referred: Chronological Paras

AIR 1979 SC 262: 1979 Lab IC 129 23
(1978) CWJC No. 670 of 1978, D/- 27-6-1978 (Pat) 17
AIR 1974 SC 2009 12
AIR 1974 Pat 164 (FB) 11
AIR 1973 SC 2451 16, 18-A
AIR 1973 All 382: 1973 All LJ 53 17
AIR 1963 SC 222 9
AIR 1960 SC 457: 1960 Cri LJ 654 7
1957 AC 436: (1957) 1 All ER 49, Attorney General v. Earnest Augustus (Prince) of Hanover 15
AIR 1957 All 297: 1957 Cri LJ 409 9
AIR 1956 SC 298: 1956 SCR 28 17
AIR 1952 SC 75: 1952 Cri LJ 510 25
AIR 1951 SC 318: 1951 SCR 682: 52 Cri LJ 1361 6

Kailash Roy, Binod Kumar Roy and Ramanuj Sinha, for Petitioners; K. D. Chatterjee (Advocate-General), Tarkeshwar Dayal (Govt. Pleader No. 2) and Shekhar Narayan Sahay, Jr. Counsel to Govt. Pleader No. 2, for the State and Ramji Sharan and Keshri Kishore Sharan No. 2 (for No. 2), for Respondents.

SARWAR ALI, Actg. C. J.:— In this writ application petitioners challenge the vires of the Bihar Consolidation of Holdings and Prevention of Fragmentation Act, 1956 (the 'Act'). But before dealing with the contentions raised, I may state the relevant facts leading to the filing of this writ application. I would also indicate the relevant statutory provisions. The facts:—

2. The petitioners filed Title Suit No. 103 of 1966. The suit was pending in the court of the Additional Subordinate Judge, Muzaffarpur, when the impugned order contained in Annexure-5 was passed. In the suit the petitioners-plaintiffs alleged that certain alienations made by defendant 1st party in favour of defendant second party were not binding on the plaintiffs. It was therefore, prayed that the said alienations be set aside and the plaintiffs be put in possession of the properties mentioned in Schedule I to the plaint. The properties in the suit are situate in several villages. In all these villages according to the finding of the learned Additional Subordinate Judge, consolidation proceedings are going on. An application was filed on behalf of the

*(Note:— The judgments in the case are printed in the order in which they are given in the certified copy. Ed.)

defendants stating that consolidation operation had commenced in all the village where the lands involved in the suit are situate. It was, therefore, prayed that it should be held that the suit has abated under the provisions of S. 4 (c) of the Act. A rejoinder was filed to this application. After hearing the parties, the suit has abated. The order of the learned Subordinate Judge is contained in Annexure. 5. It is this Annexure, which the petitioners pray, be quashed.

Statutory provisions :—

3. The long title itself and the preamble of the Act clearly reflect the purpose of the Act. It is to provide for consolidation of holdings and to prevent fragmentation of land. S. 3 of the Act empowers the State Government to declare by notification in the official gazette its intention to make a scheme for consolidation of holdings in the area mentioned in the notification. S. 4 of the Act deals with the effect of notification aforesaid, S. 4 of the Act reads as follows :—

"4. Effect of notification under S. 3 (1) of the Act :—

Upon the publication of the notification under sub-sec. (1) of S. 3 in the official gazette the consequences, as hereinafter set forth, shall subject to the provisions of this Act, from the date specified in the notification till the close of the consolidation operation, ensue in the area to which the notification relates, namely :—

(a) the district or part thereof, as the case may be, shall be deemed to be under consolidation operations and duty of preparing and maintaining the record of rights and the village map of each village shall be performed by the Director of Consolidation, who shall prepare or maintain them, as the case may be, in the manner prescribed;

(b) no suit or other legal proceeding, in respect of any land in such areas shall be entertained in any court, and in calculating period of limitation applicable to such suits and proceedings such period shall not be counted;

Provided that nothing in this clause shall apply to any proceeding under S. 48-E of the Bihar Tenancy Act, 1885 (Act 8, 1885) and to the proceedings relating to the recording of the titles of Bataidars :—

(c) every proceeding for the correction of records and every suit and proceedings in respect of declaration of rights or interest in any land lying in the area or for declaration adjudication of any other right in regard to which proceedings can or ought to be taken under this Act, pending before any court or authority whether of the first instance or of appeal, reference or revision, shall, on an order being passed in that behalf by the court or authority before whom such suit or proceeding is pending, stand abated;

Provided that if the State Government empowers any other officer appointed under this Act to dispose of any proceeding relating to survey settlement operations under the provisions of Chapter X of the Bihar Tenancy Act, 1885 (Bihar Act VIII of 1885), or Chapter 12 of Chotanagpur Tenancy Act, 1908 (Bengal Act 6, 1908) or Santhal Parganas Settlement Manual, 1872 (Manual 3, 1872) and transfer such proceeding to such Officer for disposal, then the proceeding shall not abate or shall not be considered to have been abated :—

Provided also that no such order shall be passed without giving to the parties notice by post or in any other manner that may be convenient and after giving them an opportunity of being heard :

provided further that such abatement shall be without prejudice to the rights of the persons affected to agitate the right or interest in dispute in the said suits or proceedings before the appropriate consolidation authorities under and in accordance with the provisions of this Act and the rules made thereunder :

Provided that the State Government may, by notification in the Official gazette, exempt any such proceeding, suit, appeal, reference or revision, or any class of them, if in its opinion their abatement is not in public interest, and is not necessary for the purpose of this Act :—

Provided further that nothing in this section shall apply to any proceedings under Chapters XI and XII of the Code of Criminal Procedure, 1898 (Act V of 1898), Section 48-E of the Bihar Tenancy Act (Act VIII of 1885) and the Bihar Land Reforms (Fixation of Ceiling Area and Acquisition of Surplus Land) Act, 1961 (Act XII of 1962)".

Section 7 of the Act envisages constitution of village Advisory Committee. S. 8 of the Act requires preparation of up to date record-of-rights before consolidation. S. 8A enjoins partition of joint holdings, S. 9 of the Act relates to preparation of register of lands. S. 9A deals with preparation of statement of principles. S. 10 envisages publication of register of lands

and statement of principles and objections thereon. S. 11 lays down the manner in which draft scheme is to be prepared. S. 12 requires publication of draft scheme. S. 12A relates to disposal of objections and is as follows :—

"12A. Disposal of objections: (1) All objections received by the Assistant Consolidation Officer shall, as soon as may be after the expiry of the period specified in S. 12 be submitted by him to the Consolidation Officer who shall dispose of the same, in the manner hereinafter laid down, after notice is given to the parties concerned and the village Advisory Committee.

(2) Any person aggrieved by the order of Consolidation Officer under sub-section (1) may, within thirty days of the date of the order, file an appeal before the Assistant Director of Consolidation whose decision shall, except as otherwise provided by or under, this Act, be final.

(3) The Consolidation Officer shall, before deciding the objection and the Assistant Director of Consolidation may, before deciding any appeal, make local inspection of the plots in dispute after giving notice to the parties concerned and the village Advisory Committee."

Section 12-B authorises revision of draft consolidation scheme in the circumstances mentioned therein. Section 13 of the Act deals with the confirmation of the draft consolidation scheme. S. 14 of the Act is consequential to the confirmation of the draft consolidation scheme and deals with the consequence of the confirmation of the scheme. Section 15 is as follows :—

"15. Certificate of transfer: (1) The Consolidation Officer shall grant to every raiyat to whom a holding has been allotted in pursuance of a scheme of consolidation certificate in the prescribed form containing the prescribed particulars. Such certificate shall be conclusive proof of the title of such raiyat to such holding and he shall be liable for payment of such rent as may be specified in the certificate.

(2) A similar certificate of transfer shall be granted to every under-raiyat, whether having a right of occupancy or not in any land allotted to him in pursuance of the scheme and the certificate shall be conclusive proof of the title of such under-raiyat to such land and he shall be liable to payment of such rent and to such person as may be specified in the certificate.'

Section 16 states that the confirmed scheme is to be treated as finally published record of right. S. 26-A empowers the State Government to issue notification in the official gazette stating that the consolidation operations have been closed in a particular area. S. 37 creates bar for jurisdiction of Civil Courts. It is as follows :—

"Bar of jurisdiction of Civil Courts :— No Civil Court shall entertain any suit or application to vary or set aside any decision or order given or passed under this Act with respect to any other matter for which a proceeding could or ought to have been taken under this Act."

Section 40 empowers the State Government to make rules for carrying out the purposes of the Act.

Vires of Acts :—

4. The main attack on the vires of the Act and more particularly Ss. 12-A and 87 and 4 (c) of the Act was on the ground that the Act and the aforesaid sections were discriminatory. It was contended that in the scheme of the Act Assistant Director of Consolidation and Consolidation Officer were entitled to finally determine questions of title. The determination in that regard could not be challenged in civil suit. It was contended that the officers aforesaid had no judicial training and were ill-equipped to decide questions of title, which required consideration of intricate questions of facts and law. Whereas the door of the courts were open for the general public, it was closed for those who were covered by the Act. Thus whenever consolidation proceedings had commenced the raiyats and under-raiyats had no option but to have their title determined by untrained hands. This was discriminatory and had no rational basis. The purpose of the Act, it was, conceded, was laudable. But in order to achieve the purpose the ouster of jurisdiction of the Civil Courts was neither necessary nor desirable.

5. Learned Advocate General appearing on behalf of the State contended that all those covered by the Act were treated equally. There was thus no scope for applicability of Article 14 of the Constitution. Alternatively, it was contended that in order to achieve the object of the Act, namely, consolidation of holdings it was necessary that power of deciding objections be vested in the authorities created under the Act. The mere fact that special forum has been created was

not sufficient to show that there has been discrimination. In fact, there are numerous laws which envisage the creation of special forum for determining the rights of the parties. This it was contended that the classifications had conformed to the tests laid down by the Supreme Courts.

6. Learned Advocate General is, in my view, right in contending that the mere fact that law creates special forum will not make the law suffer from the vice of discrimination. Indeed there are various laws enacted from time to time which create special forums. They are invested with the jurisdiction to decide the questions affecting the rights of the parties. House Control Legislation in several States, Land Encroachment Act, Debt Redemption Laws and Labour Welfare Legislation are some of such legislations. Particular reference must be made to the Evacuee Property Act which entitled the authorities under the Act to decide questions of title. It is well settled now that in order to pass the tests of permissible classification it has to be seen whether (a) the classification is founded on an intelligible differentia which distinguishes those that are grouped together from others left out of the group, and (b) the differentia has a rational relation to the object sought to be achieved by the Statute in question. Are these tests fulfilled in the present Statute? So far as the first test is concerned, it is patently clear that those whose lands have to be consolidated constitute a class by themselves. There is an intelligible differentia between them and those who are out of that class. Where a law is applicable to well-defined class, it is not obnoxious and it is not open to the charge of denial of equal protection on the ground that it does not apply to other person, State of Bombay v. F. N. Balsara (1951 SCR 682 at pp. 708, 709: (AIR 1951 SC 318 at p. 326)).

7. The second test also, in my view, is fulfilled in this case. But it is not without some hesitation that I have come to this conclusion. In order to achieve the object of the legislation the legislature in its wisdom and experience thought that even the questions of title should be determined by the authorities under the Act. Then only could the purpose of the legislation be achieved. In examining this question it has to be borne in mind that the opinion of the legislature has to be given great weight. Just because a more perfect or satisfactory legislation could be enacted would not bring constitutional infirmity in the legislation. See Kangshari Halder v. State of West Bengal (AIR 1960 SC 457, Para 19). It is from this point of view that I have approached the problem posed in this case.

8. The view of the legislature appears to be that the scheme of consolidation would be inordinately delayed, if not set at naught, if ordinary Civil Courts are to decide the questions of title relating to lands which are subject matter of the consolidation proceeding. It cannot be said that this view is unreasonable. It is well known that civil litigation, at least in this State, usually takes such a long time and that the litigants feel completely desperate. In such a situation to invest authorities under the Act with the power to determine questions of title could not be said to be either unreasonable or having no nexus with the objects sought to be achieved, namely, speedy consolidation of agricultural lands.

9. I may usefully refer to what was said by Agarwala, J. in Mukhtar Singh v. State of U. P. (AIR 1957 All 297 at 302): while declining with U. P. Consolidation of Holdings Act 1953:—

"Now the differentiation of tenure-holders where consolidation proceedings are taking place from tenure-holders who are not subjected to such proceedings is based upon an intelligible differentia, where an area is declared to be under consolidation proceedings it is necessary that the proceedings should terminate within a reasonable time. There may be hundreds of cases relating to title, boundaries and possession over the holdings or plots contained in those holdings. If the tenure-holders were left to the process of the ordinary law nobody can say when the litigation would terminate and when matters of dispute would be finally decided after having passed through the stage of original appellate and revisional Courts. It is well known that the ordinary procedure takes a long time to come to an end. If this were to be permitted, consolidation proceedings might be held up for an indefinite period. It is therefore necessary that such cases be treated differently from cases where consolidation proceedings are not taking place.

And finally what was said by Venkatarama Aiyar, J in Lachhman Dass v. State of Punjab (AIR 1963 SC 222 at p. 233):—

"It is then contended that S. 11 of the Act bars the jurisdiction of the Civil

Courts with reference to the disputes triable under the Act, and that is unreasonable. It is too late in the day to contend that provisions in statutes creating a special jurisdiction and taking away the jurisdiction of Civil courts in respect of matters falling within that jurisdiction are unreasonable or opposed to rules of natural justice. It has only to be remembered that provisions excluding the jurisdiction of Civil Courts in such case do not affect the jurisdiction of either the High Court under Art. 226 or of this Court under Art. 32 or Art. 136 to interfere when grounds therefore, are established".

10. Although, I am of the view that the strict standard required for getting the law declared as discriminatory and thus invalid has not been made out in the case, yet a little more reflection could have brought out such changes in the law as would have perhaps satisfied the critics. This is a matter to which I propose to make a reference at the end of the judgment, as the law in question is of far-reaching significance and consequence to the agriculturists in this State who form between 80 to 90 per cent of the population of this State.

11. Learned counsel for the petitioners placed reliance in support of his contention on the Full Bench decision of this Court in Nand Kumar Rai v. State of Bihar, (AIR 1974 Pat 164) and contended that the impugned provisions were discriminatory in matters of procedure and violative of Art. 14 of the Constitution. In my view, however, the case is distinguishable. In the aforesaid case the difference between S. 106 (as amended by amending Act 6 of 1970) was highlighted.

It was pointed out that whereas S. 106 provided for two appeals only one appeal was provided in S. 109 (3) of the Bihar Tenancy Act. The next difference between the two types of suits was that while the decision of revenue officer in a suit under S. 106 had the force of a decree, and was executable as a decree. Such was not the position in relation to decisions under S. 109 of the said Act. Thus the wide and striking difference, pointed out earlier, led the Bench to hold that S. 109 aforesaid was invalid. Such is not the position here. All those who are covered under the Act are governed by the same procedure in relation to the determination of questions of their right or interest.

It is not that some people covered by the consolidation proceeding will have their rights determined under one procedure and others under another.

12. Reliance was also placed on the decision of the Supreme Court in Magan Lal Chhaggan Lal (P) Ltd. v. Municipal Corporation of Greater Bombay (AIR 1974 SC 2009). But I do not see how the principles laid down in the aforesaid decision came to the assistance of the petitioners. As in Magan Lal Chhaggan Lal's case, so here also objections have to be decided after notice to the parties, with the right of appeal or revision. The authorities have power and privileges as vested in a Civil Court (as mentioned in S. 37-B of the Act). They have power of enforcing the attendance of witnesses, examining them on oath and affirmation or otherwise compelling any person for production of any document and the like. This is clear from the provision of S. 37-B of the Act which is as follows:—

"37-B. Authorities under this Act to have powers and privileges as are vested in a civil court in certain matters — (1) The Director of Consolidation, the Deputy Director of Consolidation, the Assistant Director of Consolidation, the Consolidation Officer and the Assistant Consolidation Officer shall have all such powers, rights and privileges while hearing any matter in dispute as are vested in a Civil Court in respect of the following matters, namely:—

(a) the enforcing of the attendance of witnesses and examining them on oath, affirmation or otherwise and the issuing a commission to examine witnesses;

(b) compelling any person for the production of any document;

(c) punishing the persons guilty of contempt.

(d) A summons signed by such officer may be substitute for and shall be equivalent to any formal process capable of being issued in any action by a Civil Court for enforcing the attendance of witnesses and compelling the production of any document."

Of course the provision for appeal as pointed out in Chhaggan Lal's case was to the principal Judge of a City Civil Courts or a District Judge. Here there is no such provision of appeal. But the mere fact that appeal is not so provided does not mean that the procedure is so unconscionable as to attract the vice of discrimination.

13. The next important contention that has been raised by the learned counsel for the petitioners is that S. 4 (c) of

the Act is ultra vires, as it not only affects the rights in respect of lands subject matter of consolidation proceedings but also rights determined in a suit where composite decrees are passed. To illustrate, it was pointed out that if there is a decree for recovery of possession and mesne profit the result of the abatement of the suit would be that the decree for mesne profits would also disappear. Several other illustrations were given during the course of argument to show that the consequence of the abatement would be to affect the right to property. The abatement of suit in respect of such matters had thus no nexus with the object of the Act. It was further contended that such a provision was not necessary to achieve the avowed object of the Act. The learned Advocate General contended, as matter of construction of S. 4 of the Act, that there is no abatement of the suits for all times to come but suits or proceedings abate only so long as the consolidation operation does not come to a close. It was further contended that S. 4 (c) has to be read with qualification. In other words the limiting words "So far as the rights or interest in land concerned" has to be read after the words abated.

14. In my view, both the contentions of the learned Advocate General are fit to be accepted. The opening words of S. 4 state clearly that the consequence, as mentioned therein, shall ensue "from the date specified in the notification till the close of the consolidation operation". The consolidation operation closes by issue of notifications envisaged in S. 26A of the Act. The language being clear and explicit effect has to be given to the words used. When the section says that the ensuing consequences are till the close of the consolidation operation, we cannot nullify the words aforesaid by saying that the consequences are for all times to come. It is obvious, therefore, that on the close of consolidation operation in a village or area the abated suits would revive. But the revival of those suits would not create any problems as suits will have to be decided in conformity with the decisions arrived at in the consolidation proceedings in so far as the rights or interest in any land covered by the consolidation proceedings is concerned. If this interpretation is accepted it would be seen that suggested harshness or injustice disappears. In the illustration already given, if a party succeeds in establishing its title, after the close of the consolidation proceedings, it would be open to it not only to have its title declared accordingly but also to have a decree for mesne profits.

15. It was contended by the learned counsel for the petitioners that there may be composite suits where two reliefs namely, one relating to title to land and some other independent relief may be prayed for. In those cases also the abatement of suit would lead to clear injustice. Such abatement would have neither any nexus with the object of the Act nor amount to a reasonable restriction on the right to property. It would thus be violative of the right to property as guaranteed under the Constitution. This argument is on the assumption that there is the abatement as a whole of a suit of this nature. In my view, such is not the position. Controversy in a suit may relate to right and title in land and certain reliefs dependant on the determination of the aforesaid title. Only in such situation, in my opinion the suit abates not only in relation to ancillary or dependant reliefs. But the position is different where independant relief or reliefs, unconnected with the declaration and determination of the title to land are involved in a suit. In such a situation the suit does not abate in relation to such controversies. It is perfectly legitimate, as a rule of construction, to give a restricted meaning to the words used if the context so requires. (See Attorney General v. Earnest Augustus (Prince) of Hanover, 1957 AC 436, 461). More so where the effect of giving a wider meaning may render the provisions constitutionally invalid. It is trite law that where a provision can be read in two ways; one of which makes it constitutional and the other unconstitutional, it should be so read and interpreted that it does not become invalid. In my view, therefore, the second contention of the learned Advocate General is also sound.

16. It would be appropriate here to clarify that there are certain class of cases which are not covered by Sec. 4 (c) of the Act. An illustration is provided by the observations in the case Gorakh Nath v. Hari Narain Singh (AIR 1973 SC 2451). There the claim of the plaintiff was that the sale of his half share by his uncle was invalid, inoperative and void. In the suit the plaintiff had prayed for cancellation of the sale-deed executed by his uncle to the extent of his half share. It was held that the suit was covered by the relevant provision of the U. P. Con-

solidation of Holdings Act and the claim had to be adjudicated upon by the consolidation courts. It was, however, pointed out that there is a distinction between cases where a document is wholly or partially invalid so that it can be disregarded by any court or authority and one where it has to be actually set aside before it can cease to have legal effect. The latter class of cases were held to be outside the scope of the provision relating to abatement of suits.

Excessive delegation:

17. Learned counsel for the petitioners contended that the provision relating to piecemeal applicability of the law conferred unguided power on the State Government to initiate proceedings in villages of its choice. This power was drastic and arbitrary. It is not possible to accept this argument also. So far as the guidance is concerned it is available both from the preamble and general scheme of the Act. It is patently clear that a law of this nature cannot be applied throughout the State at the same time. There are various administrative and financial constraints. The mere fact that consolidation operations are not undertaken simultaneously throughout the district or State does not bring any infirmity in the law. (See Ram Chandra Palai v. State of Orissa, 1956 SCR 28 : (AIR 1956 SC 298)). This very aspect has been emphasised in the case of Shyam Sunder v. Siya Ram (1973 All LJ 53) : (AIR 1973 All 382). It has been held by this Court in relation to other statutes, that piecemeal application of law is not illegal or ultra vires. (See Nasibun Nisa v. State of Bihar C.W.J.C. No. 670 of 1978 decided on 27-6-1978 (Pat)). In view of the interpretation that I have put on Section 4 (c) of the Act, I am of the view that the challenge to the validity of the provisions of the Act on the grounds urged in the course of argument cannot be accepted.

Conflict between Ss. 15 and 16 of the Act:

18. Learned counsel for the petitioners contended that there is conflict between Ss. 15 and 16 of the Act. Whereas Section 15 makes the certificate issued under the said sections as conclusive, the effect of the confirmed scheme being treated as finally published record of rights is that the same has only a presumptive value. In my view, there is no conflict. Section 15 only relates to proof of title and that is conclusive. But in respect of matters not covered by S. 15, the confirmed scheme shall have only a presumptive value. In any event, even if there be a conflict S. 15, being clear and explicit, has to prevail.

The scope of the instant suit (T. S. 103/1966).

18A. It was contended that the present suit is not covered by S. 4 (c) of the Act. It was a suit under Sec. 72 of the Bihar Hindu Religious Trust Act. The plaintiff was claiming that the sale deed executed by defendant first party was not binding on him. Thus the avoidance of the sale deed was necessary. In my opinion, the contention cannot be accepted. Section 72 of the Bihar Hindu Religious Trust Act makes special provision for suits for recovery of immovable property. The filing of the suit under this provision does not affect the true effect of the reliefs claimed in the suit. A perusal of the plaint, gist whereof has been given, makes it abundantly clear that the suit is in respect of declaration of right and interest in lands which are subject-matter of consolidation proceedings. The deed executed by the first party in favour of the second party, according to the claim in the suit, is not binding on the plaintiff. It is not a Court of competent jurisdiction. The present suit is a suit of the first category, and not the second category mentioned in Gorakh Nath Dubey's case (AIR 1973 SC 2451) (supra). The learned Additional Subordinate Judge was, therefore, right in holding that the suit is covered by S. 4 (c) of the Act and has, thus abated.

General observations :—

19. Before I conclude, I must refer to the feeling of dissatisfaction and apprehension which was expressed in course of argument. This was because the determination even in respect of question of title is left in the hands of administrative authorities untrained in law. Of course, the determination of the authorities can be challenged by way of writ. But the challenge, as is well known, is restricted challenge. There cannot be challenge to erroneous determination on questions of fact. This could have been, obviously, obviated, if in relation to question of title, at least an appellate forum was provided before a court, say, the District Judge. The apprehension that there would be delay could very well be eliminated by laying down a time limit in the law for disposal of such appeals. I have, no doubt, in my mind that the High Court would have made appro-

priate arrangements for the early disposal of such matters. Indeed, even in the High Court, cases relating to acquisition of surplus lands under the provisions of Bihar Land Reforms (Fixation of Ceiling Area and Acquisition of Surplus Land) Act are taken up and decided with utmost speed. Rule in cases, which are admitted, is usually made returnable between five weeks to eight weeks and that too to enable the State to be adequately prepared at the time of hearing and file counter affidavits, if necessary. If this can be done in the High Court, I do not see any reason why adequate administrative arrangement could not be made in the District Courts for disposal of cases which require utmost priority.

20. It would not perhaps be inappropriate to point out that if we had a Law Commission in the State many of the problems that arise either as a result of inartistic drafting or failure to appreciate the consequence and impact of legislations, would have been avoided. We have a Law Commission at the Centre. If one is constituted in the State many of the local problems that do arise may be avoided. In that context I have expressed my views in the article "what is wrong with the law?" Which has been printed in the souvenir published on the occasion of the Diamond Jubilee celebration of this High Court. Therein I have tried to explain why the constitution of State Law Commission is necessary, and the extent of its utility to the State. I may only mention here that such a Commission, if constituted, has to have statutory status. Some times back Law Commission was constituted under administrative orders in this State. As far as I know it made many useful suggestions. But those have only adorned the archives of the Secretariat. Had there been a statutory constitution of the Commission this might not have been the result. These are the matters which I hope would receive serious consideration of the State Government.

Conclusion :

21. So far as the merits of the case are concerned as already held, the writ application cannot succeed and it is accordingly dismissed, but in the circumstances without costs.

UDAY SINHA J.:— I agree.

BIRENDRA PRASAD SINHA, J.:— 21A. I have also come to the conclusion that this writ petition should be dismissed. A full and elaborate judgment has been written by the learned Acting Chief Justice and I only wish to supplement by stating briefly my views on some of the crucial points arising in this case.

22. The Consolidation Act received the assent of the President on 6th September, 1958. Independent India inherited some legacies of the British misrule. Cornwallis' Permanent Settlement had created certain vested interests in land. The agriculture was in great chaos and immediate land reform measures were too necessary. Coming in the wake of Zamindary abolition, the Consolidation Act was aimed at providing consolidation of holdings and preventing fragmentation of land. Without this agriculture could not get a boost and come to the succour of hungry millions. Needless to emphasise that better and economic agricultural management depended largely upon bringing together fragmented land holdings of the farmer. This laudable object of the Act was not disputed and rightly so. The main thrust of the argument of Mr. Kailash Roy is against the procedural aspect of the legislation.

23. Procedural laws are of recent origin. Towards the close of the Seventeenth century vigorous new policy of imperial discipline paved the way to the adoption of common law practice of the Kings' Court from Biblicism and local customary English law. It resulted into carrying appeals from provincial Courts to King in Council. The growth of propertied class created a market for the service of lawyers specially in common law. The rise of the propertied class was of the great importance in the reception of the common law also in America since the class influence was exerted to maintain stability and conservation. Rapid growth of commercial enterprises necessitated the resort to more technical system of the Enflish common law. Law can never remain static. It is nothing more than a superstructure the reflection of a certain economic structure. It is unscientific and contrary to all reasons to ignore the bond of fundamental importance uniting the law and economy and to fasten on resemblances or differences which are purely formal. By putting into effect new social ideas, the liberal democracies have profoundly changed their legal systems in the 20th century. Krishna Iyer J., in the case of Basti Sugar Mills Co. Ltd. v. State of U. P. (AIR 1979 SC 262 at p. 264) observes :—

"We touch these chords because the roots of jurisprudence lie in the soil of

society's urges, and its bloom in the nourishment from the humanity it serves. To petrify statutory construction by pedantic impediments and to forget the law of all laws, viz. the welfare of the people, is to bid farewell to the grammar of our constitutional order."

The learned judge further observes in paragraph 26 at page 270.

.....Confronted by escalating disorder, the wise ruler cannot afford to wait for lethargic legal justice to deliver its verdict but armed with crisis powers and anxious to arrest a blow-up, adopts administrative nostrums which give quick relief but do not frustrate ultimate justice. Prophylactic processes are not the enemy of normative law. Socially-oriented prompt action tranquillises where drift, vacillation inaction may traumatize."

24. The lethargic legal procedure involving inordinate delays could hardly meet the challenges of new social order. If the country was to attain new heights in the field of agriculture, quick acting procedures were only too necessary. Any Government with economic justice and welfare of its people at heart could not afford to ignore this hard reality. Only the vested interest wants to maintain the status quo. The problem, therefore, must be approached from this angle. Only because this law brought about a change in procedure—that too from a lethargic to a quick-acting one — it cannot be said that it strikes at the constitution.

25. The question is whether it discriminates between persons on whom this is to operate. The immediate answer must be in the negative. It has been found by the learned Acting Chief Justice that classification is found on reasonable basis having regard to the object to be obtained and is not arbitrary. I fully agree with this view. Every departure from the normal procedure cannot be regarded as involving hostile discrimination. The mere fact that the questions involving title have been left to be decided by the persons not fully trained in law cannot mean that it was intended to be exercised in an arbitrary manner without reference to the declared object of the Act. "Legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts" (Kolmes J in Musouri v. May (1880) 101 US 22). Competent legislatures, therefore, are entitled to alter procedural law in such a way as it considers proper. Great weight must be attached to the fact that the elected representatives of the people who made the law did not think that the law was palpably discriminatory. Of course that is not conclusive. It would be better to quote the observations of Willis, I quoted in paragraph No. 71 in the case of the State of West Bengal v. Anwar Ali Sarkar (AIR 1952 SC 75) (at p. 99):—

"The guaranty of the equal protection of the laws means the protection of equal laws. It forbids class legislation, but does not forbid classification which rests upon reasonable grounds of distinction. It does not prohibit legislation, which is limited either in the objects to which it is directed or by the territory within which it is to operate. "It merely requires that all persons subject to such legislation shall be treated alike under like circumstances and conditions both in the privileges conferred and in the liabilities imposed." The inhibition of the amendment was designed to prevent any person or class of persons from being singled out as a special subject for discriminating and hostile legislation." It does not take from the States the power to classify either in the adoption of police laws, or tax laws, or eminent domain laws, but permits to them the exercise of a wide scope of discretion, and nullifies what they do only when it is without any reasonable basis. Mathematical nicety and perfect equality are not required. Similarity, not identity of treatment, is enough. If any state of facts can reasonably be conceived to sustain a classification, the existence of that state of facts must be assumed. One who assails a classification must carry the burden of showing that it does not rest upon any reasonable basis".

26. In my opinion, the petitioners have not discharged the burden of showing that the classification in the present legislation does not rest upon a reasonable basis.

27. While parting I would like to make certain observations. More than 22 years have passed since the passing of this law. As stated above, this law was intended to be a tranquilliser and by a quick acting process the legislature thought that the object will be achieved quickly. It is only unfortunate that the sharp edges of this law have been made blunt and the quick acting procedure set at naught by lethargic and slow moving powerful bureaucracy. At the time of hearing a chart showing progress of con-

solidation proceedings in several districts of the State was shown to us by the learned Advocate General, but that shows a dismal picture necessitating vigorous steps in the matter.

Petition dismissed.

AIR 1979 PATNA 259

FULL BENCH

NAGENDRA PRASAD SINGH, BIRENDRA PRASAD SINHA AND P. S. SAHAY, JJ.

Dhanji Singh, Petitioner v. State of Bihar and others, Respondents.

Civil Writ Jur. Case No. 351 of 1978, D/- 20-4-1979.

Bihar Tenancy Act (8 of 1885), S. 48E (1) — Initiation of proceeding — Both parties heard — Respective contentions considered — S.D.O. acting as Collector purported to adjudicate respective claims — Claims of under raiyat negatived — Held that this order was passed by adopting a procedure not sanctioned by law — Scope of Sec. 48E (1) explained and duties of Collector thereunder pointed — In all cases landlord cannot appear as a matter of right at the stage of initiation of proceeding.

(Paras 7 to 14, 17, 18)

Cases Referred : Chronological Paras

1978 BBCJ (HC) 750 : AIR 1979 Pat 169	7, 17
1978 BBCJ (HC) 131	13
1976 BBCJ (HC) 48	13, 17
1976 BBCJ (HC) 395	13, 17
AIR 1973 Pat 275	7, 12, 17
AIR 1970 SC 1896	9
AIR 1967 SC 295	9
AIR 1962 SC 1110	9
AIR 1960 SC 606	9
AIR 1950 SC 222	9
(1880) 5 AC 214 : 42 LT 546, Julius v. Lord Bishop of Oxford	7

Janeshwar Singh, Arun Kumar Singh No. 1, Manoranjan Singh and Upendra Kumar Joshi, for Petitioner; Ram Balak Mahto (Govt. Advocate) with Ashutosh Jha and Akhileshwar Prasad Singh (Jr. Counsel to Govt. Advocate); Silesh Chandra Mishra and Harijee Upadhya (for No. 3), for Respondents.

NAGENDRA PRASAD SINGH J.:— The petitioner, in this writ application, questioned the legality of an order dtd. 24-1-1978 passed by the respondent Sub-divisional Officer, Sasaram, in purported exercise of power under S. 48E of the Bihar Tenancy Act (hereinafter referred to as 'the Act'). A copy of that order is Annexure 1 to the writ application.

2. The petitioner filed an application before the respondent Sub-divisional Officer, on 25-1-1977, alleging therein that he was the under raiyat of respondent No. 3 (hereinafter referred to as 'the respondent') and the respondent along with her supporters were disturbing the possession of the petitioner over the lands in question, as such, the respondent should be restrained from interfering with his possession. A copy of that petition is Annexure 2 to the writ application. The Sub-divisional Officer on that very day asked the Anchal Adhikari, Nasriganj to make enquiry and to submit report. Later, he recalled the said order and directed the project Executive Officer, Karakat to hold local enquiry and report.

The case was adjourned from time to time as the report was not received. Having learnt about the apprehension of breach of peace over the cutting of the crops, on 8-11-1977, he directed the Officer in charge of Nasriganj police station not to allow either party to harvest the paddy crop grown on the said lands till further orders. On 5-12-1977, an application was filed on behalf of the respondent making a prayer for an order allowing her to harvest the crop, which was directed to be put up on 6-12-1977. On 6-12-1977, the Sub-divisional Officer directed the Officer in charge of the police station to get the crops harvested. In the meantime a report of the Officer in charge of the police station as well as of the Project Executive Officer were received.

3. On 2-1-1978, learned Sub-divisional Officer heard both the parties on the merit of the case. On behalf of the petitioner it was urged that he was under tenant of the respondent and, as such, he cannot be dispossessed from the lands in question. On behalf of the respondent, however, it was disputed. According to the respondent, the report of the Officer in charge of the police station as well as the report of the Project Executive Officer did not support the claim of the petitioner. Both parties urged other questions of law as well as fact, and having noted their arguments in the order dated 2-1-1978, learned Sub-divisional Officer fixed 10-1-1978 for orders. Ultimately, on 24-1-1978, the impugned order was passed saying that he had heard the learned counsel appearing for both the parties and had

perused the documents filed on their behalf, as well as the reports aforesaid from which he was satisfied that the land was in possession of the respondent and the petitioner was not cultivating the said lands as under-tenant. On that finding, he dropped the proceeding and directed the police to hand over the crops, which had been harvested, to the respondent.

4. The legality of the aforesaid order has been challenged primarily on the ground that it was not open to the learned Sub-divisional Officer to record findings on the merit of the case and after initiating the proceeding he should have constituted a Board as contemplated by S. 48E of the Act. According to the petitioner, the Sub-divisional Officer has adopted a procedure which is not sanctioned by law.

5. This case was referred to a Special Bench by Hon'ble the Chief Justice, perhaps, to determine the scope of sub-section (1) of S. 48E of the Act which empowers the Collector to initiate a proceeding under that section for the purpose of deciding a dispute between the raiyat and under raiyat in respect of possession and dispossession of the lands.

6. Sub-sec. (1) to sub-sec. (3) of S. 48E of the Act, as substituted by Bihar Act VIII of 1970, which are relevant for the purpose of this case, are as follows:—

"(1) If an under raiyat is threatened with unlawful ejectment from his tenancy or any portion thereof by his landlord or if there is a dispute between them over the possession of land, crop or produce thereof, either on the ground of non-existence of relationship of landlord and tenant between them or otherwise or if an under raiyat is or has been ejected from his tenancy or any portion thereof within twelve years before the commencement of proceedings under this section in contravention of the provisions of S. 89, the Collector may, of his own motion or on application made in this behalf by the under raiyat, initiate a proceeding for preventing the landlord from ejecting the under-raiyat or for settlement of the said dispute or for restoration to possession under raiyat unlawfully ejected from his tenancy or portion thereof:—

(2) The Collector may, after hearing the parties, about which due notice shall have been given to them or ex parte, in cases of emergency, by an order in writing, prevent the landlord from ejecting the under-raiyat until disposal of the proceeding or until further orders and if he is of opinion that any crop or produce of the land which is subject matter of dispute in the proceeding under this section, is liable to speedy and natural decay, he may, if the situation so warrants and in a similar manner as aforesaid direct the proper custody or harvesting or sale as the case may be, of such crop or produce or the sale proceeds thereof.

(3) When a proceeding is initiated under sub-sec. (1) the collector may refer the matter (hereinafter referred to as 'dispute') to a Board to be appointed by him, for promoting the settlement of the dispute between the under raiyat and the landlord."

On a plain reading of the aforesaod sub-sections it appears that the Collector may, of his own motion, or on application made in this behalf by the under raiyat, initiate a proceeding under Section 48-E, (i) if an under raiyat is threatened with unlawful ejectment from his tenancy or any portion thereof by his landlord, (ii) if there is a dispute between them over the possession of the land, crop or produce thereof, either on the ground of non-existence of relationship of landlord and tenant or otherwise, (iii) if an under-raiyat is or has been ejected from his tenancy or any portion thereof within 12 years before the commencement of the proceeding under said section in contravention of the provisions of S. 89. Sub-sec. (2) vests power in the Collector to prevent the landlord from ejecting an under raiyat till the disposal of the proceeding or until further orders. This power is analogous to the power of granting injunction.

Sub-sec. (2) says that such orders can be passed only after hearing the parties, it can be passed ex parte, only in cases of emergency. Sub-sec. (3) provides that once a proceeding is initiated under sub-sec. (1), the Collector may refer the dispute to the Board to be appointed by him for promoting the settlement of the dispute between the parties. Sub-sec. (4) of S. 48-E says that the Board shall consist of a Chairman and two members to represent two parties to be appointed on the recommendation of the parties concerned. Thereafter, in view of sub-section (6), the Chairman has to give written notice to both the parties and then the Board has to make endeavours to bring about an amicable settlement of the dispute. If the Board does not succeed in bringing about an amicable set-

tlement of the dispute, in view of sub-sec. (7), it has to "make enquiry into the same, receive such evidence as it considers necessary, record its findings on the disputes and transmit the entire record of the proceeding forthwith to the Collector who may dispose of the proceeding in accordance with the terms of the finding."

In case of disagreement with the report or findings of the Board, the Collector, under sub-sec. (8), after giving the parties concerned a reasonable opportunity of being heard, can make enquiry and he can pass orders restraining the landlord from interfering with the possession of the under-tenant or declaring the possession of the under-tenant or restoring the possession to the under tenant. Sub-sec. (10) provides that if the Board fails to record its finding or transmit the records within a period of six months from the date of its appointment, the Collector may withdraw the proceeding from the Board and decide the dispute himself. Sub-sec. (12) says that the Board shall have the same power regarding the summoning and attendance of witnesses and compelling the production of documents as a Civil Court has under the Code of Civil Procedure, and "the Collector shall have general control and superintendence over the Board."

7. In view of the aforesaid provisions, there should not be any difficulty in holding that although the Collector has been vested with general control and superintendence over the proceedings in connection with the dispute between the landlord and the under raiyat, still, at the first instance, after having initiated the proceeding under sub-sec. (1) of S. 48-E, the Collector has to refer the dispute to the Board. The Board has first to make endeavour for an amicable settlement, failing which it has to make enquiry and has to receive such evidence as it considers necessary, and, thereafter, to record a finding in respect of the dispute. The Collector can decide that dispute only under two contingencies, if he differs with the findings and report of the Board, or, if the Board fails to record its finding within a period of six months from the date of its appointment. But there is no question of Collector deciding the dispute before the Board constituted by him has an occasion to apply its mind.

The purpose appears to be obvious, Sub-sec. (3) itself says in so many words that after initiating the proceeding under sub-sec. (1), the Collector may refer the matter to a Board for promoting settlement of the dispute between the parties. The Board, which consists of one representative of both the parties, shall be in much better position to make endeavour about the amicable settlement of the dispute. In the case of Ram Narain Singh v. State of Bihar (AIR 1973 Pat 275), a Bench of this Court has considered the scope of this S. 48-E and it was pointed out that the function of the Board was similar to arbitrators, the only difference being that in case of a proceeding under S. 48-E there is a provision of compulsory reference to arbitration.

In my view, although sub-sec. (3) says that when a proceeding is initiated under sub-sec. (1) the Collector 'may' refer the matter to a Board to be appointed by him, it has to be interpreted that after initiating the proceeding he has to refer the matter to the Board. It was pointed out in the aforesaid Ram Narain Singh's case in connection with sub-sec. (1) of S. 48-E that, no doubt, the legislature has used the word 'may' which is generally understood as enabling and not mandatory, but "when the power conferred by the statute is coupled with the duty of the person to whom it is given to exercise it, then even though the word 'may' is used, it has to be construed as imperative." In the case of Julius v. Lord Bishop of Oxford [(1880) 5 AC 214] The Lord Chancellor (Earl Cairns) observed:—

"That where a power is deposited with a public officer for the purpose of being used for the benefit of persons who are specifically pointed out, and with regard to whom a definition is supplied by the Legislature of the conditions upon which they are entitled to call for its exercise, that power ought to be exercised, and the court will require it to be exercised." It was further observed by the Lord Chancellor:—

"There may be something in the nature of the thing empowered to be done, something in the object for which it is to be done, something in the conditions under which it is to be done, something in the title of the person or persons for whose benefit the power is to be exercised, which may couple the power with a duty, and make it the duty of the person in whom the power is reposed, to exercise that power when called upon to do so."

In my view, although sub-sec. (3) of S. 48-E uses the expression 'may', it has

to be held that once a proceeding is initiated under sub-sec. (1) of that section, the dispute has to be referred to the Board to be constituted by the Collector. A Bench of this Court in the case of Lakshmi Prasad Bhagat v. State of Bihar (1978 BBCJ (HC) 750) has held that the Collector after initiating the proceeding has no jurisdiction to decide the dispute without reference to the Board. I am in respectful agreement with the said view. If the impugned order amounts to deciding the dispute itself, then it has to be held that the Sub-divisional Officer had no such power before it had been referred to the Board.

8. Being faced with this situation, the learned counsel for the respondent submitted that the impugned order does not amount to deciding the dispute finally, but it only amounts to refusal to initiate a proceeding under sub-sec. (1) of that section. Learned counsel further urged that the Collector is not bound to initiate a proceeding, no sooner an application is filed on behalf of the under-tenant, he has to apply his judicial mind and in appropriate cases he may reject the prayer of the under-tenant. What is the scope of sub-sec. (1), can be determined only after it is ascertained as to whether under sub-sec. (1) the Collector has to exercise an administrative power or a quasi judicial one.

According to learned Government Advocate, who appeared on behalf of the State, the Collector has no option, after having received an information or petition from the under-tenant regarding a theatened ejectment, or a dispute about possession or dispossession of the under-tenant, but to refer the same to the Board for decision. As such, according to him, there is no question of exercise of a quasi judicial power at that stage. In my opinion, it is difficult to accept this contention. Sub-section (1) prescribes three contingencies, mentioned above, under which the Collector has to initiate a proceeding. The Collector, before initiating the proceeding has to be satisfied on the materials produced before him or on the basis of the information received by him that one of those three requisite conditions exists.

Is the Collector bound to initiate a proceeding under sub-sec. (1), if an allegation has been made in the petition of the under-tenant, that he had been dispossessed on a date which is beyond 12 years from the date of the filing of this application? Similarly, is he bound to initiate a proceeding if the allegation or information is that the under-tenant has been dispossessed not by his landlord but by a third person? The answer in both the cases shall be in the negative. Therefore, it cannot be said that at the time of initiating a proceeding, the Collector has not to apply his judicial mind for the purpose of ascertaining as to whether the requisite conditions for initiating the proceeding exist or not

9. Learned Government Advocate submitted that sub-sec. (1) does not say in so many words that the Collector should be satisfied about the existence of the dispute. According to me, merely because of the absence of expression like "if the collector is satisfied", it cannot be held that the reference to the Board is an automatic action, without any application of mind. It is well settled that where a particular statute vests power in a particular authority to initiate or not to initiate a proceeding on its own opinion, still it can be shown that those circumstances do not exist or that they are such that it is impossible for any one to form an opinion therefrom, suggestive of the aforesaid things. In other words, the opinion can be challenged on the ground of non-application of mind or perversity, or on the ground that it was formed on collateral grounds and was beyond the scope of the statute.

Reference in this connection may be made to the well known case, Barium Chemicals Ltd. v. Company Law Board (AIR 1967 SC 295). In the case of the Purtabpur Co. Ltd. v. Cane Commr. of Bihar (AIR 1970 SC 1896) it was pointed out that the Cane Commissioner while allotting sugarcane areas to different Sugar Factories, was exercising a quasi judicial power. Reference can be made in this connection, to the case of Province of Bombay v. Khusaldas S. Advani (AIR 1950 SC 222) where it was pointed out that if a statute empowers an authority, not being a court in ordinary sense, to decide disputes arising out of a claim made by one party which is opposed by another party, then there is a lis and prima facie and in absence of anything in the statute to the contrary it is the duty of the authority to act judicially. Similarly, in the case of Shivji Nathubhai v. Union of India, (AIR 1960 SC 606) it was observed that when the Central Government decides a review application under rule 52 framed

under the Mines and Minerals (Regulation and Development) Act, there could be no doubt that the Central Government is required to act judicially under R. 54. In the case of Board of High School and Intermediate Education, U. P. Allahabad v. Ghanshyam Das Gupta (AIR 1962 SC 1110) it was held that although there was nothing in the statute making express provision as to when the power has to be exercised, still the authority has to act as a quasi judicial body while exercising power under the statute. The Collector under the said section, after having initiated the proceeding, can prevent the landlord from ejecting the under raiyat until the disposal of the proceeding, which order shall be in the nature of an order of injunction.

Then can it be said that he is performing only administrative functions. In my opinion, no sooner the Collector considers the question of initiation of a proceeding under sub-sec. (1) on the basis of an information received by him or on the basis of an application made on behalf of the under-raiyat, a quasi judicial proceeding is initiated and all orders passed thereafter are to be passed consistent with the norms prescribed. I have no hesitation in holding that a proceeding under S. 48-E can be initiated only after the Collector is satisfied that one of the three requisite conditions exists. On what materials and in what manner the Collector shall be satisfied about existence of one or the other requisite conditions for initiation of the proceeding, no hard and fast rule can be laid down. It will depend on the facts and circumstances of each case.

10. Learned counsel appearing for the petitioner, while challenging the impugned order, submitted that even if it is held that the order for initiating a proceeding under S. 48-E of the Act, by the Collector, is of a quasi judicial nature, still for that he is not required to hear the landlord. In my view, this contention has to be accepted. Before passing an order the other side is to be heard only under two situations, (i) if it is required by the statute itself, or (ii) even in absence of an express provision, it is required under the principles of natural justice. So far as the present case is concerned, sub-sec. (1) does not say that before initiation of the proceeding the landlord must be heard. This cannot be read even on the principles of natural justice because by merely initiating a proceeding no final order is passed affecting any of the rights of the landlord.

11. Learned counsel appearing for the respondent, however, submitted that there being no bar, if the landlord appears at his own and intervenes at the time of the initiation of the proceeding, he should be heard and it should be open to him to show that the information received by the Collector is false or that the application filed by the under-tenant is not a bona fide one. In my opinion, from the scheme of S. 48-E it is clear that it does not conceive two enquiries, one preliminary and other the final. If the applicant satisfies the Collector on the basis of the materials produced before him or the Collector is satisfied on the information received by him, then without waiting for the landlord he can initiate the proceeding.

Of course, in some cases where the claim on behalf of the under-tenant has been made by suppressing the material facts, like an order under S. 145 of the Code of Criminal Procedure between the same parties, upholding the claim of the landlord and negativing the claim of possession made by the under tenant, or a recent delivery of possession having been effected in favour of the landlord over the lands in question, then the landlord may bring to the notice of the Collector that the claim of the applicant lacks bona fide. But, the landlord cannot be permitted at that stage to convert the initiation of the proceeding, a mini trial or a parallel enquiry. He has to wait till the matter is placed before the Board.

12. Learned counsel appearing for the respondent then submitted that if the Collector is not required to verify and check the allegations and information regarding the claim of threatened dispossession, possession or dispossession at the time of initiation of the proceeding, then in many cases frivolous proceedings may be initiated at the instance of the enemies and so-called social workers causing great harassment to the landlord. I have already pointed out above that the Collector even at that stage is required to apply his judicial mind and he has to initiate a proceeding only if he is satisfied that the allegations regarding the existence of one of the three conditions are prima facie correct and bona fide. Even in the case of Ram Narain Singh (Supra) it was observed by Shambhu Prasad Singh, J., that at the

time of initiation of the proceeding the Collector must be satisfied that the dispute was a bona fide one.

13. Learned counsel appearing for the respondent then referred to some of the Bench decisions of this court where after allowing the writ applications, directions were given to the Collector concerned to hear both the parties and then to decide whether the dispute should be referred to the Board or not. Those cases are, M/s Jute and Gunny Brokers (Pvt.) Ltd. v. State of Bihar (1976 BBCJ (HC) 48), Lakshmi Thakur v. State of Bihar (1976 BBCJ (HC) 395) and Kapildeo Singh v. Chathu Lal Rai (1978 BBCJ (HC) 131). As petitioners of those cases had moved this Court and their writ applications were allowed, their Lordships directed, while remitting the cases back, to hear both the parties, but on basis of those judgments it cannot be held that it is incumbent on the Collector to hear both parties for the purpose of ascertaining as to whether one of the requisite conditions mentioned under sub-sec. (1) of S. 48E exists.

14. In the instant case, the Sub-divisional Officer acting as Collector, has not only heard both parties but he has looked into the documents and has considered the respective contentions advanced on behalf of both the parties at the stage of initiation of the proceeding. Admittedly, this case is not one of those cases where the landlord at his own initiative having appeared before the Collector has produced such a material which established the mala fide nature of the application filed on behalf of the petitioner. The impugned order itself shows that the Sub-divisional Officer has purported to adjudicate the respective claims of the parties and has negatived the claim of the petitioner after recording a finding. In such a situation, I am left with no option but to hold that the impugned order has been passed by adopting a procedure which is not sanctioned by law.

15. Accordingly, this writ application is allowed. The impugned order dated 24-1-1978 (Annexure-1) is quashed. The case is remitted back to the learned Sub-divisional Officer. He shall apply his judicial mind to the materials on the record which may include the application and documents filed on behalf of the petitioner as well as information received by the learned Sub-divisional Officer from other sources like the police and the Project Executive Officer. Learned counsel appearing on behalf of respondent No. 3 pointed out that the reports by the police and the Project Executive Officer disclose that the claim made on behalf of the petitioner is not at all sustainable. Learned Sub-divisional Officer shall consider all these aspects of the matter before passing an order whether a proceeding should be initiated or not. In the circumstances of the case, there will be no order as to costs.

BIRENDRA PRASAD SINHA, J. :— 16. I agree with the order proposed. However, I should like to add a few lines of my own.

17. It has been held that a proceeding under S. 48-E can be initiated only after the Collector is satisfied that one of the three requisite conditions mentioned in the section exists. It has been further held that the Collector while initiating a proceeding under Section 48-E has to apply his judicial mind and at this stage he acts in exercise of the quasi-judicial power. According to Webster, third new International Dictionary, the word 'initiate,' among other things, means "to begin or set going; make a beginning of; perform or facilitate the first actions, steps, or stages or to bring about the initial formation of, originate, to mark the beginning of, to begin the instruction of in some field, lead to knowledge of elements or rudiments, foster the first steps or beginning progress of, aid in becoming familiar or knowing."

This indicates that before a proceeding is initiated and the Collector decides to go further or make a beginning, he has to form an opinion. Once this is conceded, he cannot refuse to hear the landlord in proper cases. It is true that at the stage of initiating a proceeding the Collector has only to find out a prima facie case and he is not required to have a mini trial. In a criminal proceeding when a complaint is filed, under S. 200 of the Code of Criminal Procedure, a Magistrate is required to examine the complainant on solemn affirmation and examine the witnesses present, before issuing process. He must be satisfied on the materials disclosed in the petition of complaint, the statement of the complainant made on oath and the result of an enquiry under S. 202 of the Code of Criminal Procedure, about the existence of a prima facie case. There is no statutory bar for an accused person to come before the Magistrate at this stage and show that there is no prima facie case against him. But, according to the judi-

cial pronouncements, it has been held that the accused has no locus standi before a process has been issued. That rule in my opinion, cannot be applied in a case under S. 48-E of the Bihar Tenancy Act.

In a criminal case, the complainant is examined on solemn affirmation as soon as a complaint is filed and he makes himself liable for the consequences that may ensue in the event of a finding that the complaint was false or that the statement on oath had been made falsely. There is nothing of this kind in a proceeding under S. 48-E of the Bihar Tenancy Act. The person filing an application under S. 48-E, claiming himself to be a bataidar does not make himself liable for any punishment if, ultimately, it is found that the application was baseless and mala fide. In this context, the rights of the parties will have to be determined. In the case of M/s. Jute and Gunny Brokers v. State of Bihar (1976 BBCJ (HC) 48), a direction was given to the Collector to consider the matter afresh and for coming to a conclusion after hearing the parties, firstly, as to whether the petitioners of that case came within the exception or protection provided by section 48C and, secondly, whether, on the facts as asserted by them it could be said that the proceedings are mala fide or not.

The petitioners in that case were the landlords. On an application at the instance of respondent No. 2, a proceeding had been initiated under S. 48E of the Bihar Tenancy Act. The contention was that the claim put forward by the under-tenant was not bona fide and that the Collector had not applied his mind to the fact as to whether the landlords claim for exemption under S. 48C was sustainable or not. The Bench deciding that case directed the Collector to hear the parties, i.e., also the landlords, and if the finding on both the points was against the landlords then to constitute a Board under S. 48E. In another Bench decision of this Court, Lakshmi Thakur v. State of Bihar (1976 BBCJ (HC) 395), a similar direction was given to hear the landlord before instituting the proceedings and then to proceed to constitute a Board, if the finding went against the landlord. The decision in the case of Ram Narain Singh v. State of Bihar (AIR 1973 Pat 275) is to the effect that if a false, frivolous and mala fide case is prima facie proved, then the proceeding shall have to be dropped.

In order to prove that the case is frivolous and mala fide, in appropriate cases, opportunity may be given to the landlord at the time of the initiation of the proceeding itself. The decision in the case of Lakshmi Pd. Bhagat v. State of Bihar (1978 BBCJ (HC) 750) is also to the same effect. I agree with my learned Brother that S. 48E does not conceive of two enquiries but the Collector has to find out a prima facie case and, in finding out a prima facie case, he cannot shut out the landlord from appearing before him and showing that the proceeding sought to be initiated is mala fide and baseless. How it will be done will, surely, depend upon the facts of each case. Such proceedings are not aimed at harassing the landlord. No doubt, it is a beneficial legislation for safeguarding the interest of the bataidars but care must be taken that the landlords are not unnecessarily harassed at the hands of unscrupulous persons. The Collector should decide the matter as expeditiously as possible and see that the landlords do not drag on the matter on false pretexts.

P. S. SAHAY, J.:— 18. I had the advantage of going through the judgment of my learned brethren and I agree with the reasonings and conclusions arrived at by learned brother Nagendra Prasad Singh, J. that for initiating a proceeding under Section 48E of the Bihar Tenancy Act the Collector has only to see whether the three requisite conditions enumerated under sub-section (1) of Section 48E have been satisfied or not. How he will be satisfied about it, is entirely for him to decide, and no hard and fast rule can be laid down. If the landlord appears and wants to be heard then Collector may hear him. But to allow the landlord to appear in all cases as a matter of right will not be the correct procedure. As my learned brother Birendra Prasad Sinha, J., has observed that the object of the provisions under Section 48-E of the Act is to safeguard the interest of the under-tenants, who belong to weaker class, if landlords are allowed to appear in all cases at the initial stage then, in my opinion, their main object will be to delay the enquiry, by praying for time on some ground or the other which will be difficult for the Collector to refuse.

The result will be that in most of the cases the under-raiyats will lose all interest in the case to their peril. Such proceedings should be dealt with expedi-

tiously, both for the advantage of the under-tenants and the landlords, so that they may also know where they stand. That is all the more reason that the first stage of enquiry should not be time consuming because at later stages parties will have the full opportunity to place their case.

Petition allowed: case remanded.

AIR 1979 PATNA 266
FULL BENCH

S. SARWAR ALI, MADAN MOHAN PRASAD, LALIT MOHAN SHARMA, S. K. JHA AND BIRENDRA PRASAD SINHA, JJ.*

Padmraj Samarendra and others, Petitioners v. State of Bihar and another, Respondents.

Civil Writ Jur. Case Nos. 1753, 1812 and 2063 of 1977, D/- 22-3-1978.

(A) Constitution of India, Articles 15, 14 and 29 — Admission into educational institutions — Reservation of seats in Medical Colleges — Reservation is permissible to a limited extent.

Reservation is permissible only to a limited extent. There is good reason for fixing the maximum limit of total reservation at 50 per cent. The reservation virtually means that those who are better qualified, and thus deserving stand excluded in favour of less qualified and thus (in the strict sense) not deserving. To allow the less qualified and less deserving to fill up the majority of seats (or vacancies) would "destroy equality". The legally permissible limit of reservation will vary from time to time depending on the circumstances prevailing at a particular point of time. The nature and type of education or services may also be a relevant factor. The reservation has to be adopted to advance the interest of weaker sections of the Society but in doing so it is necessary to see that the deserving and qualified candidates are not excluded from admission to higher educational institution. Thus reservation is not an end but a means to secure social and economic justice. (Paras 7, 8)

*(In this case, the Judges of the Full Bench differ in their views. The judgments in the case are, however, printed in the order in which they are given in the certified copy. The first judgment is not, therefore, necessarily the judgment expressing the majority view.—Ed.)

EW/EW/C361/79/LGC

In the instant case the total number of seats for admission in Government colleges was 670. After deducting the total number of seats for culturally/economically backward class and Girls candidates, which was about 168 and was held to be valid, the reservation of 88 and 56 seats in favour of Scheduled Castes and Scheduled Tribes respectively cannot be said to be unreasonable. The reservation in their cases, therefore, is fully covered by the provisions of Article 15 (4) and cannot be said to be violative of the provisions of Article 15 (1) or 29 (2). (Paras 37, 40)

(B) Constitution of India, Articles 15, 14 — Admission into educational institutions — Backwardness — Tests of — Reservation of 10% seats in favour of backward class having annual income of Rs. 3,000/- per annum, held, was not unconstitutional.

(Paras 13, 38, 39)

(C) Constitution of India, Art. 15 (1) and (3) — Special provision for women — Admission in Medical Colleges — Allotment of certain seats for girl students — Not a reservation hit by Article 15 (1) — It is not a reservation in the strict sense of the term — It is an allotment of the source from which seats have to be filled — Per majority: (B. P. Sinha and L. M. Sharma, JJ. Contra).

(Paras 15, 36, 46, 55)

(D) Constitution of India, Article 15 — Admission in Medical Colleges — Reservation of cultural seats — Whether violation of Article 15.

Government can regulate admissions to its own institutions in the colleges run by it provided the rules for selection applicable to the colleges do not suffer from any unconstitutional or illegal infirmity. (Para 35)

In the instant case out of 670 seats 43 seats are to be filled by nomination. 6 out of 43 seats are available for Nepalese students, 23 seats are placed at the disposal of the Government of India to be filled up by nomination from out of candidates belonging to foreign countries, Nagaland, Sikkim and Bhutan for State reasons and 14 seats to be filled up by nomination by the three institutions which have been taken over by the State. This reservation for Nepalese students cannot be said to be without any reasonable nexus. Relationship with the country of Nepal has, for State reasons, to be as cordial as possible. So also is the case with regard to the 23 seats to be filled up by the Central Government. Further the economic and educational backwardness of the citizens residing in Nagaland, Sikkim and Bhutan is a notorious fact. The policy of appeasement and maintenance

of good relationship with these three territories is equally important. None of these can be said to be unreasonably excessive. So also, the reservation of 14 seats to be filled up by nomination by the three institutions mentioned above can neither be said to be unreasonable nor excessive. No constitutional provision can be said to be infringed on account of allocation of those 43 seats.

(Para 35)

(E) Patna University Act (24 of 1976), Section 29 (2) — Patna University Regulations, Regulation 16 — Non-compliance with certain clauses of prospectus — Effect of.

Per S. K. Jha, J.:— The prospectus is merely a document issued by the selection committee and supplied to the candidates with application form and that merely lays down the guidelines to the students and contains mere instructions. If certain clauses of the prospectus like the date for production of the mark sheet is relaxed by the selection committee, it cannot be said that selection committee constituted by the Board of Principals would be powerless to make any relaxation in respect of such matters over which the candidates had no control. (Para 29)

On a true interpretation of Regulation 16 read with Section 29 (2) of the Act, it is quite clear in the context that the term "subject" is a genus which includes a part of the subject which is merely a species. Therefore it cannot be said that the Vice-Chancellor and the examination board could not direct a re-examination in only practical branch of the subject of Chemistry.

(Para 31)

(F) Constitution of India, Article 226 — Parties to writ proceedings — Necessary parties — Applicability of provisions of Civil P. C. — Petition challenging selection of students for admission in Medical Colleges — Selected candidates and University not made parties to petition — Petition, held was not maintainable in absence of necessary parties who were going to be directly affected — Per majority (S. K. Jha, J. contra).

(Paras 21, 41, 49, 51, 52, 68, 74)

(G) Constitution of India, Articles 39, 41, 14 and 19 (1) (g) — Admissions in Medical Colleges — Reduction in number of seats — Whether violation of Articles 39 and 41.

Per S. K. Jha and M. M. Prasad, JJ.:

The policy which the State is enjoined to follow by Articles 39 and 41 does not confer any justiciable right legally enforceable by the petitioners. The question as to whether a particular number of seats is desirable to be limited for the purpose of admission in the medical or dental course in the medical profession cannot be said to attract infringement of any right legally conferred on any of the petitioners. Merely because the number of seats in medical colleges has been reduced, it cannot be said that State has been acting in enforcement of its policy towards an end by which the health and strength of workers, men and workmen or children, and citizens are to be adversely affected.

(Paras 38, 90)

The total number of candidates proposed to be selected for the purpose of admission in the session in question is 670 only whereas before the taking over of the private medical colleges by the State the number of seats for candidates to be admitted to the medical or dental course in the State was approximately 975. (Para 33)

The grievance with regard to the infringement of Articles 14 and 19 (1) (g) on account of the reduction in overall number of seats in all the medical colleges in the State is, if at all, too far-fetched and vague. There cannot, by any stretch of imagination, be said to be any infraction of Article 14 on account of the reduction in the number of seats, for that, in no manner, can be suggested to have resulted in a denial by the State to any person, much less any of the petitioners, of equality before the law or the equal protection of the law. (Para 33)

Cases Referred: Chronological Paras

AIR 1976 SC 490 : 1976 Lab IC 395 — 5, 6, 8, 9, 10, 12, 38, 84
AIR 1975 SC 563 — 35, 83
AIR 1975 SC 2299 — 10
AIR 1974 SC 1 : 1974 Lab IC 1 — 11
AIR 1974 SC 555 : 1974 Lab IC 427 — 33
AIR 1973 SC 930 : 1973 Lab IC 565 — 12
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AIR 1971 SC 2085 — 39, 71, 71-C, 72
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B. C. Ghose, Swaraj Kumar Ghose, Abhijit Sinha and Arun Chandra Mitra (in C. W. J. C. Nos. 1753 and 1812 of 1977) and Sudhir Chandra Ghose and Kalyan Kumar Ghose (in C. W. J. C. No. 2063 of 1977), for Petitioners; Rambalak Mahto, Govt. Pleader No. 4 and Harendra Prasad, Jr. Counsel to Govt. Pleader No. 4 (in C. W. J. C. No. 1753 of 1977); Rambalak Mahto Govt. Pleader No. 4 and Basant Kumar Singh Jr. Counsel to Govt. Pleader No. 2 (in C. W. J. C. No. 1812 of 1977) and Rambalak Mahto, Govt. Pleader No. 4 and A. Jha, Jr. Counsel to Government Pleader No. 4 (in C. W. J. C. No. 2063 of 1977), for Respondents.

SARWAR ALI, J.:— I have advantage of reading in draft the judgment prepared by my learned colleagues. The contentions raised in these cases have been formulated in the judgment of my learned brother S. K. Jha, J. in paragraph 7 of the judgment I concur in the conclusion of my learned brethren Madan Mohan Prasad and S. K. Jha, JJ. with reference to the contentions formulated in paragraph 7 (i) (ii) and (iii). It is only in relation to the arguments advanced in the context of reservation that I would prefer to express my views in my own words. Three of my learned colleagues have also held that the petitions are not maintainable. I have my doubts about the view so expressed, and proceed to deal with the question of reservation on the basis of the petitions being maintainable. In any event, when a decision is based on more than one ground, none of the grounds can be said to be obiter dicta.

2. To secure justice, social and economic, and equality of status and opportunity is the promise of the Constitution. This has been sought to be ensured by enacting constitutional provisions giving right to equality on the one hand, and on the other by giving constitutional mandate to the State, in Article 46 of the Constitution a provision though not legally enforceable, nevertheless fundamental in the governance of the country(1) (sic) — "to promote with special care the education and economic interest of the people and in particular of the Scheduled castes and the Scheduled tribes" and "to protect them from social injustice and all forms of exploitation(2) (sic)."

3. Article 14 of the Constitution secures equality before the law and equal protection of the laws. Article 15 (1) of the Constitution states that the State shall not discriminate against any citizen on the grounds only of religion, race, caste, sex, place of birth or any of them. Article 15 (4), however, states that nothing in Article 15 (1) or Article 29 (2) shall prevent the State from making any special provision for the advancement of socially and educationally backward classes of citizens, or for the Scheduled Castes and the Scheduled Tribes.

4. It cannot be gainsaid that when the Constitution came into force, a section of the population was socially and educationally backward. The causes, according to the Backward Class Commission, of backwardness amongst the educationally and socially backward classes were:

1. traditional apathy for education on account of social and environmental conditions or occupational handicaps;

2. poverty and lack of educational institution in rural areas;

3. living in inaccesible areas;

4. lack of adequate educational aids, such as free studentship, scholarship and monetary grants;

5. lack of residential hostel facilities;

6. unemployment among the educated which acts as a damper on the desire of the members to educate their children; and

7. defective educational system which does not train students for appropriate occupations and professions (Extracted from AIR 1963 SC 649 at p. 655).

The backwardness, no doubt, is a result of historical causes (T. Devadasan v. Union of India, AIR 1964 SC 179 at p. 185).

5. In order, therefore, to have real equality and not theoretical or formal equality it was, in view of the Constitution, necessary to make special provision for the backward classes, the Scheduled Castes and the Scheduled Tribes. It must, however, be not forgotten that the backwardness, social and educational, is ultimately and primarily due to poverty (M. R. Balaji v. State of Mysore, AIR 1963 SC 649 at pp. 655, 664). The view of the Constitution-maker, clearly, was that if no special provision was made for the classes aforesaid, providing some leverage to the historically oppressed, they would never be able to compete with the more advanced section of the community and such classes

1. Preamble of the Constitution.

2. Article 37 of the Constitution.

would remain unrepresented or marginally represented whether it be in educational institutions or in the services. Thus the interest of society is advanced as a whole by looking after its weaker section (D. N. Chanchala v. State of Mysore, AIR 1971 SC 1762 at p. 1770). I may extract the observation of Khanna, J. in State of Kerala v. N. M. Thomas (AIR 1976 SC 490 at p. 505) which, if I may say so with respect, clearly brings out the rationale for the constitutional provisions in relation to reservation:

".....those sections of the population would not be in a position to compete with advanced sections of the community who had all the advantages of affluence and better education. The fact that the doors of competition were open to them would have been a poor consolation to the members of the backward classes because the chances of their success in the competition were far too remote on account of the inherent handicap and disadvantage from which they suffered. The result would have been that, leaving aside some exceptional cases, the members of backward classes would have hardly got any representation in jobs requiring educational background. It would have thus resulted in virtually repressing those who were already repressed. The framers of the Constitution being conscious of the above disadvantage from which backward classes were suffering enjoined upon the State in Art. 46 of the Constitution to promote with special care educational and economic interests of the weaker sections of the people, in particular of the Scheduled Castes and Scheduled Tribes, and also protect them from social injustice and all forms of exploitation."

6. The reservation, it is also now firmly established, is permissible only to a limited extent. The maximum permissible limit of reservation was first considered by the Supreme Court some 12 years after the coming into force of the Constitution in M. R. Balaji v. State of Mysore (AIR 1963 SC 649). It was held: ".....speaking generally and in a broad way a special provision should be less than 50 per cent; how much less than 50 per cent would depend upon the relevant prevailing circumstances in each case." The true effect of the aforesaid decision was subject-matter of some controversy at the bar. The question posed was whether 50 per cent was the maximum limit of reservation or that Balaji's case permitted reservation even beyond 50 per cent. In T. Devadasan v. Union of India (AIR 1964 SC 179 at p. 186) it was observed as follows:

"It has been held by this Court in M. R. Balaji v. State of Mysore (AIR 1963 SC 649) that reservation of more than half of the seats in an educational institution for being filled up from members of the backward classes is unconstitutional."

It was later observed:

"The ratio of this decision appears to be that the reservation of more than half the vacancy is per se destructive of the provisions of Article 15 (1)."

It is thus not open to us to put our own interpretation on the decision in the Balaji's case (so far as this aspect is concerned), when the Supreme Court itself has interpreted the decision. Even in N. M. Thomas's case (supra) the same interpretation has been accepted. A. N. Ray, C. J. observed in relation to Balaji's case:

"It was said that not more than 50 per cent should be reserved for backward classes."

It may be noted that the learned Chief Justice interpreted Devadasan's case as holding that where 54 seats were reserved out of 100 that would destroy equality. Beg, J. as he then was, observed in relation to Devadasan's case and Balaji's case:

"It was held that more than 50 per cent reservation for a backward class would violate the requirement of reasonableness inasmuch as it would exclude too large proportion of others."

7. Apart from the interpretation given by the Supreme Court it appears to me that there is good reason for fixing the maximum limit of total reservation at 50 per cent. It has to be noticed that the reservation virtually means that those who are better qualified, and thus deserving, stand excluded in favour of less qualified and thus (in the strict sense) not deserving. To allow the less qualified and less deserving to fill up the majority of seats (or vacancies) would, to borrow the words of A. N. Ray, C. J., "destroy equality".

8. Having stated that considering the situation then prevailing and the strides made till the decision of the Supreme Court in Balaji's case, 50 per cent was held to be the maximum permissible limit of reservation, it has to be clearly understood and appreciated that the legally permissible limit of reservation will vary from time to time depending on the circumstances prevailing at a particular point of time. How much less than 50 per cent would depend upon the "relevant prevailing circumstances". The nature and type of education or services may also be a relevant factor. It was observed in Devadasan's case (supra): "what the percentage ought to be must depend upon the circumstances

obtaining from time to time (at p. 188)". In General Manager, Southern Rly. v. Rangachari (AIR 1962 SC 36) it was observed in relation to Art. 16 (4) of the Constitution that it was intended merely to give adequate representation to backward communities. "It cannot be used for creating monopolies or for unduly and illegitimately disturbing the legitimate interest of other employees." (at p. 45). Similarly in State of Andhra Pradesh v. U. S. V. Balaram (AIR 1972 SC 1375) it was held that the reservation has to be adopted to advance the interest of weaker sections of the society but in doing so it is necessary to see that the deserving and qualified candidates are not excluded from admission to higher educational institution. It was also observed in that case (at p. 1400) —

"If a situation arises wherein the candidates belonging to the groups included in the list of Backward Classes, are able to obtain more seats on the basis of their own merit, we can only state that it is the duty of the Government to review the question of further reservation of seats for such groups. This has to be emphasised because the Government should not act on the basis that once a class is considered as a backward class it should continue to be backward for all times. If once a class appears to have reached a stage of progress, from which it could be safely inferred that no further protection is necessary, the State will do well to review such instances and suitably revise the list of Backward classes."

The same aspect was emphasised in A. Periakaruppan Chettiar v. State of Tamil Nadu (AIR 1971 SC 2303 at p. 2311) in these words:

"But all the same the Government should not proceed on the basis that once a class is considered as a backward class it should continue to be backward class for all times. Such an approach would defeat the very purpose of the reservation because once a class reaches a stage of progress which some modern writers call as take off stage then competition is necessary for their future progress. The Government should always keep under review the question of reservation of seats and only the classes which are really socially and educationally backward should be allowed to have the benefit of reservation. Reservation of seats should not be allowed to become a vested interest."

Thus, reservation is not an end but a means — a means to secure social and economic justice. The real solution, however, lies in eliminating the causes that have led to the social, educational and economic backwardness of the weaker section of the community. But till such time as that is not achieved reservation is a measure "compensatory in character" meant to "mitigate surmountable obstacles to ensure equality of opportunity (AIR 1976 SC 490, 514 (per Mathew, J.))."

9. It would, however, be useful to remind what Krishna Iyer, J. said in Thomas's case (at page 531):

"In the light of experience, here and elsewhere, the danger of 'reservation', it seems to me, is threefold. Its benefits, by and large, are snatched away by the top creamy layer of the 'backward' caste or class, thus keeping the weakest among the weak always weak and leaving the fortunate layers to consume the whole cake. Secondly, this claim is overplayed extravagantly in democracy by large and vocal groups whose burden of backwardness has been substantially lightened by the march of time and measures of better education and more opportunities of employment, but wish to wear the 'weaker section' label as a means to score over their near equals formally categorised as the upper brackets. Lastly, a lasting solution to the problem comes only from improvement of social environment, added educational facilities and cross-fertilisation of castes by inter-caste and inter-class marriages sponsored as a massive State programme, and this solution is calculatedly hidden from view by the higher 'backward' groups with a vested interest in the plums of backwardism. But social science research, not judicial impressionism, will alone tell the whole truth and a constant process of objective re-evaluation of progress registered by the 'under-dog' categories is essential lest a once deserving 'reservation' should be administrative strategy to help the really untouched, most backward classes also emerge from such socio-legal studies and audit exercises, if dispassionately made. In fact, research conducted by the A. N. Sinha Institute of Social Studies, Patna, has revealed a dual society among harijans, a tiny elite gobbling up the benefits and the darker layers sleeping distance away from the special concessions."

10. It is also to be remembered that the main and the real cause for backwardness is economic backwardness or poverty. In this vast country it is not confined to those who are covered by Art. 15 (4) of the Constitution. In a country where only a small percentage of the population is above the poverty line, to deny opportunities of higher education (which secures employment), and employment, is to deny to those who are qualified and deserving what is or at least should be their

due. When the 42nd Constitutional Amendment was on the anvil there was suggestion of inclusion of "right to work"—which carries with it the natural corollary of assured employment—as a fundamental right. This, understandably, could not be done in a political system which is based on mixed economy. The natural effect of reservation is to close the door of betterment or even employment to even a portion of economically weak section of community. This all the more emphasises the urgent necessity of eliminating or at least substantially reducing the causes which have contributed to the creation of socially and educationally backward section of the community. Thus, creating a situation when the need of reservation would be no more. Then alone the promise of equality for all would become a reality. And it is to be remembered that right of equality is the "cornerstone of the Constitution" (N. M. Thomas's case (supra) at p. 509). (Per Khanna, J.) Chandrachud, J. (as he then was) says: "it is a right which more than any other is a basic postulate of our Constitution (Smt. Indira Nehru Gandhi v. Raj Narain, AIR 1975 SC 2299, at p. 2469). Mathew, J. describes it as the "most fundamental postulate of republicanism" (AIR 1975 SC 2299 at p. 2385).

11. In this context it would further be useful again to extract observation of Iyer, J., who concurring with A. N. Ray, C. J. observed:

".....no caste, however, seemingly backward, or claiming to be derelict, can be allowed to breach the dykes of equality of opportunity guaranteed to all citizens. To them the answer is that, save in rare cases of "chill penury repressing their noble rage", equality is equality—nothing less and nothing else. The heady upperberth occupants from 'backward' classes do double injury. They beguile the broad community into believing that backwardness is being banished. They rob the needbased bulk of the backward of the 'office' advantages, the nation by classification reserves or proffers. The constitutional dharma, however, is not an unending edification of 'backwardness' and showering 'classified' homage, regardless of advancement registered, but progressive exercising of the social evil and gradual withdrawal of artificial crutches. Here, the Court has to be objective, resisting mawkish politics."

Also the note of caution sounded in State of Jammu and Kashmir v. T. N. Khosa (AIR 1974 SC 1):

".....let us not evolve, through imperceptible extensions, a theory of classification which may subvert, perhaps submerge, the precious guarantee of equality. The eminent spirit of an ideal society is equality and so we must not be left to ask in wonderment what after all is the operational residue of equality and equal opportunity?"

12. It was contended on behalf of the petitioners that the reservation made in favour of the backward castes by the State of Bihar is constitutionally invalid. In other words those castes which have been described as backward do not fulfil the constitutional requirement. Since no foundation had been laid for this attack in the petition itself, it is not possible to entertain this argument in this case. Indeed, as pointed out by learned brother B. P. Sinha, J. the records of this case do not indicate what class or castes have been denominated as backward. I, thus, do not express any opinion on the question whether the castes designated as backward by the State of Bihar do fulfil the constitutional requirement. As to who constitute backward classes has been fully explained in several decisions of the Supreme Court. In Balaji's case (supra) it has been said (at p. 658)—"backward classes for whose improvement special provision is contemplated by Article 15 (4) are in matter of their backwardness comparable to Scheduled Castes and Scheduled Tribes." In Janki Pd. v. State of Jammu and Kashmir (AIR 1973 SC 930), it was emphasised that the backwardness being "social and educational must be similar to the backwardness from which the Scheduled Castes and Scheduled Tribes suffer". It was pointed out that these principles have been enunciated in Balaji's case and Chitralekha v. State of Mysore (1964-6 SCR 368 : AIR 1964 SC 1823). Similarly in Thomas's case it was emphasised that the backwardness must be "of the type harijans endure". "Not all castes backwardness is recognised, social disparity must be so grim and substantial as to serve as a foundation for benign discrimination" (Thomas's case (supra) at page 537 (Iyer, J.) (AIR 1976 SC 490-537)). I am explaining the criteria as laid down in the Supreme Court decisions to clarify the true concept of backwardness.

13. It was contended that in the instant cases the Government has made reservation of 10 per cent in favour of members of backward classes having an annual income of Rs. 3000/-. Thus there is division of backward classes between more backward and less backward. This was not, it is said, permissible. I do not think I can accept this contention. It has already been noticed that the consistent view of the Supreme Court is

that basically and essentially even social and educational backwardness is a result of economic backwardness. In such a situation to make reservation for those who are economically backward is to give representation to those who could not, because of their economic backwardness, compete with those of their own class who have no such disadvantage. To equate the economically weak and the economically strong amongst the members of the same class would to quote again the language of Iyer, J. mean heaping the benefit on "top creamy layer of the backward caste or class". "If there are intelligible differentia", says Mathew, J.:

"which separate a group within that class from the rest and that differentia have nexus with the object of the classification. I see no objection to a further classification within a class."

Here also, in my view, there are not only intelligible differentia but good reason for what has been suggested as a further classification within the class, the nexus being the securing of educational opportunities to those who are really weak and require protection to give them their legitimate due. "Equality of opportunity admits discrimination with reason. Discrimination with reason means rational classification for differential treatment having nexus to the constitutionally permissible object." Differential treatment to economically weak among the classes, who on acceptable standards are backward is, in any event, a rational classification.

14. Before concluding on the topic of reservation I must point out that the various dicta, observation or the legal position highlighted are all based on the pronouncement of the Supreme Court. I have only attempted to collate and synthesise them in so far as it is relevant for our present purposes. Indeed I have attempted to use the very language of the decisions of the Supreme Court.

15. I agree with my learned brethren Madan Mohan Prasad and S. K. Jha, JJ. that allotment of 125 seats for girl students is not a reservation in the strict sense of the term. It is an allotment of the source from which the seats have to be filled. So is the position in respect of 43 seats described as "cultural seats". My learned brethren have dealt with this matter at length. I need only say that such questions are justiciable and the State cannot in the garb of prescribing source effect reservation. The result, therefore, is that only 502 seats are available for being filled in by the general quota. It is out of these that reservations have to take place. The Government notification fixes 14% of seats for Scheduled castes, 9% for Scheduled tribes and 10% for backward classes. Thus the number of seats available for the three categories is 70, 45 and 50 respectively. Since the number of selected Scheduled castes and Scheduled tribes candidates are only 45 and 41 respectively, the quota fixed has not been exceeded. The position, however, is different so far as "backward class" candidates are concerned. The State case is that 63 seats have to be reserved for backward classes, being 10% of 627 seats. Since I am of the view that 10% of available seats, after deductions as noted above, is only 50, the admission of backward class candidates has to be confined to that number. 34 backward class candidates having already been included in the general list, it is apparent on the State case itself, that only 16 more seats can now be filled in by backward class candidates. This naturally follows as the reservation is on percentage basis. 10% seats having been reserved for backward classes. The remaining seats have to be filled in by candidates qualifying in the general competition. I may further clarify that had I been of the view that 125 seats allotted to girl students was a reservation and not allotment or specification of source for recruitment, I would have no alternative but to hold the reservation to be constitutionally impermissible. I say so because in that case the total reservation would have been 53%, and that for reasons discussed in paragraph 6 and 7 of my judgment would be unconstitutional. In the view that I have taken the total factual reservation (including those for Scheduled castes and the Scheduled tribes) comes to about 26% which, on the materials on the record, cannot be said to be constitutionally impermissible.

16. Lest there be some ambiguity in what I have said I would like to clarify and reiterate that I am not expressing any opinion in this judgment, whether the list that has been drawn up by the state of backward classes satisfies the constitutional requirement. When an occasion does arise this Court may have to determine:

(a) Whether the list drawn up by the State is on the basis of caste only;

(b) Whether all or some of the enumerated castes or classes come within the meaning of "backward class" as contemplated in Art. 15 of the Constitution.

It may also have to be determined with reference to the circumstances now prevailing in this State as to what percentage of reservation would be constitutionally permissible.

And whether a uniform formula would be constitutionally valid, or the percentage may vary in different faculties of education, or different categories of service. This is only to indicate some of the problems that may have to be tackled at a later date.

17. There are two other observations which I would like to make. It was contended that there has been manipulation in the result of the competitive examination which was held for admission into medical colleges. The petitioners have not been able to establish factual manipulations, which aspect has been fully dealt with by my learned brother S. K. Jha, J. The perusal of the affidavits, however, does leave an impression that the system as at present adopted requires improvement.

18. It has been stated in the affidavits that it is not the answer books which are evaluated by the computer. On the other hand the clerks prepare the sheets that have to be fed into the computers. After the evaluation by the computer the marks are noted again by the clerks. This system does appear to me as to require improvement. There is scope for genuine mistakes in preparing the sheets for the computer. There is also scope for manipulation. If the confidence of the examinees and the general public is to be had a system will have to be evolved which eliminates the chances of mistakes and manipulations. One such method may be to permit re-examination of answer books, on payment of a fee fixed in that regard, by a Special Board constituted for the purpose. It is to be remembered that admission into faculties like medicine or engineering virtually ensures the future prospects of the admitted students. The medical education is one of the most sought after higher education. The evolution of a procedure free from suspicion of bungling or manipulation is certainly something to be aimed at. The authorities will do well to give a thought to this matter.

19. There is one other aspect on which I would like to reserve my opinion, as the question was not specifically raised or agitated in the course of argument. I find that whereas according to Annexure 1, 96 is the lowest mark for eligibility of admission so far as general candidates are concerned, the merit lists of Scheduled castes and Scheduled tribes candidates include admission of those who have obtained as low mark as 54. Whether there should be a reasonable difference between marks of candidates in the general list and those who have reservation in the matter of admission is a matter on which I do not express any opinion. Prima facie, it does appear to me that too wide a difference or margin between the two may not be legally or constitutionally permissible.

20. Before finally concluding I must express the appreciation of my learned brethren and my own for the assistance rendered by Government Pleader IV. He put forth the State case with ability, eloquence and fairness. He tried to meet with measured confidence the questions raised at the bar and the queries made by bench in the course of hearing of these cases.

21. In the result, these applications have to be dismissed as the majority is of the view that the writ petitions are not maintainable on the ground that necessary parties have not been impleaded.

S. K. JHA, J. :— 22. In all these three applications under Arts. 226 and 227 of the Constitution of India are involved, more or less, identical facts and common questions of law. Hence they were heard together and this common judgment.

23. There is one petitioner in each of C. W. J. C. 1753 and C. W. J. C. 2063 and five in C. W. J. C. 1812. From the labyrinth of affidavits, counter-affidavits and rejoinders thereto, the following common set of facts emerge. The petitioners have passed the intermediate examination in science with qualifying marks for admission into the pre-medical course of the Patna University and other universities in the State of Bihar teaching medicine in the various medical colleges owned, managed and administered by the State of Bihar. Only such students as have passed the intermediate examination in science or its equivalent examination are eligible for admission into the medical course. Such admission to the medical colleges in Bihar is taken on the basis of the result of a pre-medical test held for the purpose by the State Government in the Department of Health. The State Government took over a number of medical colleges run by private individuals or enterprises in the State. Such medical colleges were the Mahatma Gandhi Memorial (Medical) College, Jamshedpur, Patliputra Medical College, Dhanbad, Magadh Medical College, Gaya, Nalanda Medical College, Patna and Shri Krishna Medical College, Muzaffarpur. The total number of students admitted into the first year class of pre-existing medical colleges, namely, the medical colleges at Patna, Ranchi, Darbhanga and Bhagalpur, owned, managed and controlled by the State Government, was 500 and the total number of students previously admitted into the first year class of the private colleges aforemen-

tioned was approximately 475. This included seats reserved for students who were admitted for studies into the various universities of Bihar and into medical colleges affiliated to those universities. They also included students from different Asian countries (which was termed as 'cultural reservation'), where proper facilities for medical education were not provided. These seats also included those reserved for scheduled castes, scheduled tribes and other educationally and socially backward classes as also girl students. The State Government arranged to hold a pre-medical test for the year 1977 for admission into all those colleges which were previously owned and controlled by the State Government as also the private colleges mentioned above, which were taken over, controlled and managed by the State Government. The total number of candidates proposed to be selected for the purpose of admission into those colleges has now been reduced to 670. The pre-medical test was originally scheduled to be held on the 3rd July, 1977. This examination was cancelled a few days before the date fixed for the examination. The petitioners have alleged in the writ petitions that they came to learn later that certain packets of question papers in transit to Ranchi were suspected to have been tampered with in course of carriage in the railway. A fresh examination was accordingly ordered to be held on the 7th August, 1977 and the same was duly held. The petitioners allege that it has been very strongly and widely rumoured that the questions had been leaked out and some of the medical coaching institutions took advantage of the same in preparing students for the set of questions handed down in the examination held in August, 1977. This allegation has further been amplified in the first supplementary affidavit filed on behalf of the petitioners wherein it has been further alleged that at the time of filing of the original writ application the petitioner of C. W. J. C. 1753 could not get a copy of any such question which he had since been able to obtain, a copy whereof has been marked annexure 3 to the first supplementary affidavit. It has been further alleged in the same supplementary affidavit that the system of examination for the purpose of pre-medical test is that the question paper is given to the candidates in the examination hall and they have to write answers against each question on the question paper itself and submit the same in the examination hall, no question can be taken out of the hall and each question has to be submitted with answer on it. It has further been alleged in the writ petition that the system of obtaining results of the examination is mechanised and the human element has not properly been excluded. For instance, it has been stated, code numbers are put on the answer books in place of roll numbers which are subsequently transferred to punch cards and are decoded after the computer has indicated the numbers by human hands. This has given rise to ample suspicion in the mind of the people that the rumour regarding leakage is not without foundation. As a result of the test so held on the 7th August, 1977 the names of the candidates categorywise provisionally selected for interview for admission into medical colleges have been drawn up on the basis of the same and published in the local newspapers on Saturday, 24th September, 1977 and Sunday, 25th September, 1977. A copy of the result so published in the newspapers has been marked annexure 1. According to the petitioners' case, it would appear from the list (annexure 1) that the candidates have been divided into several categories, namely —

(i) General/backward classes (income below Rs. 3,000 per annum, indicating thereby that the backward classes would cover those persons whose income is below Rs. 3,000 per annum only). No other criterion has been laid down for determining the backwardness.

(ii) Waiting list, 'which probably indicates', a list of persons who may be kept waiting after interview in the event of the seats not being filled at the said interview.

(iii) Merit list of girl candidates.

(iv) Waiting list of girl candidates.

(v) Merit list of scheduled castes.

(vi) Merit list of scheduled tribes.

The total number of persons selected for the purpose of interview is 525. This, according to the petitioners, included 113 girl students, 45 scheduled castes and 41 scheduled tribes students and 34 from out of backward classes. 27 were placed on the waiting list. It was not notified as to how many seats would be reserved for different categories mentioned above. But the petitioners alleged that they have gathered that in addition to these, 43 seats were also reserved in the name of 'cultural seats', which included not only students of other Asian countries but also nominees of the Tata Industries and the Coal Mines Welfare Organisation, who have not appeared at the test. Thus, according to the petitioners, out of 670 seats, 375 seats are reserved and 295 seats are open to the general competitive examination. The percentage thus comes to 56 per cent for the reserved seats and 44 for the general seats. The further case of the

petitioners is that, as already indicated above, the minimum qualification for admission into the medical colleges is the passing of the intermediate examination in science or its equivalent as prescribed by the universities of Bihar. The results of the intermediate examination in science of the various universities in Bihar, except Patna and Ranchi, had not been published at the time of filing of the writ application. In some of them examinations had not been held or completed before the pre-medical test was held. The grievance of the petitioners is that such candidates as had clearly not passed the I. Sc. examination were selected and included in the select list (annexure 1). Some of the candidates, it is further alleged who have been selected, have definitely failed in one subject or more in the intermediate examination in science held by the Patna University. Notwithstanding the same, their roll number appeared in the pre-medical test as published in annexure 1. Their selection, it is alleged, was contrary to the eligibility for sitting at the pre-medical test and that, therefore, their selection was invalid and contrary to the regulation of the universities as also the prospectus which has been issued for the purpose laying down the qualifications for candidates desirous for sitting at the pre-medical test. The Indian Medical Council, it is said, has, by regulation, provided that even in the matter of scheduled castes and scheduled tribes the concession could be only by lowering the marks at the pre-medical test from 50 per cent for such admission but not less than 45 per cent. In order to take more students from those reserved and privileged classes of students, it is said, the minimum marks for them have been sought to be reduced below the percentage of marks prescribed for them by Indian Medical Council. On these facts, it was submitted in the writ petitions as originally filed that all the various steps leading to the publication of the results in annexure 1 and the selection proposed to be made on the basis thereof were illegal, ultra vires as being in contravention of Articles 14 and 15 of the Constitution of India; the reservation for candidates to be nominated by the Tata Industries and the Coal Mines Welfare Organisation, is not warranted by the law or the Constitution. The reduction in the number of seats in the medical colleges tends to reduce the number of qualified medical men who may render health service to the people of the State and is accordingly in contravention of the directory policy as contained in Chap. IV of the Constitution. On these facts and submissions, a prayer had originally been made for issuance of an appropriate writ quashing annexure 1, the list published in the newspapers.

24. In the second supplementary affidavit filed on behalf of the petitioner in C. W. J. C. 1753 it has further been stated that after filing of the writ application the petitioner found that the interview board at the interview held on the 28th and the 29th Sep., 1977 had been issuing immediately after the interview admit cards to the candidates for admission to the medical colleges on the 7th Oct., 1977. A prayer was also made for an interim order pending the writ application for restraining the respondents, namely, the State of Bihar through the Secretary, Health Department, and Dr. Manik Singh, Convenor, Pre-medical and Dental Test, 1977, who also happens to be the Principal of Patna Medical College, from giving effect to the list as published in Annx. 1. At the time when the rule was issued in these cases, the prayer for interim relief was rejected.

25. A counter-affidavit has been filed on behalf of the respondents wherein the following facts have been asserted. True position with regard to the number of seats available for admission and reservation is as follows:—

"Total number of seats available for admission in the nine medical colleges in the State are 627 in the following manner:

Patna Medical College	— 116
Darbhanga Medical College	— 101
Ranchi Medical College	— 101
Bhagalpur Medical College	— 48
Mahatma Gandhi Medical College, Jamshedpur	— 70
Patliputra Medical College	— 41
Srikrishna Medical College	— 50
Magadh Medical College	— 50
Nalanda Medical College	— 50."

Out of these 627 seats, 88 seats are reserved for scheduled castes and 56 for scheduled tribes, but in case candidates from scheduled castes and scheduled tribes are not available in the required number, the rest of the seats which remain vacant due to the non-availability of scheduled caste and scheduled tribe candidates are made available to the general pool of candidates. 63 seats are reserved for backward classes. The criterion for filling of the seats against these 63 seats is that the candidates belonging to the backward classes, whose parents' income is less than Rs. 3,000 per annum, are candidates of backward classes for admission into medical colleges. The State Government, while determining the backward classes, take into consideration the castes socially and educationally backward

and declare those as socially, educationally and economically backward as forming the backward classes and further, for admission, economic condition of backward classes was also taken into consideration. While determining the backward classes, the State Government had taken into consideration the social and educational backwardness as also their economic backwardness. The 63 seats reserved for backward classes are not filled up by backward classes on the basis of reservation alone and if the students belonging to backward classes compete in examination on their own merit with the general candidates, the number of seats under reservation is deducted by the number competing on merit. The experience of the past had shown that 5 to 7 per cent seats are filled up by the students belonging to backward classes getting admission on the basis of general merit list. So far as the admission in the calendar session is concerned, 34 students belonging to backward classes, whose results have been published in Annexure 1, have competed on their own merit and only 29 seats have to be filled up on the basis of the reservation for backward classes. Out of the 88 seats reserved for scheduled castes only 45 seats are available for admission belonging to the scheduled castes. In like manner, although 56 seats are available for scheduled tribes, only 41 seats are available for admission belonging to that category. So far as the girl candidates are concerned, it has been asserted that the Government required a large number of lady doctors for posting in the Government hospitals and dispensaries and such lady doctors form 1/5th of the cadre strength of the doctors. Therefore, keeping in view the job requirements, one-fifth of the total number of seats, i. e., 125 seats for the different medical colleges are to be filled up by girl students belonging to all classes. In nutshell, the stand of the respondents in the first counter-affidavit is that for the purposes of admission only 45 seats out of 627 are to be filled up by scheduled castes, 41 by scheduled tribes and 29 by backward classes. With regard to the 43 seats, which are said to be 'cultural seats', the true position is that 6 seats are available for Nepalese students, 23 seats are to be filled up by nomination by the Government of India for students belonging to foreign countries as well as Nagaland, Sikkim and Bhutan. The candidates to fill up those seats are left to be nominated by the Government of India for State reasons. With regard to the candidates to be nominated by the three institutions, namely, Shri Lakshmi Narayan Trust Committee, the Coal Mines Welfare Organisation and the Tata Iron and Steel Company, it has been asserted that when Patliputra Medical College, Dhanbad and Mahatma Gandhi Medical Colleges, Jamshedpur, were taken over by the State Government, it was found that these colleges are not having hospital facilities and in order to provide medical teaching provision of a hospital is a necessity. As Shri Lakshmi Narayan Trust and the Coal Mines Welfare Organisation are maintaining two hospitals at Dhanbad where Patliputra Medical College is situate, these two institutions offered their hospitals for the purpose of teaching the students of Patliputra Medical College on the condition that some nominees of each of the said two institutions be allowed to be admitted to the said medical college. Similarly, the Tata Iron and Steel Company has been given 5 seats in the Mahatma Gandhi Medical College to be filled up by nomination by that company for extending the facility of the Tisco hospital for teaching the students. Although in paragraph 3 of the counter-affidavit it has been stated that the total number of seats to be filled up by nomination by the three institutions aforesaid is 9 only, in course of argument it was stated at the Bar by the learned Government Pleader IV that five seats in Mahatma Gandhi Medical College are to be filled up by the nomination by the Tisco and five seats in Patliputra Medical College by the L. N. Trust and 4 seats of the latter college by Coal Mines Welfare Organisation. These nominations were necessary in the interest of all the students getting admission in those two colleges. Such nominations are not to be made on the basis of any class or caste. It has further been stated in the counter-affidavit that the students who will not be in a position to produce their mark sheets of I. Sc, examination of 1977 (annual) will not be admitted in the medical colleges nor any such students who have not passed the I. Sc. examination at all. The Government had not taken any decision to reduce the qualifying marks of 45 per cent for the scheduled caste or scheduled tribe students and allegations to the contrary in the writ petitions or the supplementary affidavits were incorrect.

26. In the petitioners' rejoinder to the counter-affidavit of the respondents in paragraph 8, it has merely been stated that the percentage of reservation being more than 50 per cent was illegal and in paragraph 10 thereof it has been submitted that the reasons for reservations had no nexus with the teaching in the medical colleges and, as such, the reservations were violative of Articles 14 and 15 of the Constitution. This

counter-affidavit has been filed even prior to the admission of these 3 writ cases. Subsequent to the issuance of rule, however, a show cause petition was filed by the respondents wherein the facts stated in the earlier counter-affidavit were reaffirmed. In the petitioners' rejoinder to the respondents' show cause petition, a copy of the prospectus for the session 1977-78 containing the instructions for admission of students to the first year M. B. B. S. course of different medical and dental colleges in Bihar has been annexed and marked Annexure 2. Subsequently, however, a supplementary show cause petition was also filed on behalf of the respondents in which it has been submitted that the petitioners had no right to challenge the selection of the candidates for admission as they had themselves participated in the examination held for the purpose in which they had not competed. Having taken part in the examination, they could not turn round and challenge the validity thereof. It has further been stated that even if it be assumed that 670 seats were available for admission in the medical colleges in the State, the petitioners could not be admitted as they had not secured sufficient marks in order of merit to be selected for admission. The total mark for test was 120 and the marks secured by different petitioners have been stated in paragraph 2 of the supplementary show cause petition. From the figures given therein, it has been submitted in the show cause petition that even all the candidates, who had secured 91 marks out of 120, could not be admitted if all the seats were to be filled up on the basis of merit alone without any reservation of any sort. The petitioners, therefore, having failed to secure the minimum possible marks for selection ought not to be heard to challenge the validity of the test for selection of candidates for admission into medical and dental course. The roll numbers of only 3 of the petitioners have been supplied to the respondents till the time the supplementary show cause petition was filed. With regard to them it has been stated that the original mark sheet of marks obtained by the petitioners would be kept available in course of argument. Petitioner No. 1 of C. W. J. C. 1812, it has been stated, has secured only 76 marks out of 120, petitioner Sandeep Sen had secured only 78 marks whereas petitioner Jagdish Singh secured only 82 marks, and in between 91 marks and 82 marks there were at least 850 candidates above petitioner Jagdish Singh. Similarly, at least 1,330 candidates were above petitioner Sandeep Sen and nearly 1,640 candidates above petitioner Anil Kumar. Thus, there were only three students whose roll numbers had been given by the petitioners. Subsequently, a petition for calling for certain documents from Patna University as also from respondent No. 2 was filed. Mr. Ramananda Sinha, learned Counsel for the University, and the learned Government Pleader IV appearing for the respondents had placed before us all the relevant papers which the petitioners' learned Counsel also had occasion to see in course of the arguments.

27. It seems till this time the petitioners were merely groping in the dark in taking any definite stand on account of which any constitutional point could be said to be involved in these cases. Ultimately, when a supplementary counter-affidavit was filed on behalf of respondents 1 and 2, it was stated in paragraph 5 thereof that the seats which had been allocated or reserved for the girl candidates were by orders of the Government dated 29-1-1975, a true copy of which was marked Annexure A to the supplementary counter-affidavit. Annexure A is an order dated 29-1-1975 issued by the State Government in the Department of Health to the Principals of various medical colleges wherein it has been stated that for admission into the different Government medical colleges of the State 14 per cent of the seats for admission be reserved for scheduled castes, 9 per cent for scheduled tribes, 10 per cent for backward classes 20 per cent for girls and 47 per cent for the general candidates. Apart from them, it was also directed that the seats reserved for nomination by the Government of India or by other States shall remain as they were before the issuance of Annexure A. It was only after the filing of this supplementary counter-affidavit on behalf of the respondents that a point was raised at the Bar by Mr. B. C. Ghose, learned counsel for the petitioners in C. W. J. C. 1973 and C. W. J. C. 1812 that directions of the State Government were ultra vires the provisions of Articles 14 and 15 of the Constitution. When the cases were being heard before a Division Bench, Mr. Ghose, learned Counsel for the petitioners, submitted that the directions of the State Government as contained in Annexure A being violative of Articles 14 and 15 the constitutionality or otherwise of Annexure A should be tested and the cases could accordingly be heard by a 5-Judge Special Bench in view of the provisions of Article 228-A (4). Hence, these cases were placed before us.

28. On these pleadings, allegations and counter assertions Mr. B. C. Ghose submitted

the following points in support of these applications; Mr. S. C. Ghose, learned Counsel for the petitioner in C. W. J. C. 2063 of 1977, adopted Mr. B. C. Ghose's arguments. The points raised are noted below in the same sequence in which they were argued by Mr. B. C. Ghose—

(i) The minimum qualification for any candidate to sit at the pre-medical test being that he must have passed his intermediate science examination with 50 per cent marks, candidates, who have not passed by the 23rd of July, 1977, were not eligible to sit at the test.

(ii) The leakage of the questions in the test to be held on the 7th of August, 1977 rendered the whole test void.

(iii) The reduction in the overall number of seats in all the medical colleges of the State of Bihar taken together was without any reasonable basis and, therefore, in contravention of the directive principles of State Policy as enshrined in Part IV of the Constitution and, as such, the State Government be directed not to reduce the number of seats at all.

(iv) The reservations giving weightage to certain classes of people, as indicated in Annexure A to the supplementary counter-affidavit, were in contravention of the provisions of Articles 14 and 15 of the Constitution.

I shall deal with each of these points seriatim.

29. Apropos the first point, it was submitted that the prospectus for the session 1977-78 (Annexure 2) lays down in paragraph B the eligibility for competitive test which reads thus—

"B. Eligibility for competitive test :—

(1) Candidates who have passed I. Sc. or equivalent examination from any of the Universities of Bihar or from any other University recognised by Patna/Ranchi/Bihar/ Bhagalpur/L. N. Mithila University with English, Modern Indian Language; Physics, Chemistry and Biology (Botany and Zoology). Candidates from Universities/Boards where Modern Indian Language is not a compulsory subject are also eligible

or

Candidates who have passed the B. Sc. examination with one or more of the subjects mentioned above provided they have passed the remaining subjects of the medical group (Physics, Chemistry & Biology) in the I. Sc.

Note :— Such candidates may also apply who may have appeared but results not yet published or may be appearing at the ensuing I. Sc./B. Sc. or equivalent examination before the last date of filing application but they should produce the mark sheet latest by 23rd July, 1977".

It was argued on the basis of the note to paragraph B extracted above that the production of the mark sheet latest by the 23rd July, 1977 was a must and that, therefore, candidates who had not produced their mark sheet by that date ought to have been held not eligible to sit at the competitive test. This submission was further sought to be reenforced by pressing upon our attention paragraph J of Annexure 2 in which it is, inter alia, stipulated—

"J. Issue of Admit-card :—

(i) ... ...

(ii) Such candidates who had not submitted the I. Sc./equivalent examination mark sheet along with the application form due to the non-publication of the result till the last date of the application will also receive admit card from the Medical/Dental College where they have applied but they should produce the mark sheet latest by the 23rd July, 1977.

(iii) ... ..."

The argument is fallacious. It will appear from paragraph G of the prospectus (Annexure 2) that the date of examination was fixed as the 3rd July, 1977 which, on the admitted case of the parties, was actually held subsequently on the 7th August, 1977, and in paragraph H it has been stipulated that—

"H. Application-form and form for admission to the test (admit-card) :—

Application of candidate seeking admission to the competitive test must reach the office of the Principal concerned on or before 3rd June, 1977 as per instructions given hereunder :—

1. (1) ... ...

Following documents are required to be enclosed with the application-form :—

(a) Attested copy of marksheet of I. Sc. or equivalent examinations. In case a candidate has passed his/her examination part by part all mark sheets (attested copies) are required to be enclosed. Mark sheets are not returnable."

It will be seen from the aforesaid provisions that the interpretation put on note to paragraph B (1) of the prospectus is not the correct interpretation. In my view, the eligibility for competitive test has been laid down as the point of time when a candidate is to sit at the test. The initial stage when a candidate is qualified to sit at the test cannot have any reference to the production of mark sheet which is not in the dominion of the candidate himself/herself. The production of mark sheet is dependent upon so many factors over which a candidate has no control. It will be noticed from paragraph G of Annexure 2 referred to earlier that the date of examination

is scheduled as the 3rd July, 1977 and the prospectus itself permits candidates to produce their mark sheet up to the 23rd July, 1977. This by itself goes to show that the production of mark sheet had or has no relevance to the test for eligibility to sit at the competitive examination. It was just a chance that the date of the examination had to be postponed to the 7th August, 1977. All the provisions of the prospectus read together leave no manner of doubt that the production of the mark sheet can have relevance only at the point of time when the candidate presents himself for selection before the interview board after the result of the test. There is no sacrosanct about the date — 23rd July, 1977. There is great force in the submission of learned Government Pleader IV that the prospectus is merely a document issued by the selection committee and supplied to the candidates with application form and that merely lays down the guidelines to the students and contains mere instructions. Mere non-observance of or non-compliance with certain clauses of the prospectus like the one with regard to the date of production of mark sheet cannot be held to be laying down the test of eligibility. If certain clause like the date for production of the mark sheet is relaxed by the selection committee, it cannot be said that selection committee constituted by the Board of Principals would be powerless to make any relaxation in respect of such matters over which the candidates had no control. Our attention was also invited to para. O of Annexure 2 which states that—

"O. In all matters relating to the test the decision of the Board of Principals shall be final."

and paragraph X which states that—

"X. If by mistake, a candidate is allowed to sit at the test which otherwise would not have been possible and the error is subsequently detected at any stage before/after admission, the candidate will lose all rights and claims for admission even if he/she competes successfully and in case of any legal dispute arising out of it candidate will not be admitted till the final judgment of the case."

The prospectus (Annexure 2) is signed merely by Principal Manik Singh respondent No. 2, who is designated as the "Convenor P. M. D. T. 1977-78". From all these provisions in the prospectus (Annexure 2), it is quite that with regard to some matters of details the decision of the Board of Principals was meant to be final. The date for presentation of the mark sheet by the candidates would, in my view, certainly be one of such matters falling within the domain of the Principals which they had the power to relax. Apart from this, the petitioners have not been able to substantiate their allegation that any such candidate has been selected for admission after the interview who has not passed the I. Sc. or equivalent examination. There is a clear assertion in the counter-affidavit that no such candidate has been admitted. In that view of the matter, there seems to be no substance in the first point of Mr. Ghose.

30. With regard to the second point raised by Mr. Ghose regarding the selection being vitiated on the ground of leakage of the question papers, it has been categorically asserted in paragraph 12 of the show cause petition filed on behalf of the respondents that it was not correct that the same questions were set for the examination held in the month of August, 1977 and the coaching institutes took any advantage out of it. The allegations have been dubbed as false and mere surmises and have been denied. In that view of the matter, it is not possible for this Court to go into that question at all. Even if it were permissible to go into this controversial question of fact, suffice it to say that all that is alleged in the writ petitions, the supplementary affidavits or the rejoinders filed on behalf of the petitioners is that it was strongly rumoured that there had been such a leakage of the questions. I am not prepared to decide this academic question on the allegation of mere rumour. Even Annexure 3 filed by the petitioners along with their supplementary affidavit, which is a copy of the question paper, gives a bad odour to the petitioner's case. It has already been stated earlier that it is the admitted case of the petitioners that the question papers which were supplied in course of the pre-medical test held on the 7th August, 1977 had to be submitted in the examination hall with the answers of the candidates on the question papers themselves. It is curious, therefore, to follow as to how the petitioners were able to obtain Annexure 3 which is a question paper along with answers given thereon. To say the least, the conduct of the petitioners does not seem to be absolutely above board.

31. Incidentally, it is worthwhile noticing a particular fact and a particular provision of law which were brought to our notice in course of the arguments. In pursuance of this Court's order the Patna University submitted the marks obtained in the special examination in Chemistry Practical which was held subsequent to the annual examination held in that branch of the subject. A supplementary counter-affidavit was filed on 19-1-1978

on behalf of the respondents. In that counter-affidavit an assistant working in the office of the Principal, Patna Medical College, and conversant with the facts of the case, has stated that the examination board of the Patna University resolved by a resolution dated 22-1-1977 to hold a special examination in Chemistry Practical only. It was submitted that the aforesaid resolution was passed under Regulation 16 of the Patna University Regulations (hereinafter to be referred to as the Regulations) read with Section 29 (2) of the Patna University Act, 1976 (Bihar Act XXIV of 1976), to be referred to hereinafter as the Act. A true copy of that resolution has been marked Annexure B to the counter-affidavit. Section 29 (2) of the Act reads as under—

"29 (2). The Examination Board shall render advice to the Vice-Chancellor on conduct of examinations and appointment of examiners, setting and moderating question papers, preparation, moderation and publication of examination results, submission of report of such examination results to the Academic Council and generally regulating the methods of improvement in the procedure of correct evaluation of achievement of students and the Vice-Chancellor shall be competent to take final decision:

Provided that the Vice-Chancellor shall appoint the question setters and examiners from the panel of names submitted by the Examination Board."

Regulation 16 of the Regulations runs thus—

"Action to be taken by Examination Board.

16. If it is proved to the satisfaction of the examination board that the questions in any subject are such that candidates could not reasonably be expected to answer within the time allowed or have not been clearly distributed over the whole course of that subject, or did not conform to the regulations laid down for the examination in that subject, or show a marked change of standard, or that from any other cause injustice has been or is likely to be done, the examination board shall issue such directions as may be necessary to remedy or prevent such injustice and shall inform the board of moderators concerned of the action taken."

It will be seen from the aforesaid provisions of the Act and the Regulations that in case the examination board is satisfied that any injustice has been done on account of any marked change of standard or due to any other cause, the said board may take steps to remedy or prevent such injustice. If the examination board so makes a recommendation under Regulation 16 aforesaid, under the provisions of Section 29 (2) of the Act the Vice-Chancellor may take such steps in the matter as may be deemed advisable. It has been asserted in Annexure B to the counter-affidavit that the examination board had taken into consideration the large number of failures in Chemistry Practical (45 as compared to 4 in the preceding year) as also the sizeable number of hard cases and had decided that a special examination in Chemistry Practical only may be held and candidates who had failed in Chemistry Practical may appear at such an examination if they so liked on payment of fee of Rs. 25/-. The resolution is duly signed by the members of the examination board and the meeting at which the resolution was passed was presided over by the Vice-Chancellor himself. It has been asserted that it was on account of this special examination held in Chemistry Practical only in Patna University that the date for submission of the mark sheet was subsequently extended by the Board of Principals under whose authority the prospectus (Annexure 2) was issued. Mr. Ghose appearing for the petitioners wanted us to consider the provisions of Regulation 16 as laying down that it was only in cases of unfair questions having been set from the point of view of candidates in general that the examination board could take such a step for having the questions re-moderated by the board of moderators. In my opinion, the language of regulation is quoted above does not warrant any such construction for the simple reason that it is intended to undo a mischief either where the mischief is imminent or to prevent such injustice where it has already been done. The words 'to remedy or prevent such injustice' leave no manner of doubt that the examination board was competent to make such a recommendation to the Vice-Chancellor who, under the authority conferred on him under Section 29 (2) of the Act, was competent to order a re-examination in one or more branches of the subject or subjects. Mr. Ghose also submitted that if it be construed to confer a power on the Vice-Chancellor acting in consultation with the examination board to order a re-examination, such a re-examination ought to have been in the entire subject and not only in the practical part of it. It was, therefore, submitted that if at all the University authorities were competent to hold any examination, they could have done so legitimately in the entire subject of Chemistry and not only in Chemistry Practical. Much stress was laid on the words 'for the examination in that subject' for the purpose of justifying such a submission. In my view,

this submission is again misconceived. On a true interpretation of Regulation 16 read with Section 29 (2) of the Act it is quite clear in the context that the term 'subject' is a genus which includes a part of the subject which is merely a species. I do not, therefore, see any force in the contention that the Vice-Chancellor and the examination board could not direct a re-examination in only practical branch of the subject of Chemistry. This contention of Mr. Ghose, therefore, also must be overruled.

32. It may also incidentally be mentioned, as has already been stated earlier, that the mechanised system of coding and decoding the roll numbers and the symbols allotted to the candidates as also for any other purposes was the subject-matter of great comment by learned Counsel for the petitioners. It was submitted time and again that even in mechanically computerised system the human element was not altogether eliminated. Assuming that to be so, that does not advance the cause of the petitioners' case. It is nobody's case that there has been any sort of human manipulation in coding and decoding of the relevant symbols and roll numbers either prejudicing the case of the petitioners or leading any one else to gain any advantageous edge over them on account of such an imperfect system of coding and decoding through mechanised procedure. Indeed, even in the most perfect scientific system of electronic computation human element is bound to be there. For, it is said, in this world there is no other greater than man and in man there is nothing greater than mind. In all fairness, Mr. Ghose very frankly stated that he had no case of mala fide to press. This criticism of the petitioners in the writ petitions with regard to the possible failure in the working out of the human element in computerised system leads us nowhere. As I have already hinted earlier, the petitioners have set themselves in these cases to a wild goose chase.

33. This then brings us to the third point of Mr. Ghose, namely, that the reduction in the number of seats without any reasonable basis amounts to violation of Articles 39 and 41 enshrined in Part IV of the Constitution. While developing this point, it was suggested in course of the argument that such an arbitrary reduction was against the interest of the people of Bihar and being arbitrary in nature was violative of Article 14 and also amounted to a curtailment of the right of the citizens of the State to carry on profession of their own choice, namely, the medical profession, thus violating the provisions of Article 19 (1) (g) of the Constitution too. As has already been stated earlier the total number of candidates proposed to be selected for the purpose of admission in the session in question is 670 only whereas before the taking over of the private medical colleges by the State the number of seats for candidates to be admitted to the medical or dental course in the State was approximately 975. This has been stated in paragraph 7 of the writ petitions. A ground has been taken in paragraph 24 (vi) that the reduction in the number of seats in medical colleges tends qualified medical men, who may render health service to the people of the State and is accordingly in contravention of the directive principles of the State policy. In paragraph 11 of the show cause petition filed on behalf of the respondents it has been stated that the reduction in seats has been made on different recommendations of the Indian Medical Council as well as a High Power Committee. It has further been stated that in course of the strike resorted to by the Junior Doctors of the State one of the conditions for calling off the strike was a reduction in the number of seats in the medical colleges which the State Government had to concede. It was suggested by Mr. Ghose that the reply in the show cause petition on this aspect of the matter was too vague to justify the reduction in the number of seats. The grievance with regard to the infringement of Articles 14 and 19 (1) (g) on account of the reduction in overall number of seats in all the medical colleges in the State is, if at all, too far-fetched and vague. There cannot, by any stretch of imagination, be said to be any infraction of Article 14 on account of the reduction in the number of seats, for that, in no manner, can be suggested to have resulted in a denial by the State to any person, much less any of the petitioners, of equality before the law or the equal protection of the law. With regard to Article 19 (1) (g), suffice it to say that Clause (6) of Article 19 confers ample competence to the State to make any law imposing in the interest of the general public reasonable restriction on the exercise of right conferred by Article 19 (1) (g). If in its wisdom the State Government has chosen in the interest of the citizens of the State to reduce the number of seats for the purpose of calling off the strike resorted to by the Junior Doctors of the State, that certainly is a relevant consideration from the point of view of the interest of the general public for which the State has acted. The argument with regard to the infraction of either Article 14 or Article 19 (1) (g) merely

on account of the reduction in overall number of seats, apart from being too remote and far-fetched, has to be stated merely to be rejected. There is equally no substance in the point of Mr. Ghose that either Art. 39 or Art. 41 in Part IV of the Constitution in any way inhibits the State from reducing the number of seats in medical colleges owned, managed and controlled by the State Government. Our attention was drawn especially to Clause (e) of Article 39 which lays down that the State shall, in particular, direct its policy towards securing that the health and strength of workers, men and women and the tender age of children are not abused and that citizens are not forced by economic necessity to enter avocations unsuited to their age or strength. Article 41 merely lays down a guideline for the State to follow that within the limits of its capacity and development the State shall make effective provision for securing the right to work, to education and to public assistance in cases of unemployment, old age, sickness and disablement, etc. In my view, the policy which the State is enjoined to follow by Articles 39 and 41 does not confer any justiciable right legally enforceable by the petitioners. The question as to whether a particular number of seats is desirable to be limited for the purpose of admission in the medical or dental course in the medical profession cannot be said to attract infringement of any right legally conferred on any of the petitioners. Merely because the number of seats in medical colleges has been reduced, it cannot be said that State has been acting in enforcement of its policy towards an end by which the health and strength of workers, men and workmen or children, and citizens are to be adversely affected. The comment of Mr. Ghose that the reply of the respondents in paragraph 11 of their show cause petition in response to the allegations made in paragraph 7 of the writ petitions is vague, is, I say so with due deference, wholly misconceived. As a matter of fact, the allegation of the petitioners in this behalf is itself, if I may say so repeatedly, much too vague and remote to attract any inhibitive clause either in Part III or Part IV of the Constitution. Our attention was drawn to the decisions of the Supreme Court in the case of State of Bombay v. Bombay Education Society (AIR 1954 SC 561). In re The Kerala Education Bill, 1957 (1959 SCR 995) and E. P. Royappa v. State of Tamil Nadu (AIR 1974 SC 555). None of these cases, as I shall presently point out, can be pressed into service for aiding the petitioners' cause. In the case of Bombay Education Society (supra) the question that had fallen for consideration by the Supreme Court was whether an order of the Bombay Government to the effect that no primary or secondary school shall admit to a class where English is used as the medium of instruction any pupil other than one belonging to a section of citizens, language of which is English, namely, Anglo-Indians and citizens of non-Asiatic descent was valid or not. It was held that the impugned order offended against the fundamental right guaranteed to all citizens by Article 29 (2) of the Constitution. There was absolutely no question of any infraction of Articles 14 and 19 or for that matter any provision of Part IV of the Constitution. The decision is wholly irrelevant for the purpose. In the case of Kerala Education Bill (supra) the Supreme Court held that a directive principle of State policy could not override a fundamental right and must subserve it but no court in determining the ambit of fundamental right should entirely ignore a directive principle and should try to give as much effect to both as possible by adopting the principle of harmonious construction. It was further held that the clauses of the Kerala Education Bill, 1957 could not be said to be violative of the provisions of Article 14 of the Constitution. I do not see how this case can be of any help to the petitioners for the purpose of the point canvassed by Mr. Ghose. In Royappa's case (supra) the observation of the Supreme Court that was relied upon was that Articles 14 and 16 strike at arbitrariness in State action and ensure fairness and equality of treatment. They require that the State action must be based on valid, relevant principles applicable alike to people similarly situate and must not be guided by any extraneous or irrelevant considerations because that would be denial of equality. In that context, it was also observed that mala fide exercise of power and arbitrariness are different lethal radiations emanating from the same vice: in fact, the latter comprehends the former; both are inhibited by Articles 14 and 16. In the instant cases, for the point that has been urged nothing has been shown as to what extraneous or irrelevant consideration has weighed with the Government in reducing the number of overall seats in the medical and dental colleges of the State nor, for that matter, nothing has been shown as to how persons similarly situate are being discriminated against one another. I am not satisfied that anything has been shown to us which can lead to an inference that the reduction of seats is a result of any extraneous consideration or mala fide exercise of power.

The observations relied upon are, therefore, of no avail.

34. This then brings us to the last submission of Mr. Ghose namely, the infraction of Articles 14 and 15 of the Constitution on the ground of reservation of seats for different sections of people. I have already stated earlier that it is now the admitted case of the parties that out of the total number of 670 seats, 6 seats are available for the Nepalese students, 23 seats are available for being filled up by nomination by the Central Government under the head 'cultural seats' and 14 seats are to be filled up by nomination by the three institutions, namely, the Lakshmi Narayan Trust, Tisco and the Coal Mines Welfare Organisation. This leaves a balance of 627 seats. Out of them, 125 seats are earmarked for girl candidates, 88 seats are reserved for scheduled caste candidates, 56 for scheduled tribe candidates and 63 for backward classes. According to Mr. Ghose, this leaves a balance of 295 seats only. Thus, the total reservation for different classes of candidates is much more than 50 per cent. and is, hence, ultra vires. While dealing with each of the classes separately, I shall state the stand taken by the respondents in this regard.

35. So far as the 43 seats to be filled up by nomination are concerned, certainly it cannot be a case attracting the provisions of Article 15 of the Constitution. The question is whether it impinges upon the provisions of Article 14. It is well settled that Government can regulate admissions to its own institutions in the colleges run by it provided the rules for selection applicable to the colleges do not suffer from any unconstitutional or illegal infirmity. In the case of D. N. Chanchala v. State of Mysore (AIR 1971 SC 1762) the validity of the rules for admission to the Government medical colleges in the State of Mysore was challenged on, inter alia, a ground that 60 seats out of an aggregate of 765 seats were placed at the disposal of the Government being set apart for the various categories of persons mentioned therein. While rejecting this contention, Shelat, J., speaking for the Supreme Court held as follows :—

"... ... ... The Government is entitled to lay down sources from which selection for admission would be made. A provision laying down such sources is strictly speaking not a reservation. It is not a reservation as understood by Article 15 against which objection can be taken on the ground that it is excessive".

It was further held—

"Setting apart 60 seats under Rule 4, is, as already stated, not a reservation but laying down sources for selection necessitated by certain overriding considerations, such as obligations towards those who serve the interest of the country's security, certain reciprocal obligations and the like."

In the case of Chitra Ghosh v. Union of India (AIR 1970 SC 35) a number of seats were reserved in the Maulana Azad Medical College, Delhi, for certain groups of persons. The first group of persons were the sons and daughters of residents of Union Territories other than Delhi. Another group consisted of the sons and daughters of Central Government servants posted in Indian Missions abroad. Still another group of persons were the cultural, Colombo Plan and Thailand scholars by reason of reciprocal arrangements of educational and cultural nature. These reservations were challenged as being ultra vires. In that context, Grover, J., speaking for the Supreme Court, held in para. 9—

"It is the Central Government which bears the financial burden of running the medical college. It is for it to lay down the criteria for eligibility. From the very nature of things it is not possible to throw the admission open to students from all over the country. The Government cannot be denied the right to decide from what sources the admission will be made. That essentially is a question of policy and depends inter alia on an overall assessment and survey of the requirements of residents of particular territories and other categories of persons for whom it is essential to provide facilities for medical education. If the sources are properly classified whether on territorial, geographical or other reasonable basis it is not for the courts to interfere with the manner and method of making the classification".

So in the case of State of Uttar Pradesh v. Pradip Tandon (AIR 1975 SC 563) the reservation of seats in medical colleges in Uttar Pradesh for candidates from hill and Uttarkhand areas was held to be valid on the ground that such areas were instances of socially and educationally backward classes of citizens. In that context, it was observed that when large areas of land maintain a sparce, disorderly and illiterate population, whose property is small and negligible, the element of social backwardness is observed. In the instant cases it has already been stated earlier that the stand of the respondents is that 6 out of 43 seats are available for Nepalese students, 23 seats are placed at the disposal of the Government of India to be filled

up by nomination from out of candidates belonging to foreign countries, Nagaland, Sikkim and Bhutan for State reasons and 14 seats to be filled up by nomination by the three institutions mentioned above. This reservation for Nepalese students cannot be said to be without any reasonable nexus, for it needs no argument to persuade me to hold that relationship with the country of Nepal has, for State reasons, to be as cordial as possible. The lack of sufficient medical education in Nepal is also a wellknown fact of which, I think, we can take judicial notice. So also is the case with regard to the 23 seats to be filled up by the Central Government. It needs little argument to persuade me to hold that candidates of foreign countries are to be nominated by the Government of India on account of reciprocal arrangements or for other State reasons. And, in so far as the candidates for Nagaland, Sikkim and Bhutan are concerned, they are clearly covered by the principle laid down by the Supreme Court in Pradip Tandon's case (supra) as also the cases of Chitra Ghosh and D. N. Chanchala. The economic and educational backwardness of the citizens residing in Nagaland, Sikkim and Bhutan is a notorious fact. The policy of appeasement and maintenance of good relationship with these three territories is equally important. None of these can be said to be unreasonably excessive. So also, the reservation of 14 seats to be filled up by nomination by the three institutions mentioned above can neither be said to be unreasonable nor excessive. The reason given by the respondents is that it was by way of an agreement with those 3 institutions which had offered their hospitals to the State for educational facilities in the medical colleges, namely, Mahatma Gandhi Medical College, Jamshedpur and Patliputra Medical College, Dhanbad. This is not by way of any reservation hit by Article 15 or 29. This allotment is merely with regard to the sources from which these seats are to be filled up due to the exigencies of the State policy. In my view, no constitutional provision can be said to be infringed on account of allocation of those 43 seats. A number of other cases were also referred to on behalf of the respondents which I do not think it worthwhile to discuss in detail; I may merely make a reference to them, namely, Probhudas Morarjee v. Union of India (AIR 1966 SC 1044) and R. Chitralekha v. State of Mysore (AIR 1964 SC 1823).

36. With regard to 125 seats earmarked for girl candidates, at the initial stage even Mr. B. C. Ghose did frankly admit that reasonableness was shown in their cases in the counter-affidavits and show cause petitions filed by the respondents. Subsequently, however Mr. Ghose contended that this reservation was hit by the provisions of Art. 15 (1) and could be protected by Art. 15 (3) only if a rational nexus is established by the State between the object to be achieved and the making of this special provision for girls. It was argued on behalf of the learned Government Pleader that this was not a reservation hit by Art. 15 (1) but was merely a classification of a source from which these seats were to be filled up. In my opinion, the contention put forward on behalf of the respondents is justified. Article 15 (1) merely inhibits a discrimination on the ground, inter alia, of sex only. In the instant cases, it cannot be said that the reservation of 125 seats for girls is on account of sex only. It has already been stated that the respondents' counter-affidavit and show cause petition clearly state that there was a requirement in the State of a large number of lady doctors for posting in the Govt. Hospitals and dispensaries and the cadre strength of lady doctors was more or less 1/5th of the entire cadre strength of the doctors in the State. The Government, keeping in view the job requirement of this 1/5th of the total cadre strength, had fixed 125 seats to be filled up by girl candidates belonging to all classes. The mental aptitude and psychological background of lady patients for treatment of gynaecological diseases and obstetric services by lady doctors cannot also be ignored for the purpose of judging the reasonableness of such earmarking. The fact that the lady doctors form 1/5th of cadre strength of the doctors' strength has nowhere been categorically denied. If in the interest of the lady patients of the State and for filling up the required cadre strength of doctors, 125 seats have been reserved for girl candidates, that action cannot, in my view, be said to be any discrimination on the ground of sex alone. Even assuming though not accepting the position that the provisions of Article 15 (1) are attracted, it cannot be said that the reason behind such a reservation is non est. There is certainly a nexus between the reservation and the object to be achieved by such reservation, namely, the filling up of the 1/5th of the cadre strength of doctors of the entire State by the lady doctors and, therefore, it must be held to be fully protected by the provisions of Article 15 (3). There is thus no merit in this contention of the petitioners also.

37. So far as the candidates of the scheduled castes and scheduled tribes are concern-

ed, it has already been stated that the reservation is of 88 seats for scheduled caste candidates and 56 for scheduled tribe candidates. Apart from the fact, as already stated above, that the seats in this particular session to be filled up by reservation by the candidates of scheduled castes and scheduled tribes are 45 and 41 only respectively, even the reservation of 88 seats for scheduled castes and 56 for scheduled tribes cannot be said to be unreasonably excessive, for 88 seats form barely 14 per cent and 56 seats merely 9 per cent of 627 seats to be filled up including the girl candidates. The reservation in their cases, therefore, is fully covered by the provisions of Article 15 (4) and cannot be said to be violative of the provisions of Article 15 (1) or 29 (2) of the Constitution.

38. That leads us to the question of reservation for backward classes only. As I have already said earlier, the respondents' stand is that even 63 seats said to be reserved for backward classes constituting 10 per cent of the entire aggregate of 627 seats are not filled up by the backward class candidates on the basis of reservation alone. If the students belonging to backward classes compete on their own merit with the general classes, the number of reserved seats for them is reduced by the number competing on merit. It is also their case that the past experience has shown that 5 to 7 per cent seats are to be filled up by candidates belonging to backward classes on their own merit. As such the percentage of reserved seats for backward classes has already been reduced by 5 to 7 per cent in the past. So far as the present session is concerned, 34 candidates belong to backward classes, whose results have been published after competing on their own merit, leaving only 29 seats to be filled up on the basis of reservation for the backward classes. I have also stated earlier that the allegation of the petitioners that there is further relaxation with regard to their eligibility by reducing the percentage of marks from 45 per cent to a figure below that, has been stated to be incorrect on behalf of the respondents. That being so, according to the respondents if only 29 seats out of the total number of 627 seats are to be filled up by the candidates of backward classes on the basis of reservation at all, it cannot be said to be unreasonably excessive. That question is wholly academic in these cases. There is a fundamental reason why the petitioner's grievance on this score cannot be ventilated in these writ applications. In the writ petitions the adjudging by the State Goverment, in the past, of persons as forming the backward classes has not been challenged at all. Even if it be assumed that by way of submission in the subsequent affidavits it has been challenged or, as the point has been agitated at the Bar, it was open to challenge, one thing is quite clear, namely, that if it were shown to us that the backward classes had been treated to be synonymous with backward castes, I would have no hesitation in holding it to be unconstitutional. It is evident that economic consideration has to be weighed along with social and educational backwardness by the Government in defining the backward classes. If caste is not the sole factor but other relevant factors are also taken into consideration then it may, to some extent be justified in appropriate cases. Mr. Ghose vehemently contended that the onus was on the State or on the respondents to justify the reservation in favour of the backward classes or for that matter any other reservation which was in the nature of exceptions to the provisions of Arts. 14, 15 (1) and 29 (2) of the Constitution. Mr. Ghose strongly relied on the decision of the Supreme Court in the case of M. R. Balaji v. The State of Mysore (AIR 1963 SC 649), State of Andhra Pradesh v. P. Sagar (AIR 1968 SC 1379) and State of Kerala v. N. M. Thomas (AIR 1976 SC 490 : (1976) SCC (Lab) 227). In Balaji's case (supra) it was held that Art. 15 (4) has to be read as a proviso or as an exception to Art. 15 (1) or 29 (2). The backward classes, for whose improvement special provision is contemplated by Art. 15 (4) are, in the matter of backwardness comparable to scheduled castes and scheduled tribes. The backwardness under Art. 15 (4) must be social and educational. It should not be either social or educational but is both social and educational. Social backwardness is, on the ultimate analysis, the result of poverty to a very large extent. Keeping these principles in view, the Supreme Court held that the order of the Government of Mysore by which 68 per cent of the seats available for admission to the Engineering and Medical Colleges and to other technical institutions were reserved for backward classes, more backward classes, scheduled castes and scheduled tribes was bad because the classification of socially backward classes of citizens made by the State proceeds on the consideration only on their castes without regard to other factors which were undoubtedly relevant. This case is not of any avail to the petitioners because, as I have already shown, in the instant cases we are left merely guessing as to what factors—relevant or irrelevant—have been taken into consideration apart from the caste factor

as the definition of such a class has not been clearly and expressly challenged. If all the relevant considerations weigh with the Government in making the reservation in favour of backward classes whose family income does not exceed Rs. 3,000/- per annum, that per se cannot be said to be illegal. If at all, this case really supports the respondent's stand. In the case of P. Sagar (supra) it was held that Art. 15 (1) guarantees fundamental right of far-reaching importance to the public generally. Within certain defined limits an exception has been engrafted upon the guarantee of the freedom in Cl. (1), but being in the nature of an exception, the conditions which justify departure must be strictly shown to exist. It was further held that when a dispute is raised before a Court the Courts of the country are invested with the power to determine the validity of the law which infringes the fundamental right of the citizens and others and when a question arises whether a law which prima facie infringes a guaranteed fundamental right is within an exception, the validity of that law has to be determined by the courts on materials placed before them. Mr. Ghose contended on the authority of these decisions that no materials have been placed before us to justify the validity of the reservation for the backward classes. As I have pointed out at the outset, in the instant cases no dispute has been raised regarding the validity of formation of the backward classes nor have even the Notifications under challenge been produced before us. If and when such a dispute is raised in a more appropriate case, the formation of such classes as backward may have to be judged objectively. But in the instant cases no foundation of facts has been laid nor any dispute raised which can justify my going into this question in these cases. In the case of N. M. Thomas (supra) where the Supreme Court was seized with the question of testing the validity of an action in the context of Article 16 (1) and (2) read with Art. 14 and was trying to find out whether it could be protected under the provisions of Art. 16 (4), it was held that the classification of employees belonging to scheduled castes and scheduled tribes is a just and reasonable classification having rational nexus to the object of providing equal opportunity for all citizens in the matter relating to employment or appointment to public office, and at the same time it was held that the special treatment accorded to the scheduled castes and scheduled tribes in Government services, which had become part and parcel of the conditions of service over these long periods, amply justifies the classification of the members of the scheduled castes and scheduled tribes as a whole by Rule 13-AA and Government Orders dated 13-1-1972 and 11-1-1974 in that case. This case also does not help the petitioners. In the instant cases also it will be seen that the Government order under challenge dated 29-1-1975 as contained under annexure A was issued as far back as on the 8th Jan., 1973 and on the basis of economic backwardness seats have been filled up in the past years also, while I fully agree that in a case where dispute is raised challenging the validity of classification, the materials have to be produced by the State to satisfy the Court as to whether they justify the constitution of such backward classes; in the instant cases the question of onus is wholly academic for the simple reason that the petitioners have never challenged the validity of the formation of backward classes.

39. A large number of other decisions were relied upon by learned counsel for the petitioners. They were the cases of Heggade Janardhan Subbarye v. State of Mysore ((1963) Supp I SCR 475), Rajendra v. State of Madras ((1968) 2 SCR 786 : AIR 1968 SC 1012), Triloki Nath v. State of Jammu and Kashmir (AIR 1969 SC 1), Triloki Nath Tiku v. State of Jammu and Kashmir (AIR 1967 SC 1283) and A. Periakaruppan Chettiar v. State of Tamil Nadu (AIR 1971 SC 2085). In the view that I have taken, none of these decisions can be pressed into service in the aid of the petitioners' case, and the reservation in the instant cases cannot be said to have been made for extraneous reasons or for reason of caste alone nor can it be said to be unreasonably excessive.

40. Mr. Ghose dwelt at length upon, and addressed us, more or less, in a spirited manner that it was high time that there should be no reservation in favour of backward classes, scheduled castes and scheduled tribes at all, for it was intended to give them protection for some time only, namely, for 10 years and subsequently for another 10 years on the recommendation of the Backward Classes Committee and that, therefore, such reservation should no longer be permitted by Courts of Law. There may be much to be said in favour of Mr. Ghose's speech or dissertation but certainly we feel bound by the constitutional provisions and so long as the Constitution contains the provisions like Arts. 15 (3) and (4), it is not open to us to go behind the policy of such reservations; we are merely to test as to whether such reservations in favour of such of the classes on

the ground of sex or caste or class can be held to be justified. In the instant cases I have already held that in so far as the 43 'cultural seats' and 125 seats for girl candidates are concerned, they are not reservations at all nor, for that matter, is the reservation in favour of girl candidates only on the ground of sex. They cannot be said to be reservations hit by Art. 15 (1) or 15 (2) but are merely defining the sources from which these seats have to be filled up classifying the sources, and these have been validly classified for the purpose not being hit by the provisions of Art. 14 of the Constitution. But even assuming in the case of girl candidates that it was a reservation and not a definition of sources from which the seats were to be filled up, it is not a reservation on the ground of sex alone and, therefore, does not attract the provision of Article 15 (1). Apart from that, even assuming that Article 15 (1) is attracted, the reservation is amply protected on account of its reasonableness by Art. 15 (3). In the cases of candidates from scheduled castes and scheduled tribes I have already held that the reservations are both reasonable and not excessive. Regarding the reservation in favour of backward classes, the definition of 'backward classes' by the State may have to be tested in a suitable case where such formation is directly challenged and proper foundation for such challenge has been laid in such a case in future.

41. Before parting with the cases, I may mention a technical objection raised on behalf of the respondents regarding the maintainability of these applications on account of non-joinder of the University or the candidates who had already been admitted. I, for one, do not see any force in such objection for two reasons. Firstly, all the candidates who have been admitted have been so done during the pendency of these writ applications and, secondly, what is challenged is the reservation or definition of source from which the candidates are to be taken by the State. If a State action or law is challenged on the ground of infraction of any constitutional provisions, it is not a rule of universal application that all persons deriving an advantage or benefit out of such a State action or law must necessarily be impleaded as parties, for should the State action or law itself be unconstitutional, no person is entitled to seek protection of such an action or law. Without going into this question any further, on the facts and in the circumstances of the instant cases, I do not see any justification in the preliminary objection raised on behalf of the respondents with regard to the non-maintainability of these applications on account of non-joinder either of the candidates who have been admitted during the pendency of these applications or the Patna University.

42. I thus do not see any merit in these writ applications. They are accordingly dismissed but in the circumstances of the case I shall make no order as to costs.

BIRENDRA PRASAD SINHA, J. : 43. Ever since the case of State of Madras v. Smt. Champakam Dorairajan (AIR 1951 SC 226), the question regarding the reservation of seats in the medical colleges has been considered by the Supreme Court many a time. In the above case, it was held that the fundamental rights guaranteed by Articles 15 (1) and 29 (2) were not controlled by any exception and that since there was no provision under Article 15, corresponding to Art. 16 (4), the Government's order fixing the admission in the stated proportion by reference to the communities and the candidates could not be sustained. It was directly as a result of the decision in the above case that Art. 15 was amended and clause (4) was added to it. The matter came up for detailed consideration in the case of M. R. Balaji v. The State of Mysore (AIR 1963 SC 649). It was held that backwardness under Art. 15 (4) must be social and educational. It was not either social or educational but it was both social and educational. The learned Judges stated :

"The problem of determining who are socially backward classes is undoubtedly very complex. Sociological, social and economic considerations come into play in solving the problems, and evolving the proper criteria for determining which classes are socially backward is obviously a very difficult task; it will need an elaborate investigation and collection of data and examining the said data in a rational and scientific way. That is the function of the State which purports to act under Article 15 (4)."

On the question and about the extent of the special provision to be made under Art. 15 (4), the learned Judges observed as follows :

"When Article 16 (4) refers to the special provision for the advancement of certain classes or scheduled castes or scheduled tribes, it must not be ignored that the provision which is authorised to be made is a special provision; it is not a provision which is exclusive in character, so that in looking after the advancement of those classes, the State would be justified in ignoring altogether the advancement of the rest of the society. It is because the interest of the society at large would be served by promoting the advance-

ment of the weaker elements in the society that Art. 15 (4) authorises special provision to be made. But if a provision which is in the nature of an exception completely excludes the rest of the society, that clearly is outside the scope of Art. 15 (4). It would be extremely unreasonable to assume that in enacting Article 15 (4) the Constitution intended to provide that where the advancement of the Backward Classes or the Scheduled Castes and Tribes was concerned, the fundamental rights of the citizens constituting the rest of the society were to be completely and absolutely ignored."

They further observed:

"Speaking generally and in a broad way, a special provision should be less than 50 per cent; how much less than 50 per cent would depend upon the relevant prevailing circumstances in each case."

The whole matter, thus, has to be approached objectively and in a rational manner. A reservation of 68 per cent in the above case was held inconsistent with Article 15 (4). The decision in the case of Balaji (supra) was interpreted in the case of T. Devadasam v. Union of India (AIR 1964 SC 179), in which it was held that the ratio of the decision in the case of Balaji was that the reservation of more than half the vacancies was per se destructive of the provision of Art. 15 (4). Considerations of natural interest and interests of community or society as a whole cannot be ignored in determining the question as to whether the special provision contemplated by Article 15 (4) can be special provision which excludes the rest of the society altogether. It may be relevant to state here that the decision in the case of Balaji (supra) was given on 28th of Sep., 1962. The report of the University Education Committee which had considered the problem of assistance to the Backward communities was considered in the said case. The Commission had observed that the percentage of reservation should not exceed a third of the total number of seats and added that the principle of reservation may be adopted for a period of ten years. The All India Council of Technical Education had recommended that the reservation for Scheduled Castes and Scheduled Tribes and other Backward communities may be up to 25 per cent with marginal adjustments not exceeding 10 per cent in exceptional cases. The Central Government suggested to the various State Governments that reservation should not, in any case, exceed 35 per cent (vide para 14, Balaji's case, supra). This shows that the reservation contemplated under Articles 15 (4) and 16 (4) was not to be excessive and, in any event, could not be perpetual. As was pointed out in the case of T. Devadasam (supra), the assessment must be made every year. It must be established by the circumstances and conditions obtaining from year to year.

44. It is in this background that I would like to consider the question about the extent of the special provision made in the present case.

45. It is admitted on all sides that the total number of seats to be filled in all the medical colleges of Bihar is 670. As stated in para 3 of the counter-affidavit filed on behalf of the respondent-State, the "seats available for admission and reservation" are 627. Out of this, 88 seats are reserved for Scheduled Castes, 56 for Scheduled Tribes, 63 for Backward classes and 125 for girl students. The remaining 43 seats out of 670 are said to be cultural seats. Out of the said 43 seats, six are available for Nepalese students, 23 to be filled up by nomination by the Central Government and 14 to be filled up by nomination by the three institutions, viz., the Lakshminarain Trust, TISCO and the Coal Mines Welfare Organisation. So far as the 43 cultural seats are concerned, the argument is that the Government is entitled to set apart certain seats for the various categories of persons. Reliance was placed on the case of D. N. Chanchala v. State of Mysore (AIR 1971 SC 1762) in which it was held that the Government was entitled to lay down sources from which selection of admission could be made and a provision laying down such sources was, strictly speaking, not a reservation. This was necessitated by certain overriding considerations. In the case of Chitra Ghosh v. Union of India (AIR 1970 SC 35) also it was held that the Government which bears the financial burden of running the medical colleges could lay down the criteria for eligibility and, if the sources are properly classified on reasonable basis, it was not for the Courts to interfere with the manner and making of classifications. I agree that no constitutional provisions can be said to be infringed on account of the allocation of these 43 seats and hold accordingly.

46. As regards the 125 seats to be filled up by the girl candidates, I am in respectful disagreement with the findings of my learned brothers that this is not a reservation but merely a classification of sources from which these seats are to be filled up. A half-hearted argument was made by the learned Government Pleader IV that these 125 seats to be filled up by the girl students are not reserva-

tion but allotment. In the alternative, it was argued that even if it was treated as reservation, it was fully protected by the provisions of Article 15 (3) of the Constitution and was neither excessive nor unreasonable. It may once again be stated here that according to the State's counter-affidavit 627 seats are "available for admission and reservation". 125 seats meant for the girl students are included in these 627 seats. According to paragraph 3 (IV) of the counter-affidavit, these 125 seats are to be filled up by girl students belonging to all classes on account of certain job requirements. In the show cause filed on behalf of the State (in para 7), it was stated that keeping in view the job requirements, 1/5th of the total number of seats have been "ear-marked" for girl candidates. It is nowhere stated in the counter-affidavit that these 125 seats to be filled up by the girl candidates are not reservation but only a classification of source. This probably could not be done. A supplementary counter-affidavit was filed on behalf of the State. In para 5 of this supplementary counter-affidavit, it was stated that "the seats which have been reserved or allotted to the girl candidates are by orders of the Government dated 29-1-1975". Here again, it was not categorically stated that these 125 seats are not reservation seats but allotment. The order dated 29-1-1975 has been annexed to this counter supplementary affidavit and has been marked as Annexure A. It reads as under:

विषय—राज्य के विभिन्न राजकीय चिकित्सा महाविद्यालयों में अनुसुचित जाति तथा अनुसुचित जन जाति के उम्मीदवारों के प्रवेश के लिये स्थान सुरक्षित करना ।

महोदय,

निर्देशानुसार उपयुक्त विषय के संबंध में मुझे सुचित करना है कि राज्य के विभिन्न राजकीय चिकित्सा महाविद्यालयों में अनुसुचित जाति अनुसुचित जन जाति तथा अन्य कोटि के उम्मीदवारों के प्रवेश के लिए निम्न प्रकार स्थान सुरक्षित रहे ।

१.	अनुसुचित जाति—	१४ प्रतिशत (चौदह प्रतिशत)
२.	अनुसुचित जन जाति—	९ प्रतिशत (नव प्रतिशत)
३.	पिछड़ा वर्ग—	१० प्रतिशत (दस प्रतिशत)
४.	बालिकायें—	२० प्रतिशत (बीस प्रतिशत)
५.	सामान्य कोटि—	४७ प्रतिशत (सैंतालिस प्रतिशत)
		१०० प्रतिशत

२. भारत सरकार तथा अन्य राज्य के लिए स्थान पूर्ववत रहेंगें । यदि किसी स्तर मे सभी सुरक्षित स्थानों के लिए अनुसुचित जाति एवं अनसुचित जन जाति के उम्मीदवार नहीं मिल सके तो बाकी स्थानों को सामान्य कोटि के उम्मीदवारों द्वारा भरा जायगा ।

This document is the basis of reservation and fixes the percentage of reservation for the scheduled castes, scheduled tribes, backward classes and the girls. According to annexure A, 20 per cent of the seats are to be reserved for the girl students. It may be stated here that 125 is near about 20 per cent of 627. This is not a mere coincidence. It is also stated in annexure A that the seats meant for the Central Government and other States shall remain as before. No percentage has been fixed for this. If these 125 seats for the girl students were meant to be allocation, it could have been so stated in annexure A. No order of the Government has been brought to our notice showing that these 125 seats are allocations or that the Government ever classified the source for the girl candidates. The State has relied only upon annexure A in this respect. Annexure A clearly makes a reservation of 20 per cent even for the girl students. Moreover, if this was a classification of source, then like the 43 seats, these 125 seats also should have been set apart from the total number of 670 seats and in this way only 502 seats could be available for general competition. I fail to understand why these 125 seats, like those 43 seats, were not set apart. Fourteen per cent reserved for the scheduled castes will be only 70 seats out of 502 and not 88 seats as reserved for them. 88 seats reserved for scheduled castes will become 17.5 per cent of 502. Nine per cent reserved for scheduled tribes will be 45 seats out of 502 and not 56 as reserved for scheduled tribes. 56 seats reserved for the scheduled tribes will be more than 11 per cent of 502. Similarly, ten per cent reserved for Backward classes will be only 50 seats out of 502 and not 63, which has been reserved for them. 63 will be 12½ per cent of 502. The number of seats reserved for Scheduled Castes (88), Scheduled Tribes (58) and Backward classes (63) comes to 207, which will be about 41 per cent of the 502 left over seats for general competition. Annexure A does not make a reservation of 41 per cent for these three categories. Reservation for these three categories, according to annexure A, works out to only 33 per cent. The Government while working out the number of seats on the basis of the percentage given in annexure A appears to have taken into consideration 627 seats and has arrived at the figure 88, 56 and 63 respectively, for the three categories. This also shows that the 125 seats meant for

the girl students can never be allocation but a reservation. The argument of the respondent State thus appears to be self-contradictory. No specific averment was made on behalf of the State in this regard and only a half-hearted attempt was made by the learned Government Pleader to justify the 125 seats by saying that it was an allotment. Here, I must once again repeat that the sources, if any, must be properly classified on reasonable basis. The classification of source must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group and that the differentia must have a rational relation to the object sought to be achieved. It is for the State to supply the materials in this respect as the matter is justifiable. Merely saying that a particular number of seats are allocation or classification of source is not enough. Even assuming that the 125 seats meant for the girl students are allocations, on the basis of the grounds mentioned in the counter-affidavit, I am not prepared to accept that they are reasonable. I am, however, also not prepared to accept that they are allocation and merely a classification of source. On the basis of the materials on record and annexure A, it must be held that this is also a case of reservation. According to annexure A, the total reservation meant for scheduled castes (14 per cent), scheduled tribes (9 per cent), Backward classes (10 per cent) and girls (20 per cent) comes to 53 per cent. A reservation of 53 per cent in the instant case must be held to be destructive of the provisions of the Constitution and is ultra vires.

47. So far as the question of reservation in favour of Backward classes is concerned, I agree with the views expressed by Sarwar Ali, J. The principles governing reservation have been succinctly stated by him. It was contended on behalf of the petitioner that the reservation made in favour of the Backward classes is not constitutionally valid, but since there is no case made out for this attack in the writ application, it is not possible to decide this matter in the present case. It is true that no material has been placed on record in support of the State's contentions that the Government had taken into consideration the social and educational and economic factors while making the reservation in favour of the Backward classes. The onus to prove this is surely on the State but where the criteria itself is not under challenge, the question of onus does not assume any importance. It is however, relevant to state here that at the time of argument learned Government Pleader produced before us a printed list of backward castes torn out of some document and stated that that list contained the various castes constituting the Backward classes. That list was not brought on the records of the case for the reasons best known to the respondent-State and the learned Government pleader. He was repeatedly asked by us to disclose from where he had got that list but, in spite of promises made in that behalf, he did not disclose the source. There is, therefore, no material on the record to show which caste or castes are included in the list of Backward classes. It may be stated here that caste may be a relevant circumstance in ascertaining the social backwardness but it cannot be the sole or dominant test in that behalf. Article 15 (4) of the Constitution does not speak of caste but only speaks of classes. It was pointed out in the case of R. Chitralekha v. State of Mysore (AIR 1964 SC 1823) that if the makers of the Constitution intended to take caste also as units of social and educational backwardness, they would have said so as they have said in the case of scheduled castes and scheduled tribes. If it were the intention to equate classes with castes, nothing prevented the makers of the Constitution to use the expression "Backward classes or Castes". The learned Judge pointed out:

"The juxtaposition of the expression 'Backward classes' and 'scheduled castes' in Article 15 (4) also leads to a reasonable inference that the expression 'classes' is not synonymous with castes. It may be that for ascertaining whether a particular citizen or a group of citizens belong to a backward class or not, his or their caste may have some relevance, but it cannot be either the sole or the dominant criterion for ascertaining the class to which he or they belong."

The learned Judge further observed as follows:

"But what we intend to emphasize is that under no circumstance a 'class' can be equated to a 'caste' though the caste of an individual or a group of individuals may be considered along with other relevant factors in putting him in a particular class."

In the case of Triloki Nath Tiku v. State of Jammu and Kashmir (AIR 1967 SC 1283) certain reservations were made in favour of Muslims, Hindus from Jammu Province and Kashmiri Pandits under Art. 16 (4). The sole test of backwardness was the inadequacy of representation in the services of the State. It was held that in order to attract Cl. (4) of Article 16, it was necessary to satisfy two con-

ditions, viz. (1) a class of citizen is backward, i. e., socially and educationally, in the sense explained in Balaji's case (supra) and (ii) the said class was not adequately represented in the services of the State. The question was whether Mohammadans of the entire State of Jammu and Kashmir and the Hindus of Jammu Province were backward and whether they were not adequately represented in the services of the State. If they were backward, whether the percentages of reservation provided for them in the services were reasonable, having regard to the employment opportunities in that cadre of service to the general public. On the materials placed, the Supreme Court could not come to any conclusion and called for a report before finally disposing of the writ petition. It directed the High Court to gather the necessary materials such as the total population of the entire State, the break up figure of the two provinces, the strength of the two communities and the extent of their social and educational backwardness and the criteria applied in that regard. I have emphasised this point for the following reasons. In the torn printed list mentioned above, a list of several castes has been given. There is nothing more in it. As stated above caste alone cannot be the basis of backwardness. It is for the State to place materials to show that it has taken into consideration the social and educational backwardness of each of them. What would be the basis of such a consideration is fully explained in the case of Triloki Nath Tiku (supra). In the case of Rajendran v. State of Madras (AIR 1968 SC 1012) a list was submitted which was based on caste alone. It was contended that it was violative of Article 15 (1). In that case, however, explanation was given by the State which was not controverted. No attempt seems to have been made on behalf of the petitioners to show that any caste mentioned in the said list was not socially and educationally backward. In that event, even though the list was prepared castewise, it was held that it was not violative of Article 15. Such an attempt has not been made on behalf of the State in the present case. It has been generally stated that the Government took into consideration the social and educational backwardness of the various castes mentioned in the list. That, in my opinion, is not sufficient. It may be that a particular caste or castes mentioned in the said list were never socially and educationally backward or, if they were so at any point of time, they have ceased to be so with the advent of the social, educational and economic progress which the country has made since after independence. Backwardness is really and primarily a result of poverty and this factor cannot be lost sight of. In the case of State of Andhra Pradesh v. P. Sagar (AIR 1968 SC 1379) it was observed:

"Reservation may be adopted to advance the interests of weaker sections of society, but in doing so, care must be taken to see that deserving and qualified candidates are not excluded from admission to higher educational institutions. The criterion for determining the backwardness must not be based solely on religion, race, caste, sex or place of birth, and the backwardness being social and educational must be similar to the backwardness from which the scheduled castes and the scheduled tribes suffer".

By merely asserting that reservation was made after full consideration of the relevant matters, the jurisdiction of the courts to determine whether by making such a reservation the fundamental right has been infringed, is not excluded. In the facts and circumstances of this case, however, I would refrain from expressing any opinion as to whether the persons or the castes who have been designated as Backward classes in the present case, fulfil the constitutional requirements.

48. On point Nos. 1, 2 and 3, formulated in paragraph 7 by S. K. J., I agree with the conclusions arrived at by him and Madan Mohan Prasad, J.

49. It was urged on behalf of the State that the writ applications were not maintainable in absence of the necessary parties, viz. the students who have been selected for admission into the medical colleges. It has been held by Madan Mohan Prasad, J., that in the absence of necessary parties, the writ applications are not maintainable and must be dismissed. I agree with him.

50. The writ applications, therefore, must be dismissed but without costs.

LALIT MOHAN SHARMA, J.:— 51. I have got the advantage of perusing all the four judgments prepared by my learned brothers in this case. I agree with Mr. Justice Madan Mohan Prasad that the writ applications are not maintainable in absence of the students who have been selected for admission in the colleges, including the 38 students who passed the I. Sc. examination after clearing Chemistry Practical at the special examination. The petitioners might be held to be under a disadvantage in this regard at the time when the writ applications were filed. They asserted that they had no means to get the names of the selected candidates, but the position changed during the pendency

of the writ applications. On an application filed by the petitioner, the respondents were directed to produce the names of all the students either admitted or in respect of whom a decision had been taken for their admission along with their marks etc. The case was taken up for hearing before the Full Bench on the 18th January 1978 and the learned counsel for the petitioners mentioned before the Bench that the documents were not available to them and they have not been able to examine the same. The Bench immediately directed that the documents would be made available for examination by the learned counsel for the petitioners in court. The hearing of the case thereafter continued for a number of days and was ultimately concluded on 1-2-1978, but no attempt was made on behalf of the petitioners to join the selected candidates as parties to the case in spite of pointed observations made from time to time to the non-maintainability of the applications on this ground.

52. Even if it be assumed, in the facts and circumstances of the case, that the writ applications cannot be held to be not maintainable, it cannot be denied that the selected candidates will be adversely affected, if the applications are allowed. The sessions in educational institutions in Bihar are, unfortunately, starting late for the last several years and the position of the medical colleges is no better. However, the colleges other than the medical colleges started their classes for the current session several months back, and the first year classes of the medical colleges also have now started. Some of the students selected for admission have not been able to join due to the stay order passed in the present cases. I presume that they are still waiting for the judgment and it has not been said before us that any of them has taken admission in any other college. In these circumstances, I am of the view that the judicial discretion under Article 226 of the Constitution of India should be exercised in refusing to interfere in the present situation.

53. In view of what I have said above, no other question requires decision. But since my learned brothers have expressed their opinion on several points, I wish to indicate my views on some of them.

54. The general principle applicable to cases of reservation has been considered by Mr. Justice S. Sarwar Ali and I full agree with what he has said in paragraphs 2 to 13 of his judgment. My learned brother B. P. Sinha, J. has discussed the test which has to be applied for determining whether a particular group of persons or caste comes within the expression "backward classes" and I agree with what he has said on the point. I also agree with my learned brothers that the question whether the reservation made in the present case in favour of backward classes is valid or is illegal does not arise to be decided as the petitioners have failed to raise this point in the writ petition or by the further affidavits filed by them. After the State Government filed an affidavit on 13-1-1978 referring to the instruction dated 29-1-1975 making reservations and the case was referred to a Bench of five Judges, the petitioners if they chose, could have got their writ applications amended by specifically challenging the reservation in favour of the backward classes. In his reply, the learned Government Pleader placed the writ application as well as the other petitions and affidavits filed on behalf of the petitioners and submitted that since the question was not raised, the State Government was not attempting to justify the reservation in favour of the backward classes. I agree with the argument of the learned Government pleader. There is, therefore, no occasion to deal with this question, although it appears that if it had been raised by the petitioners, it would have been an important point demanding serious attention of the Bench.

55. On the question as to the nature of the allotment of 125 seats to girl students, I agree with the view taken by B. P. Sinha, J. that it is not a case of allocation of the seats at source. This allotment also must be held by way of reservation.

56. I further agree with the observations of my learned brother Sarwar Ali, J. in paragraphs 18 and 19 of his judgment.

57. The writ applications, however, must be dismissed, but without costs.

MADAN MOHAN PRASAD, J.:— 58. The petitioners are students who, having passed the examination of Intermediate in Science (I. Sc.) set for a competitive test examination for admission into the Medical college in Bihar. It appears that the Government of Bihar have a number of Medical Colleges some of which were earlier run by private institutions and were subsequently taken over by the State Government.

59. Briefly stated, the facts, as stated in C. W. J. 1753 of 1977 which was filed on 27-9-1977, are as follows. The total number of seats available in various Medical Colleges was 975. This was, however, reduced to 670. This is the first cause of grievance. Next, there are 43 seats reserved by the Govern-

ment for being available to persons from different Asian countries where proper facilities for medical education are not provided. This is said to be "cultural Reservations". Then there are reservations for Scheduled Castes, Scheduled Tribes and other educationally and socially backward classes, as also for women. The Pre-Medical Test aforesaid was to be held on the 3rd of July, 1977, but due to leakage of question it was postponed and held on the 7th of August 1977. There is strong and wide rumour that the same questions were set for the subsequent examination in August and that certain Coaching Institutes had taken advantage of the leakage of questions. There is a defect in the system of obtaining the results of such examinations which is said to be mechanised but actually it does not properly exclude the human factor which outweighs the mechanical device which is that code numbers are put on the answer books in place of roll numbers and then transferred to punch cards and de-coded after the computer has indicated a number, by human hands. As a result of the test held on the 7th of August, 1977, the results thereof were published on the 24th and 25th of September, 1977 in the newspapers. The result showed that the aforesaid list had been divided into different categories, namely, (1) General/Backward Class (income below Rs. 3,000/- per annum only, no other criterion having laid down for determining the backwardness), (2) Waiting List (probably indicating that "they may have to be kept waiting after interview in the event of all the seats being not filled up at the said interview)", (3) Merit list of Girl candidates, (4) Waiting list of Girl candidates, (5) Merit list of Scheduled castes and (6) Merit list of scheduled tribes. The total number of candidates selected for the purpose of interview was 525, which included 113 girls, 45 scheduled castes, 41 scheduled tribes and 34 backward classes. Besides them, there were 73 on the waiting list. There was no notification as to how many seats would be reserved for different categories, but the petitioners gathered that in addition to the aforesaid there were 43 seats called "Cultural Reservations", but these "Cultural Reservations" included also nominees of the Tata Industries and Coal Mines Welfare Organisation who had not appeared at this test examination. Thus, out of 670 seats, 375 are reserved and the remaining 295 alone are available to General candidates. This means that the reservation comes to 56%, which is illegal. The petitioners made certain representations to the Government in this respect but to no effect. That some of the Universities in Bihar had not yet published the result of the Intermediate Examination in science and yet such persons who had not passed the aforesaid examination have been selected at the interview. Further, some of those who had failed at the I. Sc. examination have also been selected. The result is that those who have passed the examination have been excluded by them. That in respect of scheduled castes and scheduled tribes the Indian Medical Council has provided that the marks secured by them to enable them to be selected for admission, which is 50% for general candidates, may be lowered to 45%, but the State Government are seeking to reduce it below the aforesaid percentage prescribed.

60. On the basis of the aforesaid allegations it has been submitted in the petition (1) that all the steps taken for selecting candidates for admission into the medical colleges are illegal and mala fide, (2) that the list of selection is illegal and ultra vires, (3) that as published in the selections aforesaid are illegal, ultra vires, void and contravening Arts. 14 and 15 of the Constitution, (4) that the selection of candidates who had failed is contrary to law, (5) that the reservations for candidates for Tata Industries and Coalfield Management are not warranted by law and (6) that the reduction in the number of seats is in contravention of the directive principles of the Constitution. In that view of the matter, the prayer for issuance of an appropriate writ for quashing the list of selected candidates (Annexure 1) and for a direction to act in accordance with the law and the constitution has been made.

61. By a supplementary affidavit filed on 30-9-1977 the petitioner stated that he had been able to obtain one copy of the question paper of the aforesaid examination which he produced. It was further stated that the system of examination is that the question paper is given to the candidate in the examination hall and he has to write out the answers against each question on the question paper itself and submit the question paper in the hall itself and no question paper can be taken out of the hall. By a second supplementary affidavit it was brought to the notice of the court that the interview Board was granting admit cards to the candidates and a prayer for an order of injunction was made but was refused.

62. In C. W. J. C. No. 1812 of 1977 which was filed a few days later than C. W. J. C. 1753 of 1977 i. e., on 29-9-1977, the petitioners had annexed to their petition a copy

of the alleged question paper of the aforesaid examination. The petition is, however identical to that mentioned above. In C. W. J. C. No. 2063 of 1977, which was filed on the 4th November, 1977, also the petition is identical to the others, but amongst the grounds it has been stated "that the reservations made of about 56% seats on various grounds are violative of and contravenes Article 14 of the Constitution and are not protected by Clauses 3 and 4 of Article 15 of the Constitution" and also "that there is no criteria laid down for backward classes and there is no rational basis for fixing the criteria in the list based on monthly income as that is not in consonance of Article 15 of the Constitution of India".

63. The respondents had filed a counter-affidavit prior to the admission of the writ petition, which was sworn by an Assistant in the office of the Principal of the Medical college, wherein it was mentioned that the total number of seats available is 627 (leaving out 43 'cultural reservation'); out of them 88 are reserved for scheduled castes, 56 for scheduled tribes, 63 for backward classes having an income of less than Rs. 3,000/- per annum and in case members of the scheduled castes and tribes are not available the remaining seats would be available to the general candidates. It was further stated that the Government while determining the backward classes had taken into consideration their social and educational backwardness as also their economic backwardness. In this respect also it is said that if the students belonging to backward classes compete for admission on their own merits, the corresponding number of seats are made available to the general class of students. In the present case, it was said that 34 students of the backward classes had competed on their merits and thus 29 alone have to be filled up on the basis of reservation; similarly, only 45 students of the scheduled castes and only 41 students of the scheduled tribes are available and thus the 43 seats of the scheduled castes and the 15 seats of the scheduled tribes would go to general candidates. Further, it was stated that in view of the requirement of a large number of lady doctors for posting in Government hospitals and dispensaries, and keeping in view that the number of lady doctors 1/5th of the cadre strength, the Government directed 125 seats, i. e. 1/5th of the total number to be filled up by girl candidates belonging to all classes. Thus, it was said that out of the total number of 627 seats in the present case only 45 are to be filled up by scheduled castes, 41 by scheduled tribes and 29 by backward classes, making a total of 115 seats and even if the earmarking of 125 seats for women were to be treated as reservations, it would make a total of 240 out of 627 and thus much below 50%. With regard to the remaining 43 cultural seats (670-627), it is said that 6 are meant for students from Nepal, 23 are available to the Government of India for students from foreign countries, Nagaland, Sikkim and Bhutan, the students to be nominated by the Government for State reasons. With regard to the remaining 14 seats it was stated that when the State took over some of the colleges at Jamshedpur and Dhanbad, they had no hospital facilities and the Tatas, the Coalmines Welfare Organisation and Lakshmi Narain Trust offered their hospitals on the condition and some nominees of each of them be admitted into the said colleges. In course of argument it was said that five nominees each were to be of Tisco and coalmines welfare organisation and four of the Lakshmi Narain Trust. It was next said that no student who had failed at the examination would be admitted, nor had they been admitted. It was also said that the Government had not taken any decision to reduce the qualifying marks for the scheduled castes and tribes below the one prescribed by the Indian Medical Council. The other allegations were also denied as incorrect. This very counter-affidavit was to be treated so in C. W. J. C. 1812 of 1977.

64. The respondents also filed a petition showing cause after the admission of the writ petition, on the affidavits of a section officer of the department of Health, Government of Bihar and, the Principal of the Patna Medical College, on the same lines as stated above. It was, however, mentioned further that even if all the seats are left open for admission to general candidates on merits and no reservations is made, even then the petitioners will not qualify for admission because on merit only students securing 85 marks or above could qualify for admission and the petitioners had not disclosed the marks obtained by them. It was also stated that the reduction in seats had been made on account of the recommendation of the Indian Medical Council as well as of a High Power committee and also because during the course of strike of junior doctors reduction in seats was demanded and conceded. It was denied that the same set of questions were set for the two examinations, or that any institution had taken any advantage thereof. The apprehension of mistake in the method of arriving at the result of the test was said to be baseless. Regarding the earmarking of seats for women it was

said that it was on account of the requirement of the State Government and for special upliftment of women and in accordance with Article 15 (4) of the Constitution. It was stated that candidates selected after the test for admission on merit are having 91% marks and above and the petitioners are not entitled to invoke the jurisdiction of this court.

65. These led to several rejoinders and replies. The prospectus of the examination was produced by the petitioners along with a rejoinder and it was asserted that there was no mention of reservation for backward classes or for girl students in the prospectus and that no criterion had been laid down therein for backward class candidates nor the number allotted to them had been mentioned. It was said that the petitioners had not been able to obtain their marks sheets and "it is not possible for them to say what would happen if the seats were filled up purely on merits since the very foundation for the selection, i. e., those who got 91 marks had been selected, is itself false. A notice of a special examination in chemistry practical of I. Sc. for such students as had failed in the chemistry practical, was produced as an annexure as also the result showing those who had passed thereat and it was said that 38 students who had passed at the said examination have also been illegally selected. By a supplementary show cause petition the respondents pointed out that the petitioners had participated in the examination held in which they had not competed as they had not secured sufficient marks on merit and they are thus not entitled to maintain the writ application. It was said that the petitioners on the basis of their roll numbers as supplied by them had obtained marks as stated hereafter :—

Anil Kumar	76 marks
Sandip Sen	78 marks.
Jagdish Sinha	82 marks
Prabash Kumar	33 marks
Navin Sinha	33 marks
Dinesh Kumar	93 marks
Parwez Iqbal	77 marks
Padmaraj Samarendra	92 marks.

The respondents, however, do not know whether the roll numbers have been correctly supplied as they were not stated on affidavit. However, it appears that 753 candidates have secured more than 92 marks and 111 candidates have secured 92 marks, and that 570 have obtained more than 93 marks at the said examination and thus none of these petitioners could be selected on merit. A letter of the Department of Health of the Government of Bihar to the Principals of the Medical Colleges, dated 29-1-1975, was produced as an annexure saying that the State Government had decided that in the various medical colleges in the State 14% seats should be reserved for scheduled castes, 9% for scheduled tribes, 10% for backward classes and 20% for girls and the remaining 47% should be open to the general candidates and besides these, the reservation for the Government of India and the other States would remain as they were. Further, it says that if the candidates of scheduled castes and scheduled tribes are not available the seats would go to the general candidates. A reply was again given to this by the petitioners stating that this was undue and excessive reservations. Apart from other things it was also mentioned that the candidates for the 'cultural' seats were not required to appear for the qualifying tests and were admitted without undergoing such tests. In a supplementary counter-affidavit filed by the respondents it was said that the special examination in chemistry practical was held under Regulation 16 of the Patna University Regulations read with Section 29 (2) of the Patna University Act. It was also pointed out that the Board of Principals of the Medical colleges is the final authority to decide about the test and admission of students to medical colleges and the Board had resolved to extend the date for submission of marks sheets by the candidates, which originally was the 23rd of July, 1977, until the last date of the interview. A resolution of the examination Board was also produced to show that the Board "taking into consideration the large number of failures in Chemistry practical (45 as compared to 4 last year) as also a sizeable number of hard cases" had decided that a special examination in Chemistry practical only, which should be optional, may be held and candidates who have failed in Chemistry practical may appear at this examination, if they so liked on payment of a fee of Rs. 25/-. The proceedings of the meeting of the Board of Principals were also produced to show that the last date for receiving the marks sheets had been decided to be relaxed.

66. On the basis of the aforesaid allegations, counsel for the petitioners have made out the following points :—

(i) The reduction of seats from 975 to 670 is violative of Article 39 of the Constitution.

(ii) The reservations for backward classes and women and the 'cultural reservations' are arbitrary and violative of Articles 14 and 15 of the Constitution.

(iii) The test examination was void because of the leakage of question papers, unfair advantage obtained by some students and the device for competition of marks being defective.

(iv) The result of the test is bad because of the selection of the candidates who had failed at the I. Sc. practical examination, candidates who had not submitted their marks sheets by the 23rd of July, 1977 as required by the prospectus, having been selected, and candidates having been admitted during the pendency of the writ application.

67. Counsel for the respondents, on the other hand, has contended (1) that the petitions are fit to be thrown out, firstly because even if there were no reservations, the petitioners could not have succeeded, and secondly because they have not impleaded the University, the students who have been selected and whose selection the petitioners challenge; (2) that the reservations in favour of backward classes and the indication of sources in the case of women and 'cultural' seats are justified; and (3) that the test examination and the results were properly held and arrived at.

68. The first question which I should like to discuss is with regard to the maintainability of the petitions. In all of them only the State of Bihar and the Principal of the Medical college of Patna have been impleaded as respondents. It is undisputed that 525 students have been selected for admission into the medical colleges and, as stated earlier, there being no stay order by this court, some of them have been admitted into the college and are studying. Again undisputedly 38 students who had failed at the I. Sc. Examination in Chemistry practical had appeared at a special examination held by the University and passed thereat and have been selected for admission. The question arises whether these students were necessary parties. It must be borne in mind that the challenge to the validity of the test at which they had appeared and which has created in them the right to be admitted to the colleges, or which has led to their admission, has been made. There is no gainsaying the fact that if we were to hold this test to be illegal all these persons are going to be affected as well as that they will lose their right to be admitted and those who have already been admitted will forfeit their right to study in the Medical Colleges. The question is whether such a right or interest creates a right in such students to be represented. It is obvious that the interest of these 525 students is at a stake. It is equally obvious that the petitioners are challenging not only the validity of the test held but also the admissions of these students. It has been specifically stated that some of them have already been allowed to be admitted into the colleges in spite of the pendency of the writ proceeding and that such admissions are illegal on that account also. It is thus evident that they are necessary parties. It does not need to be said that these students have acquired a right enforceable at law. Once the authorities have found them fit to be admitted into the colleges, the right cannot be refused and these students could as well come into a court of law for enforcement of their legal right in one way or the other. Even so, those students who have already been admitted cannot be denied by the authorities their right to continue the studies. That also is a right enforceable at law. It is not necessary to point out the distinction between proper parties and necessary parties. There the right of an individual is being challenged and a decree or an order is being asked for which would directly affect him, there cannot be the least doubt that such person is a necessary party. In this case there is also a specific challenge against the legality of the selection of 38 students who had failed at the I. Sc. Examination but had passed as a result of the special examination in Chemistry practical. The validity of this examination and not only that, the selection of these 38 students as a result of their passing that examination has also been already and specifically challenged. I have not the slightest doubt in my mind that they were necessary parties.

69. During the pendency and hearing of these cases— they were originally heard by a Division Bench and then by this Full Bench for several days — the question had cropped up about the necessity of impleading these parties. The petitioners have not taken advantage thereof, and have refused to implead any of them. It is thus not open to the petitioners to say that for one reason or the other, they had no opportunity of doing so even during the pendency of the proceeding. In fact the petitioners ought to have done that in the very beginning. They were challenging the results published in the newspapers (Annexure 1) of 525 specified individuals bearing different roll numbers. They could have easily obtained the names of such candidates and impleaded them as parties. They also knew the names of the 38 candidates who had passed at the special examination in Chemistry practical as would appear from the result sheet produced by them.

70. The next point which must be noticed is that although the special examination in Chemistry practical conducted by the University has been challenged as illegal, the Patna University has not been impleaded. It is obvious that if this examination is held to be void or illegal, it affects the University as such as it does those 38 students who passed thereat. These were the only persons who were directly interested in supporting the validity of the said examination and yet they have not been impleaded. That not having been done, the question is whether the present application is maintainable.

71. Mr. B. C. Ghose, appearing for some of the petitioners and whose argument was adopted by Mr. S. C. Ghose, appearing for the others has contended that the present applications cannot be thrown out on the ground of absence of parties. Firstly it has been urged that no relief has been claimed as against the University and thus it is not a necessary party; secondly, that the students are also not necessary parties because if the entire procedure is vitiated, those who would suffer by it need not be impleaded; thirdly because no right had accrued to the students before filing of the petition. He has placed reliance on a decision of this Court in Arun Kumar v. State of Bihar ((1970) ILR 49 Pat 396) and in the case of A. Periakaruppan Chettiar v. State of Tamil Nadu (AIR 1971 SC 2085). I am unable to accept the contention of Mr. Ghose. With regard to the University it is obvious that the relief claimed is that the examination held by the University be declared to be void and illegal. The University is the statutory authority and conducts the examination by virtue of the rights granted to it by the Patna University Act and its Regulations. One of the proceedings of such a Body is sought to be challenged. I am not prepared to accept that this does not amount to asking for an order against the University. As I have already stated, it is not correct to say that the students had not acquired any right whatsoever prior to the filing of the writ application. They had been selected at the test and that, in my view, gave them a right enforceable at law. On the petitioners own admissions, some of the students had been admitted into the colleges during the pendency of the writ petitions. They had acquired a right to continue their studies in those colleges. It is not as simple as saying that they had acquired no legal right or legal interest.

71-A. There is no substance even in the contention that it is a case where an entire procedure is being challenged from beginning to end and, therefore, the persons who are to be affected thereby need not be impleaded. Here, as will appear from the facts stated, there are different proceedings which are being challenged, viz., the test examination conducted by the Medical Examination Board in which the University has no hand whatsoever and which is undoubtedly different from the proceeding, viz. the examination in Chemistry practical in which respect the Board has nothing to do and the only body concerned is the University. The petitioners are next challenging an order of State Government making reservations and are contending that if there had been no reservations for backward classes, women or those called 'cultural reservations', they would have been successful in being selected at the test in preference to the students who have been so selected. Obviously thus it is not one proceeding of any one body which is under challenge. Was it not within the rights of such students to show that even if all the premises contended by the petitioners be granted, their claims was still better than those of the petitioners? Actually the petitioners are contending that they have been discriminated against vis-a-vis those students who have been selected. Was it not within the right of those selected to come up and show that there has been no discrimination whatsoever? The argument is beyond my comprehension that in such circumstances neither the students nor the University were necessary parties or that no right had accrued to them.

71-B. In Arun Kumar's case (supra) the petitioner had come up to this court for quashing an order of the State Govt. by which the number of seats in the Medical Colleges of Ranchi and Darbhanga had been fixed for students passing from the different universities in Bihar. The petitioner had contended that there were 180 seats in each of the two colleges and the number of candidates securing marks higher than the petitioner was less than the total number of seats at the two colleges and thus but for the Government orders fixing the number of seats for students passing from different universities, he would have been admitted. This order of Government had been issued after the petitioner had made his application for admission and it was, therefore, contended that this sudden change in the criteria affected his career because if he had known of those reservations earlier he might have applied to some other college. During the pendency of the writ application an application under Chapter XXIC, Rule 5 of the Patna High Court Rules had been filed by five persons for re-

calling an order of stay passed at the time of admission of the writ application. On behalf of these five persons Mr. B. C. Ghose appearing in that case had contended that they were applicants for admission into the first year M. B. B. S. course in Rajendra Medical College, Ranchi and neither they nor those who had got letters of admission had been made parties to the writ application and the application was accordingly not maintainable. The learned Judge repelled the contention on the following grounds:

"The writ petitioner is aggrieved by the order contained in Annexure 2, and if that order is held to be invalid, the authorities of the two colleges must proceed without being bound by the directions contained therein. It is not possible to hold that the writ petitioner should have made all the students who had applied for admission to the 1st year M. B. B. S. course in Rajendra Medical College, Ranchi, party respondents or even those who would be entitled to admission in this college under Annexure 2."

Firstly I would like to show that the facts of that case were entirely different and no principle of law uniformly applicable to all cases has been laid down by this court in that decision. Secondly, it must be noticed that the plea was to implead the students who had applied for admission. It is obvious that a mere application does not create any right in the person concerned. So far as the latter part of the observation is concerned about impleading "even those who would be entitled to admission", with very great respect I consider it an obiter and I would not concur if that were to be treated as a general proposition of law. But, as pointed out by the learned Judges, in that case it was a government order alone which was under challenge and the State of Bihar was very much a party. What the learned Judges meant to lay down was that all those who would be affected by setting aside the Government order need not have been made parties. There does not appear from the Report to be any statement of fact made by those five persons of any specified individual or individuals having been issued letters of admission. The point thus appears to have been only casually mentioned by way of an argument. It does not appear that there was any basis in fact for any such argument with regard to non-impleading any person who had already got a letter of admission. The decision in this case, therefore, in my view, neither supports the contention of Mr. Ghose, nor can be taken to lay down a proposition of law in general that even persons whose legal rights are to be directly affected need not be impleaded.

71-C In Chettiar's case (supra) it appears that the petitioner had applied for admission for a seat in one of the medical colleges in the State of Tamil Nadu, he was called for interview but was not selected as he was said to have secured low marks at the interview. He challenged the selections made on various grounds including that the selections were manipulated by the Government. The Supreme Court held that "the selections made were invalid", but did not strike down the selections in view of the fact that the selected candidates had not been made parties to those petitions. Their Lordships had directed the State to constitute a separate Expert Committee for making selections to the unfilled seats. In pursuance of that a selection committee had been appointed and had selected 24 students but not the petitioner. It was in those circumstances that the petitioner had come up a second time with a writ petition again challenging the validity of the selections made. The learned Judge held that the procedure adopted by the selection committee was vitiated. Towards the end of the judgment in para 12 the learned Judges said:

"We were informed that the 24 students whose selections are impugned in the present writ petition have already joined one or the other medical college in the State of Tamil Nadu and they have been attending classes for over a month. In view of the hardship that may be caused to those innocent students, by the order that we proposed to make, we asked the Advocate-General of Tamil Nadu on Jan. 4, 1971, when the petition came up for hearing, to see if he could persuade the Government of Tamil Nadu to admit the petitioner in any one of the medical colleges in Tamil Nadu and thus avoid the unpleasant consequence."

But the Government was unable to accept the suggestion of the Court. The court made a second attempt to persuade the Government to see if the petitioner could be admitted so as to avoid the unpleasant consequences to the selected students, but the Government's reaction was again unfavourable. Hence the writ petition was allowed. All that we find from the aforesaid is that the 24 students' selections were impugned. It does not appear from the report as to whether they were parties to the application or not. In any case, from that very judgment of the Supreme Court it appears that in the first instance the court had not struck down the

selections "in view of the fact that the selected candidates had not been made parties to those petitions". It will be noticed that even if it be assumed that those 24 students were not parties, the fact remains that it was a challenge to the procedure adopted by the selection committee which was contrary to the orders of the Court given on the first occasion and the Selection Committee was very much a party. It was only the indirect effect of such a procedure being vitiated that all the selections were held to be bad. That is a point of distinctions between that case and the instant case before us where the facts and allegations are entirely different including those against particular individuals saying that they had not passed at the examination of I. Sc. or that they had no right to be selected because they had not submitted their mark-sheets within time or that they had no right to continue their studies because they had been admitted during the pendency of the applications etc.

72. I find support for the view which I have taken in this respect from other decisions of the Supreme Court itself. In the case of P. Rajendran v. State of Madras (AIR 1968 SC 1012 : 1968 (2) SCA 636) (a decision by five Judges, unlike Chettiar's case (supra) decided by three Judges), a preliminary objection was raised on behalf of the respondents that the selected candidates whose number was in the neighbourhood of 1100 were not included as parties and therefore the cases should be rejected on that ground alone. In that view of the matter the counsel for the petitioners had conceded that they would not press for quashing the selection and they, therefore, prayed "that the points raised may be decided for the future and the selection made this year may not be disturbed". In such circumstances the Court decided the points raised in the cases but did not disturb the selections made that year. If there were no necessity at all of impleading them as parties, the court could have very well held so and disturbed the selections in spite of a concession made by the counsel. It is well known that even if concessions are made by counsel wrongly, the Court is not bound to act thereon but decide the case on its merits. There are other cases where the Supreme Court and different High Courts, considering the necessity of impleading necessary parties, allowed the petitioners opportunity to remove the defect of parties (see the Hoshiarpur Azad Transporters (Pvt.) Ltd. v. State of Punjab (AIR 1961 Punj 374), Mandir Thakur Dawara, Dhuri v. State of Pepsu (AIR 1955 Pepsu 159), Devichand Mookchand v. Dhanraj Kantilal (AIR 1949 Mad 54) and Bimal Chand v. Chairman, Jaigunj Azimgunj Municipality (AIR 1954 Cal 285)). In the circumstances of the present case, therefore, I am unable to accept the contention that neither the university nor the 38 students who were selected on the basis of their passing the special examination in chemistry practical nor the students selected at the competitive test were necessary parties at all.

73. As I have said earlier, in the present case the petitioners had ample opportunities of impleading them but they have refused to do so. The question thus arises whether the petitioners having refused to implead persons directly affected. It is obligatory on the part of the court to issue notice to them suo motu and remove the defect of parties. In my view it is not. Mr. B. C. Ghose has relied on Rule 5 of the Chapter XXIC of the Patna High Court Rules. The aforesaid chapter deals with the rules for disposal of applications under Arts. 226 and 227 of the Constitution of India. Rule 5 is as follows :

"The notice of the application along with a copy of the application and annexures, if any shall be served on all persons directly affected and on such other persons as the court may direct :

Provided that on the hearing of any such application, any person who desires to be heard in opposition and appears to the court to be a proper person to be heard shall be heard, notwithstanding that he has not been served with notice of the application and shall be liable to costs in the discretion of the court, if the order shall be made."

Reading the aforesaid rule, the first part appears to be laying down the rule that the notice shall be served on all persons directly affected. Is it for the Court to find out who are the persons directly affected and to serve notices on them or is it the duty of the petitioner to implead them and then it becomes obligatory on the part of the court to issue notices to such persons directly affected. Obviously, it follows from the rules that notices need not go to persons who are not directly affected. Therefore, if persons are impleaded as parties, even though they are not directly affected, notices may not be served on them. The rule, of course, gives the discretion to the court to have notices served on other persons as well. The rule also enables the court to hear a person who has not been served with a notice. The rule, in my view, does not lay down that a person directly affected need not be impleaded as a party or that it is for the court to find out the persons, other

than those impleaded, who are going to be directly affected and to serve notices on them. The contention thus that there is no duty on the petitioners to implead persons directly affected, must be rejected.

74. In this connection Mr. Ghose further placed reliance on the rules in the Code of Civil Procedure and contended with vehemence, that the Civil Procedure Code applies to writ proceedings and, therefore, a writ application like a suit could not be dismissed only on the ground of non-joinder or misjoinder. Behind this contention appears to be a reliance on Rule 9 of Order I of the Code of Civil Procedure. Rule 9 lays down:

"No suit shall be defeated by reason of the mis-joinder or non-joinder of parties, and the Court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it:

Provided that nothing in this rule shall apply to non-joinder of a necessary party."

The reliance on this rule is a misconceived because in view of the proviso the rule has no application to the case of a non-joinder of necessary party. Apart from that, the contention with regard to the application of the Code of Civil Procedure to writ application must also be rejected for the simple reason that by the Code of Civil Procedure Amending Act I of 1976, an explanation has been added to Section 141 of the Code which is as follows:

"In this section, the expression 'Proceeding' includes proceedings under Order IX, but does not include any proceeding under Article 226 of the Constitution."

This amendment seems to have escaped the notice of the learned counsel and the contention is thus misconceived. For the reasons aforesaid, I hold that the petitioners are not entitled to get the reliefs prayed for in the absence of necessary parties who are going to be directly affected by the decision of this court in this matter. On this ground alone the petitions must be dismissed.

75. There is however another reason why these petitions must be dismissed. The respondents have taken the objection that these petitions are not maintainable—firstly because these petitioners had appeared at the test examination and failed to secure such marks as would have entitled them to be admitted, and secondly because, even if all the reservations and ear-makings of seats were to be set aside, the petitioners would not be admitted on merit because there were at least 570 candidates who had secured marks higher than all the petitioners, the best among them having secured 93 marks. As stated earlier, the respondents found out the marks allotted to the roll numbers which were alleged by the petitioners to be theirs. It may be stated here that the petitioners did not swear any affidavit to the statement of fact made by them regarding their roll numbers even though the attention of the petitioners had been drawn by the respondents that they had not disclosed on affidavit their roll numbers which was necessary to find out as to what were the marks secured by them. Therefore, the respondents were not sure whether the petitioners had given out their correct roll numbers. But assuming that they have correctly given them, the best among them had secured only 93 marks and there were 570 candidates who had secured much more than that, and in the absence of any reservation of any kind, the petitioners can in no circumstance be admitted on the basis of the marks obtained by them at the test examination. By a reply to a supplementary counter-affidavit of the respondents, the father of one of the petitioners in C. W. J. C. 1812 of 1977 stated that the petitioners did not accept that they had secured 33 marks. It would appear that Prabhas Kumar and Navin Sinha, both petitioners in that case, were stated to have obtained 33 marks. That is, however, immaterial, because except making this denial, the petitioners have not produced their marksheets to contradict the statements by the respondents. What is material is that in respect of the marks obtained by all others the statements made by the respondents on affidavits have not been challenged nor has the statement to the effect that there are 570 candidates above them, been challenged. On these unchallenged facts, therefore, the question arises whether if at all the court directs the selections to be made on the basis of the marks secured at the test examination, any writ can effectively be issued so far as these petitioners are concerned. It has been stated on affidavit with regard to the petitioners who have obtained 77, 78, 76 and 33 marks that their position would be beyond 2080 and thus by no stretch of imagination they have any chance of admission on merit even if all the 670 seats are made available to general candidates. With regard to the candidates securing 92 and 93 marks, it is said that there are 753 candidates who have secured more than 92 marks and 111 who have secured 92 marks. Thus, as against petitioner Padmaraj there are 753 above and 111 equal. With regard to petitioner Dinesh Kumar there are 570 candidates who have secured more than

93 marks and he can be admitted on the basis of the marks obtained by him only if there are more than 570 seats available to the general candidates out of the total number of 670.

76. It is thus obvious that the petitioners, other than Dinesh Kumar, have no chance at all of being admitted on the basis of the marks obtained by them at the test examination, even if there were no reservations for any class at all, unless the examination itself is held to be vitiated and a fresh examination is directed. Their petition cannot thus succeed otherwise. Petitioner Dinesh Kumar alone has some chance even if the examination be held not to be vitiated in case he can successfully challenge the reservations so as to make 571 seats available to students of general class.

77. That brings me to the question as to whether the test examination was, for any reason, vitiated. In this connection, as stated earlier, what the petitioners have alleged are (1) that there is a widespread rumour that the questions had leaked out and that coaching institutes and others had taken advantage of the same. There is no material produced by the petitioners to support the aforesaid statement of facts which has been controverted by the respondents. In this connection a question paper alleged to have been set for the Examination held in August, 1977, has been produced. Further it is said that the same question paper had been set for the examination in July. It must be borne in mind in this respect that it is said that the practice is that the question papers are distributed in the hall, answers are written thereon and returned to the examination authorities. Assuming that this question paper was meant for both the examinations, the petitioners have not disclosed the source from which they have been able to obtain this. If the matter is treated on the ground of preponderance of probabilities, it is obvious that this could not have been the question paper which had been obtained earlier than the examination due to leakage in transit. It is said by the petitioners themselves that the candidates had written out answers thereon. If that be so, it could not have been done before the examination. If the question paper had been a blank one, one could have a suspicion that it could have been obtained prior to the examination. There is also no knowing if this very question paper was set for the examination proposed to be held in July. It seems difficult to accept, assuming that there had been leakage of questions and consequent postponement of the examination from July to August that the authorities would allow the same question papers to be used for the examination held in August. Further the petitioners did not call upon the respondents to produce the question papers which were set at the examination in August or the one set for the earlier examination in order to be able to show that the same questions were set at both the examinations. Next, on the statement of the petitioners themselves the question papers have been correctly answered. If that be so, no student who could answer the questions correctly would leave the examination hall along with the question paper and thus allow himself to fail at the examination rather than pass at it. The circumstances thus clearly rule out the allegation that this is one of the question papers which had been obtained by somebody on account of leakage. In this respect the petitioners' allegations are that some question papers had been lost during transit of the packets containing the question papers to Ranchi. As I have said above, if that were so, this question paper would not have contained answers. There is no statement on affidavit that the answers were written by anyone subsequently and that it was blank when obtained. Obviously, therefore, it is a question paper used at the examination and not obtained prior to the examination. There is thus no substance in this contention.

78. The second allegation in this respect is that the mechanical device is not foolproof and human factors outweigh the correctness of the results. It is said that code numbers are put on answer books in place of the roll numbers and they are transferred to the punch cards and they are de-coded by human hands after the computer has indicated the numbers. This by itself would not prove that whatever device has been used must be considered to be incorrect and ineffective. Supposing the de-coding is done by human being, unless it is shown that anybody had acted mala fide in this respect, the system adopted to find out the result of the examination cannot be thrown out as defective. After all, examinations used to be held all over the world, answers books were examined by human beings and marks also given by human beings. A human being is also likely to err, but that alone is not sufficient for holding, unless an error is pointed out, that the system is wrong. Even so, where mechanised device has been used in part for the purpose of keeping the roll number secret in order to exclude the possibilities of partiality, only because a part of the process is done by human hands, the system as a

whole cannot be said to be one which would bring out wrong results. The petitioners have not even given illustrations to show that the mechanical device has resulted in wrong results on any occasion. How are we to assume then that the system itself is entirely bad and for that reason the result published in the present case must be held to be bad? If there be any defect in the system and improvement is required, the authorities holding the examination may think of making such improvements, but the vague apprehension expressed by the petitioners by itself cannot entitle a court to hold that the system is calculated to bring out wrong results. This contention also must, therefore, be held to be untenable.

79. The test examination has been assailed on some other grounds also. Firstly it is said that the prospectus required candidates to submit their mark-sheets by 23rd of July, 1977, but those submitting marks even after that date were allowed to appear at the test. Mr. Ghose has said that the prospectus issued to the students had the effect of 'law' which could not be violated by the authorities holding the examination. The argument is misconceived. A prospectus issued by any educational institution is merely a document giving information and directions to candidates who wish to apply. It is not a document of title nor an instrument of law which creates rights to the intending candidates. Besides that, as will be apparent, originally the examination was to be held on the 3rd of July, 1977. Keeping that in view the prospectus required applications to be submitted by the 6th of June and marks-sheets to be submitted by 23rd of July, 1977. Since the results of most of the Universities in Bihar had not been published, the said date for filing of the marks-sheets had been fixed and the intending candidates were intended to be allowed to appear at the examination on the 3rd July, 1977. As has been mentioned earlier, the Board of principals had extended this date until the last date of the interview. According to Mr. Ghose it was a mandatory provision that the marks-sheets should be produced latest by the 23rd of July, 1977. This argument has merely to be mentioned in order to be rejected. It has also been urged that the Board of Principals had no right to extend the date of submitting the marks-sheets. It has been stated on behalf of the respondents that the Board of Principals of all medical colleges in Bihar was the final authority in regard to test and admission of students and the Principal of the Patna Medical College was its Convenor and it was this Board which had decided to extend the date of submission of the marks-sheets. I do not see any reason why the Board which is the final authority in this connection could not extend the date. The contention in this respect also thus is, on its very face, untenable.

80. Another ground of attack is that students who had not passed at the I. Sc. having failed in Chemistry practical, were allowed to appear at the test examination and thus the examination was vitiated. This argument has also no foundation. The respondents have produced the resolution of the Examination Board of the Patna University by which the Board had decided to hold a special examination in chemistry practical. It appears therefrom that the Board took into consideration the large number of failure in Chemistry practical, which was in the relevant year 45 as compared to 4 in the previous year, as also the sizeable number of hard cases and on these grounds, it had decided to hold a special examination in Chemistry practical. The aforesaid resolution is said to have been passed in pursuance of the powers given to the Board by Regulation 16 of Chap. IV of the Patna University Regulations read with S. 29 (2) of the Patna University Act. Section 29 (2) of the Act aforesaid is as follows:

"29. (2). The examinations Board shall render advice to the Vice-Chancellor on conduct of examination and appointment of examiners, setting and moderating question papers, preparation, moderation and publication of examination results, submission of report of such examination results to the Academic Council and generally regulating the methods of improvement in the procedure of correct evaluation of achievement of students and the Vice-Chancellor shall be competent to take final decision:

Provided that the Vice-Chancellor shall appoint the question setters and examiners from the panel of names submitted by the Examination Board."

Regulation 16 aforesaid is as follows:

"If it is proved to the satisfaction of the Examination Board that the questions in any subject are such as candidates could not reasonably be expected to answer within the time allotted or have not been fairly distributed over the whole course in that subject, or do not conform to the regulations laid down for the examination in that subject, or show a marked change of standard, or that from any other cause injustice has been or is likely to be done, the Examination Board shall issue such directions as may be neces-

sary to remedy or prevent such injustice and shall inform the Board of Moderators concerned of the action taken."

In my view, it is thus obvious that it was within the jurisdiction of the Examination Board to take into consideration the aforesaid reasons and decide to hold a special examination. In this connection it was urged that Chemistry practical, being a part of the subject, could not be treated as a subject and, therefore, examination could not be held in part of a subject. Any layman can see the difference between theoretical and practical examinations. It is true that the practical is a part of the subject. If, however, the Board had the authority to have a fresh examination in the subject, it must be deemed to have the authority to hold an examination also for part of a subject. In the absence of any rule or regulation prohibiting them from doing so, it cannot be said that if their powers were wider they could not be exercised within the smaller sector. That exhausts the grounds for attack on the examination held.

81. In the result, I find no good ground for holding that the test examination held for selection of candidates in the present case is vitiated on account of any reason alleged.

82. That brings me to the question of reservations. As will appear from the writ petitions, originally the petitioners stated their grievance in this respect to be that the reservation taken as a whole amounted to 56% which was not permissible and secondly that the reservations for the Tata Industries and Coalmines Welfare Organisation and 'cultural' reservations were unwarranted by law. There was no prayer in the writ petitions and there is none even today for holding that the reservations in favour of the scheduled caste and tribes or backward classes were improper or unwarranted. All that was mentioned in the writ petition with regard to the backward classes was in the description of the different categories in which the aforesaid result of test had been divided. While enumerating the first category of backward classes it was merely stated:

"(1) General/Backward Class (Income below Rs. 3,000/- per annum, indicating thereby that the backward class would be those persons whose income is below Rs. 3,000/- only). No other criterion has been laid down for determining the backwardness."

In C. W. J. C. No. 2063 of 1977, however, as stated earlier, it was stated that "there is no criteria laid down for backward classes and there is no rational basis for fixing the criteria in the light based on monthly income as that is not in consonance of Art. 15 of the Constitution of India". Still even in this petition there was no prayer for quashing any order of Government laying down the list of backward classes on the ground of improper or irrational classification. As I have stated earlier, the Government order was produced in the form of annexure by the respondents. Still, there never was any amendment of the writ petition made asking the court to quash that order. It was not even contended during the course of arguments that those who have been put in the list of backward classes were, for any reason, not fit to be included therein. Even though it was said on behalf of the respondents that the fixation of the backward classes has been made on the grounds of social, cultural and economic considerations, there was no challenge by any of the writ petitioners that there was no material for coming to the conclusions aforesaid, nor were they called upon to produce materials in support of the Government decision. As will appear, what was pointed out in the writ petition, was that the criterion of monthly income was not a rational basis. It is well settled that no new ground of attack can be made without amending the writ petition (see Sivadev Singh v. State of Bihar, AIR 1963 Pat 201). In such a situation we are not called upon to hold that the list of backward classes prepared by the State of Bihar and produced in this court was illegal, improper and fit to be quashed.

83. The limited question thus which, upon the pleadings, arises is whether the classification of the backward classes limiting it to such persons whose parents have an income of less than Rs. 3,000/- per annum, is legal and proper. The question of criteria for determining backward classes came up for consideration before the Supreme Court. In the case of State of Andhra Pradesh v. P. Sagar (AIR 1968 SC 1379). In that case it was held that caste alone is no basis to determine backwardness; while determining a class caste cannot be excluded altogether; backwardness must be social and economic and similar to that of scheduled castes and tribes. Long before this in the case of State of Madras v. Smt. Champakam Dorairajan (AIR 1951 SC 226) the same question had come up for consideration and their Lordships had held that social and educational backwardness must be the determining factor. In the case of M. R. Balaji v. State of Mysore (AIR 1963 SC 649) again the Supreme Court held that caste cannot be the sole basis for determination of a backward class. In the case of Triloki Nath v. State of Jammu and

Kashmir (AIR 1969 SC 1) it was held again that caste alone could not be the determining test; it may, however, be that members of one caste may as a whole be backward taking into consideration the social, educational and cultural backwardness of such a caste as a whole. It is not necessary to multiply authorities for the propositions mentioned above. I would only mention the other directly relevant decisions. They are to be found in the cases of Minor P. Rajendran v. State of Madras (AIR 1968 SC 1012) and State of Uttar Pradesh v. Pradip Tandon (AIR 1975 SC 563) where the Supreme Court held the criteria for determining backwardness and said that the standard of living, the economic condition, the lack of educational facilities and the apathy for education etc. must be taken into consideration for determining backwardness of a class. In the case of State of Andhra Pradesh v. U. S. V. Balaram (AIR 1972 SC 1375) the Supreme Court held that the condition of the backward classes should be comparable to that of the scheduled castes and scheduled tribes; determining the backward class by caste name is not violative of Art. 15 (4) of the Constitution. Thus, by now it is well settled that while determining the backwardness of a class the social, cultural, educational and even economic circumstances must be taken into consideration.

84. In the present case for the purposes of admission into the medical colleges the State Government have decided that seats should be reserved only for such socially, educationally backward classes as have an income of less than Rs. 3,000/- every year. It is obvious that the object is to provide medical education to students and the classification is for the purpose of making such education available even to those members of the backward classes as cannot on grounds of their economic backwardness afford it. There is thus a clear nexus between the object and the classification. In this connection, however it has been pointed out that this is carving out a smaller class from a bigger class which means carving out more backward from within the backward classes. In my view, even that is permissible. It is not discriminatory to other members of the backward classes if it is for a particular purpose that a reasonable classification is made out. The criteria for such classification must, however, have rational basis for separating a group within that class from the rest and that differentia must have nexus with the object of the classification. Obviously the object is to spread medical education and keeping in view the social, educational, cultural and economic condition of the backward classes the said object can be achieved only by making reservation for members of the backward classes and while determining such backward classes, it is open to the State Government to restrict the class to those having a particular annual income. In other words, it means only that the State Government has taken into consideration the economic condition of the class also while determining it. It is that which distinguish the class carved out from the rest and there can be no doubt that it is a reasonable, intelligible and just criterion for separating the smaller out of the bigger class. It may be that the backward class for other purposes may be a bigger class, but for the purpose of reservations in the Medical Colleges, in view of the economic condition, if only a smaller class having a certain monthly income is preferred, there is no discrimination whatsoever. I am supported in this view by the observations of Mathew, J. in the case of State of Kerala v. N. M. Thomas (AIR 1976 SC 490 at p. 519 in para 108) to the following effect:

"If there are intelligible differentia which separate a group from that class from the rest and that differentia have nexus with the subject of the classification, I see no objection to a further classification within a class."

The contention of the petitioners in this respect must, therefore, fail.

85. That brings me to the next ground of attack in respect of the 'cultural' reservations. In the writ petitions the challenge was specifically made only to the reservations for the three institutions, namely, the Tatas, the Coalmines Welfare Organisation and the Lakshmi Narain Trust. It has been stated on behalf of the respondents that the reservation for their nominees was a condition precedent to their making available the facilities of their hospitals at Dhanbad and Jamshedpur which was necessary for the purpose of providing medical education through the medical colleges situated at those places and taken over by the State. It is quite obvious that if the State Government had not consented to the reservation aforesaid, the taking over of the medical colleges at those places would have been useless, for, it is well known that medical education cannot be given without affording the facilities of a hospital for the purpose of education and training of the students. It is thus for the very object of spreading medical education that these allotments had to be made. No valid objection can thus be made to it. In fact, these are not 'reservations' but these seats, as stated by the

respondents, are 'earmarked', to be filled up in a certain manner. It has been stated earlier that six such seats are earmarked for students from Nepal, 23 for foreign countries and for Nagaland, Sikkim and Bhutan to be nominated by the Central Government and 14 for the organisations which provided the hospital facilities. It is well settled that the indication of a 'source' for filling up seats does not amount to 'reservation'. The Government have a right to determine as to whether for State reasons, which may include reciprocal arrangements between different States, they should earmark any number of seats in such colleges as are run by them for foreigners or other groups of students. I would refer to the decisions in the case of D. N. Chanchala v. State of Mysore (AIR 1971 SC 1762), Kumari Chitra Ghose v. Union of India (AIR 1970 SC 35) and State of Andhra Pradesh v. U. S. V. Balaram (supra). In the last mentioned case of State of Andhra Pradesh the Supreme Court held that it is open to the State to prescribe the source from which the candidates are declared eligible for applying for admission to the medical college. In the case of D. N. Chanchala (supra) sixty seats had been set apart to be at the disposal of the State Government. The Supreme Court held that "the Government is entitled to lay down sources from which selections for admission would be made" and that "a provision laying down such source is, strictly speaking, not a reservation. It is not a reservation as understood by Art. 15 against which objection can be taken on the ground that it is excessive." In the case of Chitra Ghose (supra) also, the court held that the Government which bears the financial burden of running the medical colleges has the right to lay down the criteria for eligibility, and further that the Government cannot be denied the right to decide from what source the admission will be made. Their Lordships further said that that "if the sources are properly classified..... it is not for the courts to interfere with the manner and method of making the classification." As I have said, the specific challenge was only with regard to the three organisations yet during the course of argument the earmarking of 43 seats as a whole was assailed but it is for the same reasons that I have mentioned why the argument cannot be accepted either for a part or for the whole.

86. The next alleged reservation is in favour of women candidates. This is said to be a reservation not protected by Article 15 (4) of the Constitution. The question first arises whether it is a reservation for women or an earmarking of seats for them unlike reservation for backward classes or scheduled castes or tribes. In this connection it is relevant to state that the State stated in its very first counter-affidavit that it was only an indication of source keeping in view the State's job requirements. In its show cause petition, it was sought to be justified also on the ground that even if it amounted to reservation it was protected under Art. 15 (4). The Government order shows the reservations in favour of the scheduled castes and tribes and backward classes and at the same time for women. It was on this account said that the Government did not intend to indicate the source in the case of women, but made 'reservation' as in the other cases aforesaid. In such circumstances the question arises, whether assuming this to be so, it is open to them to justify the same now as 'indication' of a source. I do not see any reason why the State cannot do it. It may be that originally it had not occurred to them to mention the nature of the alleged reservation for women as a 'source'. The matter relates, however, only to an interpretation of the nature of the act. The original intent alone cannot be the criterion for determining the same. Now that we are called upon to judge the validity thereof, it is fair that we must judge it, after considering all the interpretations that can be put upon the transaction. Now that we have to decide whether it is 'reservation' or 'indication of a source', considering all the circumstances obtaining today we have to judge its validity. Today, upon the arguments and the materials produced, if it appears that it is merely earmarking of seats for women, we must hold it to be so. In this background, I will consider the question. Article 15 (1) prohibits discrimination on the grounds "only of.....sex.....". Clause (3) of the said article, however, enables the State to make special provision for women and children. Clause (4) further states that the State is not prevented from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the scheduled castes and tribes. This is notwithstanding Art. 15 or Art. 29 (2). Article 29 (2) does not refer to women. It has, however, been urged on behalf of the petitioners that the reservation in the present case for women is not covered by Arts. 15 (3) and 15 (4). In the present case it has been urged on behalf of the State that in view of certain consideration 20% of the seats have been allotted to women without any restriction of caste or creed or backward-

ness of the class; the consideration being that there is need for women doctors in the State to run the hospitals and departments therein particularly for women, health and family planning centres etc. and that 1/5th of the cadre strength of doctors in the State Medical services is that of women and, therefore, it follows that the Government needs at least 20% women doctors to fill up the seats earmarked for them in the Health services and with this end in view the State Government have allotted 20% or 125 seats for women. The question, therefore, arises as to what is the difference between a 'reservation' and 'indication of a source'. A reservation in the sense in which the word is used with regard to backward classes and scheduled tribes and castes, obviously means that particular tribes and castes and classes which are considered to be socially, economically and educationally backward have to be provided for. In my view, the reservations have to be made on account of that fact that they are so backward, that it is for the interest of the communities concerned keeping in view the object of social justice that reservation is made. Where, however, a source is indicated and seats are allotted they would not be, for the reason that the persons for whom the seats are earmarked should be educationally, socially or culturally backward and require protection. If that were so, it would amount to reservation. In view of the decisions of the Supreme Court, however, it is undoubtedly the right of the Government which runs the medical institutions to allot certain seats to certain persons on grounds other than social, educational or economical or cultural backwardness. The earmarking of seats in the present case for women is not on account of any need for women as such. It is to fulfill the needs of the State which runs the medical colleges and bears the expenses thereof. The distinction between indication of a source and reservation, to my mind, is that in one case it is the interest of the class for which reservations are made and that is the determining factor, whereas in the case of earmarking it is not the need of the students which dictates the earmarking of seats for them but it is the need of the State or some other valid consideration. To illustrate it, seats are allotted to foreign students, it is not on account of their need for protection that there is allotment. It is because the State wants to have reciprocal arrangement or for other reasons of State it is considered proper that the State should provide for citizens of another State to have education in this country. There are decisions of the Supreme Court categorising certain allotments as mere indication of sources and not reservations. My attention has, however, not been drawn to any decision where the distinction between "reservation" and "indication of source" has clearly been laid down. I have, however, ventured to express my opinion as above. In my view, therefore, in the present case it was the need of the State of having 20% doctors in order to be able to fill up the cadre and to be able to provide medical facilities for women patients in hospitals and other institutions, that the aforesaid earmarking has been done. I have thus no hesitation in accepting the case of the State that these are not reservations like those for the backward classes and scheduled castes and tribes. Such allotment of seats for women cannot, therefore, be challenged as not coming within Article 15 (3) or violative of Article 15 (4). The criteria adopted for testing the validity of reservations in respect of backward classes or scheduled castes and tribes cannot be employed for testing the validity of allotment of seats. I would accordingly repeal the argument. Thus, these allotments cannot be challenged.

87. In view of what I have said above, it is clear that the petitioners have not succeeded in challenging successfully the reservations for backward classes or the 'cultural' reservations or the allotment of seats to women. As I have said earlier, they did not challenge at all the reservations in favour of scheduled castes and tribes.

88. Assuming, however, that the reservations in favour of the backward classes, the 'cultural' reservations and the allotment of seats to women are bad, still it cannot be lost sight of that the petitioners do not challenge the reservation for scheduled castes and tribes. These reservations, as stated earlier, are 14% for the scheduled castes and 9% for the tribes. They make a total of 23%. These reservations must be taken to be good. Thus, out of the total number of 670 seats, 23% thereof, which would be roughly 155 seats, have been validly reversed. The total number of seats reserved upon the statement of the parties is, however, 88 for the scheduled castes and 56 for scheduled tribes. If that be relied upon, a total number of 144 seats are reserved for them. Thus the seats which remain to be filled up, if there are no reservation for anyone other than members of the scheduled castes and tribes, are only 526. To go back thus to the point with regard to the claim of the petitioners, it is obvious that even if their entire allegation be accepted and only the reservation in favour of scheduled castes

and tribes, which is unchallenged, is accepted, none of these petitioners would be able to qualify for being selected even if all the seats, barring these 144, were left open for general candidates. The reason is, as I have said earlier, that there are 570 persons who sat at the test and have obtained marks higher than the petitioner who has obtained the highest among them, namely, 93 marks. Upon their own case thus, and upon the uncontroverted statement with regard to the marks obtained by them, it is quite obvious that the petitioners do not have a right to maintain these writ applications, for, assuming everything in their favour they have no chances at all of being taken in and the writ if issued would thus be infructuous. In this connection I must point out that the finding that the examination was not vitiated in any manner is a premise for the aforesaid finding.

89. That brings me again to the challenge which was made originally, namely, that the total reservations come to 56% which violates the maximum laid down in the decision of the Supreme Court in the case of M. R. Balaji (supra). According to the State the total reservations came to 53% and that is what appears from the Government order already referred to earlier. The slight distinction between the two is, however, immaterial. If, as I have held above, the cultural reservations and the earmarking of seats for women are allotments and indication of sources from which the seats are to be filled up, they must be excluded in calculating the percentage of reservation from the backward classes and scheduled castes which comes to only 33%. The question of their being beyond 50% does not arise. The question was agitated at the Bar as to whether the limit of 50% laid down in the case of M. R. Balaji (supra) was the maximum limit or not. It is not necessary for me to express any opinion on that question for the simple reason that in view of the findings in the present case the reservations amount to only 33% and no more.

90. That brings me to the last point with regard to the reduction of seats from 975 to 670. This has been challenged on the ground that it is violative of Article 39 of the Constitution. It is well known that the directive principles contained in the Constitution are not enforceable at law. Apart from that, the point has to be considered in the background of the circumstances of a case, there being no hard and fast rule laid down anywhere that the number of seats cannot be reduced. In the present case the State Government have reduced the number in accordance with the recommendations of a High Power Committee and of the Indian Medical Council. The Government run the institutions. The Government have thus the right to determine how many students can be given medical education and trained. The Government have also to determine how many students they can afford to educate in their institutions. While fixing the number of seats in the medical colleges in the State the Government have thus to keep in mind and to be dictated by different kinds of relevant considerations. It is difficult for me to understand how when a Government decides upon a total number of seats in a medical college, it can be said to be violative of Art. 39 of the Constitution. All that the aforesaid article does is to lay down certain principles of policy to be followed by the State. It is, however, obvious that the principles are to be followed to the extent the State Exchequer or the reasons of State would permit. During the course of argument counsel for the petitioners could not say anything concrete as to why the Government did not have the right to change its policy with regard to the number of seats to be made available to students within the State. It was urged by Mr. Ghose in this connection that Article 19 (1) (g) of the Constitution guaranteed the right to carry on a profession of one's choice and the curtailment of such a right, by reducing the number of seats available is a violation of such a right. The argument is obviously untenable. It would be plausible only if it be held that a citizen has a right, enforceable at law, to demand from the State that it shall make provision for the entire population of the country to be educated for each profession. It cannot so be held without being absurd. It would mean that there should be arts colleges, science colleges, medical colleges etc. having unlimited seats and unlimited provisions for education of an unlimited number of students for it is not known what percentage of students would like one profession or the other. If that be not so, then the question as to how many persons the State can provide for, is a matter which rests with their discretion — of course the discretion must be exercised justly and fairly. In the instant case, the State came out with good reasons, and they remain uncontroverted. It is not said that it was done with any mala fide. In the circumstances aforesaid, the Government had the right to determine whether the medical colleges should have 975 seats or 670. It cannot thus, by any stretch of imagination, be said to violate Article 19 (1) (g) or Art. 14

of the Constitution. The argument in this regard is thus untenable.

91. In the result, I would dismiss all the three applications. In the circumstances of the case, however, I would make no order as to costs.

Petitions dismissed.

AIR 1979 PATNA 308

S. SARWAR ALI, AG. C. J. AND S. K. CHOUDHURI, J.

M/s. Parshava Properties Ltd., Petitioner v. A. K. Bose, Opposite Party.

Civil Revn. Case No. 2132 of 1978, D/- 15-5-1979.*

Civil P. C. (1908), Ss. 2 (2), 47, 96 and 115 — After amendment of 1976 — Interpretation of S. 2 (2) — "Suit" meaning of — Decision of a question under S. 47 whether decree — Whether appeal or revision lies. AIR 1978 Raj 127 and AIR 1978 Ker 201 (FB), Diss.

An objection under S. 47, Civil P. C. to execution of a decree of injunction against a company by attachment of its properties and for detaining its director in civil prison under O. 21, R. 32 (2) was overruled and the Court granted leave to proceed with execution as prayed. A revision was filed in the High Court against that Order.

Held that the order of the executing Court under S. 47 amounted to a decree within S. 2 (2) as amended by Act 104 of 1976 and being appealable as a decree no revision was maintainable. (Para 30)

Although the definition of "a decree" in S. 2 (2), Civil P. C., as amended in 1976 has omitted from the old definition the statutory fiction viz., 'a determination of a question under Section 47 shall be deemed to be a decree', nevertheless if an order passed by a court satisfies the essential characteristics of decree, as now defined, the mere fact that the order was passed in exercise of powers under Section 47 of the Code would not be of consequence. (Para 8)

In order to satisfy the definition of decree two things have to be established. They are: (a) The adjudication in question conclusively determines the rights of the parties with regard to all or any of the matters in controversy (b) The determination is in respect of a controversy in the suit. (Para 10)

Construing the word "suit" in Section 2 (2) in its wider meaning as including proceedings which are continuation of the suit in the eye of law, the determination in a proceeding such as an appeal from or execution of the decree would be a determination in the suit, so as to amount to a decree within S. 2 (2). AIR 1957 SC 540 and AIR 1962 SC 1886, Rel. on. (Paras 11, 12, 13 and 22)

It is true that the purpose of the amendment of S. 2 (2) was to eliminate unnecessary appeals and a number of orders passed under Section 47 of the Code would be non-appealable, in view of the amendment of Section 2 (2) of the Code. Nevertheless, there may be certain orders which may be appealable, which in its turn would depend on whether such orders come within the definition of decree. (Para 14)

If the amendment of S. 2 (2) be taken to abolish right of appeal against orders under S. 47 even where final determination of rights takes place, the provision would be discriminatory and violative of Art. 14 of the Constitution. (Para 15)

Hence, the right of appeal is only available against conclusive determination and not in regard to orders which are interlocutory in nature. The intention of the legislature appears to eliminate appeals only against orders where right of appeal is not essential like orders which are interlocutory in character. AIR 1976 SC 1503 and AIR 1962 SC 1886, Ref. AIR 1978 Raj 127 and AIR 1978 Ker 201 (FB), Diss. (Para 21)

Cases Referred: Chronological Paras

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*(Against order of Budhdeo Narain Sinha, 3rd Addl. Sub. J., Sasaram, D/- 12-8-1978).

(1906) ILR 29 Mad 309 13, 27
(1902) ILR 26 Bom 109 13, 27
(1896) ILR 20 Bom 198 13
(1895) 22 Ind App 44 (PC) 13

Lal Narain Sinha, R. P. Katriar and Sudhir Kumar Katriar, for Petitioner; Sudhir Chandra Ghose and Arun Chandra Mitra, for Opposite Party.

SARWAR ALI AG., C. J.:— This application raises an interesting but difficult question in relation to interpretation of Section 2 (2), Civil P. C. ("the Code"), as it now stands after the amendment of the Code. The point under consideration is not covered by either a decision of the Supreme Court or a bench decision of this Court. But first the facts.

2. The predecessor-in-interest of the opposite party filed a suit being Title Suit No. 17/51 of 1949/50 for various reliefs. They included: (a) a declaration that the plaintiff is entitled to quarry limestone and manufacture lime from the lower and upper Murli Hills; and (b) the defendants be permanently injuncted from dispossessing the plaintiff from the suit property described in the schedule to the plaint. The suit was dismissed on 12-4-1951. On appeal the High Court modified the decree on 15-11-1970 (sic). A further appeal was taken to the Supreme Court which was disposed of on 22-8-1967. The decree of the High Court was modified. It was held, inter alia, that the State of Bihar, its agents and servants, and Messrs Dalmia Jain and Company Ltd. are restrained from interfering with the plaintiff's possession in respect of plot No. 168 of village Bakhnour Plot Nos. 42, 128, 130 and 44 (excluding the lands acquired for the Dehri Rohtas Light Railway Company Ltd.) of village Samahuta so long as the tenancy rights vested in the plaintiff are not lawfully determined.

3. On 8-1-1968 an application for execution was filed. It was stated in the execution petition as follows:—

"That in spite of the decree of the Supreme Court the defendants judgment-debtors although has and had an opportunity to obey it and are wilfully disturbing the possession of the decree-holder on the aforesaid plots and are trespassing over the aforesaid plots with the view to go to the upper Murli Hill."

It was prayed in the execution petition that the properties as detailed be attached and that Sri J. P. Saxena, a Director of Parshava Properties Ltd. (Dalmia Jain and Company having been subsequently named as Parshava Properties Ltd.) be detained in civil prison. Thus it was prayed that action under Order 21, Rule 32, Civil P. C. be taken.

4. An objection under Section 47, Civil P. C. was filed by the petitioner. The allegation that the judgment-debtors or its employees were disturbing the possession of decree-holder on the plots claimed was denied. It was further contended that there was no violation or disobedience of the order of any court. The court below having heard the parties has overruled the objection and has held that there was wilful and flagrant disobedience of the direction of the Court. In the facts and circumstances of the case it, therefore, thought fit, to grant leave of the Court to the decree-holder for detaining in civil prison the Director or other Principal Officers named in the petition for execution. It further ordered that the decree be enforced by attachment of property.

5. Aggrieved against the aforesaid decision of the learned Subordinate Judge the petitioner filed a Civil Revision application. A first appeal numbered as First Appeal 916/1978 has also been filed.

6. When this Civil Revision application was listed for hearing before a learned Single Judge it was contended on behalf of the petitioner that it was the First Appeal and not Civil Revision which was maintainable against the impugned order. The learned Single Judge has referred this case to the Division Bench.

7. It is not in dispute that the determination of the court below in this case is under Section 47, Civil P. C. According to the law as it stood before the recent amendment of 1976 such an order was appealable as a decree. This was so because the definition of decree included by a deeming fiction "determination of any question within Section 47" of the Code. Now that fiction has been eliminated by the amended definition of decree. The question which remains to be considered is whether all orders passed under Section 47 of the Code are excluded from the definition of the decree, or even now some of the orders come

within the express words of the amended definition. This takes us to the consideration of the definition of decree and the scope and content thereof.

8. It would be first pertinent to read the definitions before and after the amendment. Decree was defined as follows before the recent amendment:

"2 (2) "decree" means the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final. It shall be deemed to include the rejection of a plaint and the determination of any question within Section 47 or Section 144, but shall not include—

(a) any adjudication from which an appeal lies as an appeal from an order, or

(b) any order of dismissal for default."

It now reads as:—

"2 (2). "Decree" means the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final. It shall be deemed to include the rejection of a plaint and the determination of any question within Section 144, but shall not include—

(a) any adjudication from which an appeal lies as an appeal from an order, or

(b) any order of dismissal for default."

The definition before the amendment was thus in three parts. The first part sets out the essential characteristics which, if satisfied, would amount to a decree. The second part introduced a legal fiction. It said, inter alia, that determination of any question within Section 47 of the Code shall be deemed to be a decree. The third part states what shall not be a decree. By the amendment the second part has been deleted, in so far as "any question under Section 47" is concerned. The effect thereof obviously is that the aforesaid statutory fiction disappears. It cannot now be said that the determination of any question within Section 47 is a decree. Nevertheless, if an order passed by a court satisfies the essential characteristics of decree, as now defined, the mere fact that the order was passed in exercise of powers under Section 47 of the Code would not be of consequence.

9. It was contended that the very purpose of the deletion of the deeming clause was to make orders passed under Section 47 non-appealable. Further that it would frustrate the object of the legislature if orders under Section 47 were held to be a decree and as such appealable. Dealing with the last aspect it may at once be pointed out that a large number of orders would not in any event come within the definition of the decree, as they do not finally determine the rights of the parties with regard to all or any of the matters in controversy. To illustrate, orders of stay of execution proceeding and the like cannot come under the said category. I would later refer to the aspect of legislative intent and the legislative policy.

10. Let us first look to the language of the provision. In order to satisfy the definition of decree two things have to be established. They are: (a) The adjudication in question conclusively determines the rights of the parties with regard to all or any of the matters in controversy and (b) The determination is in respect of a controversy in the suit. There does not appear to be serious dispute that if the order of the court below determines a controversy in the suit, and that controversy conclusively determines some of the rights of the parties, such an order would fulfil the definition of decree. The decision in this case, therefore, hinges on whether the order of the court below is in relation to a matter in controversy in the suit.

11. The expression suit may be interpreted in two ways. It may either mean a civil proceeding which is instituted by presentation of a plaint and culminates in the decree passed by the court of first instance. This would be a narrow or limited meaning. The crucial expressions may also have a wider meaning. The expressions may embrace within themselves proceedings which are continuation of the suit in the eye of law.

12. It is well settled that an appeal is not a fresh suit. It is only a continuation of the original proceeding

and a stage in the suit (See AIR 1957 SC 540 at p. 553 and AIR 1915 Mad 1223 at p. 1229 (FB)). It is to be observed that there is no specific provision in the Code requiring preparation of decree in an appeal from original decree. But that a decree has to be prepared is implicit in Section 100 Civil P. C. This section envisages second appeal, in enumerated circumstances, from decree passed in appeal. The question of preparation of decree can only arise if the decision in appeal is decree within the meaning of law. It can only be treated to be a decree provided the determination in an appeal is a determination in the suit. We are, therefore, led to the conclusion that the determination in a proceeding which is continuation of a suit is determination in the suit, so as to amount to decree, within the meaning of Section 2 (2) of the Code.

13. The true nature of the execution proceeding has been clearly indicated in Bhushayya D. v. K. Ramkrishnayya, (AIR 1962 SC 1886 at p. 1899) where it has been held (approving the decisions in (1902) ILR 26 Bom 109, (1906) ILR 29 Mad 309 and (1933) ILR 56 Mad 430 (FB)) that execution proceeding is a continuation of the suit. Reference in this connection may also be made to the decisions in Sadashiv Ganpatrao v. Vitthaldas Nanchand ((1896) ILR 20 Bom 198) and Thakur Prasad v. Sheikh Fakir-Ullah ((1895) 22 Ind App 44 (PC)) where it has been held that applications for execution of the decree are proceedings in the suit. It would thus appear that both appeal and execution proceedings are continuation of the suit. Just as final determination of a controversy in the appeal is a decree, so must be the decision in the execution proceeding, provided the other necessary ingredients of Section 2 (2) of the Code, are fulfilled.

14. Much emphasis was laid by the learned counsel for the opposite party on the legislative policy in bringing about the amendment. It was contended that all determinations made under the provisions of Section 47 of the Code have been made non-appealable. The underlying purpose of this, it was claimed, is the shortening of litigations. That the purpose of the amendment was to eliminate unnecessary appeals is neither in doubt nor disputed. As already noticed a number of orders passed under Section 47 of the Code would be non-appealable, in view of the amendment of Section 2 (2) of the Code. Nevertheless, there may be certain orders which may be appealable, which in its turn would depend on whether such orders come within the definition of decree.

15. Learned counsel for the petitioner contended that if the amendment be taken to abolish the right of appeal even where final determination of rights takes place there will be violation of principles of equality as embodied in Article 14 of the Constitution. In my view the contention has substance. It is well known that in order to satisfy the test of permissible classification two conditions have to be fulfilled. They are: (1) the classification must be founded on an intelligible differentia which distinguishes those who are grouped together from those who are left out and, (2) it must have a rational relation to the object sought to be achieved by the statute in question.

16. The narrower construction as canvassed by the opposite party could result in the provision becoming discriminatory (as) would be illustrated by examining different situations in which appeal would or would not lie from various determinations.

17. Let us take a case where in a suit for recovery of money, a decree is passed against one defendant and dismissed against another. In the course of the execution proceeding the exonerated defendant files objection. The objection of the exonerated defendant is overruled and the said defendant or his legal representatives are made liable by the decision in the execution proceeding. Such a person would not have a right of suit. Section 47 refrains him from filing a suit. An appeal would be impermissible on the contention raised. This may be compared with a situation where a person is not impleaded in the suit or though impleaded, is struck off from the record (which comes to the same thing). Such a person can raise objection to the attachment of property under O. 21, R. 58 of the Code. If his objection is overruled he has a right of appeal under Order 21, Rule 58 (4) of the Code. It appears to me that there would be no rational basis for classification in putting impleaded parties or

their representatives against whom the suit has been dismissed as one class, different from persons who were not impleaded in the suit. In the illustration just given what has been determined in the suit is the liability of one of the defendants. The exonerated defendant is not liable under the decree nor the defendant whose liability was left undetermined ((See AIR 1959 Mad 80). A person not impleaded in the suit has also his liability undetermined. In either case when the objection is in regard to a property which they claim, the matter would not be concluded by the decree one way or the other. The decree has no relevance to the question of such a claim. Yet if the contention of the opposite party is correct, there would be no right of appeal to the impleaded party or his representatives.

18. It would be pertinent to examine the provisions of Order 21, Rules 97 to 103 of the Code. The provisions confer right of appeal in enumerated circumstances. If a dispute arises with regard to the claim of property followed in execution then if the dispute has arisen before the sale there is no right of appeal to the impleaded party although there is such a right to a new claimant. There would be right of appeal to all parties if the dispute arises at the stage of delivery of possession. This is a clear indicator to the intention of the legislature that right of appeal in respect of final determination of a matter not adjudicated upon was in the contemplation of the legislature. To take away right of appeal even in such cases would be, in my view, violative of Article 14 of the Constitution.

19. The contention of the opposite party leads to anomalies and patent injustice. And these have to be avoided unless compelled by the express language of the statute. As Lord Simon pointed out in Rugby Joint Water Board v. Footitt (1972-1 All ER 1057):

"It is a canon of statutory interpretation, founded on happy experience, that Parliament is presumed to intend justice and to avoid injustice."

The Supreme Court has approved this approach in the following words in Budhan Singh v. Babi Bux, (AIR 1970 SC 1880):

".....It is necessary to mention that it is proper to assume that the lawmakers who are the representatives of the people enact laws which the society considers as honest, fair and equitable. The object of every legislation is to advance public welfare. In other words, as observed by Crawford in his book on Statutory Constructions that the entire legislative process is influenced by consideration of justice and reason. Justice and reason constitute the great general legislative intent in every piece of legislation. Consequently, where the suggested construction operates harshly, ridiculously or in any other manner contrary to prevailing conceptions of justice and reason, in most instances, it would seem that the apparent or suggested meaning of the statute was not the one intended by the law-makers. In the absence of some other indication that the harsh or ridiculous effect was actually intended by the legislature there is little reason to believe that it represents the legislative intent."

20. It would also be pertinent to point out that in all developed jurisprudence there is at least one right of appeal even on questions of fact. Faced with a situation where two plausible interpretations are possible, I would be rather inclined to the view which upholds the right of appeal — in preference to an interpretation which denies such a right. This I am observing on the assumption that the two views are equally balanced. But, as already indicated, in my opinion, the view propounded by the petitioner is correct and acceptable.

21. Learned counsel for the opposite party laid much stress on the fact that the intention of the legislature was to shorten litigation by eliminating the right of appeal. In my view, the interpretation that I am putting does not go contrary to that intention. Even on the interpretation that I have put, right of appeal is only available against conclusive determination and not in regard to orders which are interlocutory in nature. The intention of the legislature, in my view, appears to me to eliminate appeals only against orders where right of appeal is not essential like orders which are interlocutory in character.

22. In my view, therefore, the expression suit should be interpreted for the purpose of Section 2 (2) and Section 96, Civil P. C. to continue after the decree till the stage of appeal and execution.

23. It only now remains to examine some of the decisions that were cited at the bar. Learned counsel for the opposite party placed strong reliance on Diwan Brothers v. Central Bank of India, Bombay (AIR 1976 SC 1503). All decisions, even the decisions of the Supreme Court, have to be examined in the context of the essential facts. Decision of courts are not like definition clauses in a statute. The observations made are in relation to the controversy raised. They do not purport to lay down proposition which are not necessary for the decision of the case. Decisions are authorities for what they decide and not what logically follows from them. I now examine the following observations in Diwan Brothers' case which has been relied upon by the opposite party:—

"Thus on a consideration of the authorities mentioned above the propositions may be summarised as follows:

'Firstly, that under the definition of a 'decree' contained in Section 2 (2) Civil P. C. 1908, three essential conditions are necessary:

(i) that the adjudication must be given in a suit:

(ii) that the suit must start with a plaint and culminate in a decree; and

(iii) that the adjudication must be formal and final, must be given by a civil or revenue court."

24. It would appear that the decision was dealing with a fiscal matter and decided the principles which govern the interpretation of fiscal statutes. Secondly the decision itself points out that there could not be decree having been passed by a tribunal and not a court. If I may say so with respect, the observation that a suit may be identified by its commencement on the basis of a plaint and its conclusion by a decree is an observation quite apt for identification of a proceeding which may be called a suit, but the question whether the suit after it is decided at the initial stage continues to be so even in appeal or execution proceeding was neither relevant nor decided.

25. The next case relied upon by the learned counsel for the opposite party is the decision Hansraj Gupta v. Dehradun-Mussoorie Electric Tramway Co. Ltd. (AIR 1933 PC 63) where it was observed:—

"The word "suit" ordinarily means, and apart from some context must be taken to mean, a civil proceeding instituted by the presentation of a plaint." The Privy Council in that case was considering the question whether application by a liquidator under Section 186 of the Companies Act 1913 was a suit within the meaning of Section 3 of the Limitation Act, 1908. It is in that context that the observation relied upon was made. It is not, in my view, helpful in resolving a controversy which is in a completely different context.

26. Learned counsel for the opposite party placed reliance on the observation of the Privy Council in R. M. A. R. A. Adaikappa Chettiar v. R. Chandrasekhara Thevar (AIR 1948 PC 12) in paragraph 8 where a distinction is made between execution proceeding and a suit. That distinction was pertinent in the context of the question under consideration and cannot be read to mean that the execution proceedings are not continuation of the suit.

27. I must now refer to the decisions relied upon by the learned counsel for the petitioner, namely, Bhushayya D. v. K. Ramakrishnayya (AIR 1962 SC 1886). In the case before the Supreme Court, in the execution proceeding, pursuant to a decree, certain properties were brought to sale and were purchased. Before the sale was confirmed the appellant (a minor) represented by his maternal grandfather, filed an application to set aside the sale under Order 21, Rule 90 of the Code. Later a memorandum was filed in the court by the guardian of the appellant to the effect that the matter was adjusted and the petition should be dismissed as having been withdrawn. No sanction of the court was obtained by the guardian for withdrawing the objection. The question for consideration was whether the withdrawal of the said petition by the guardian was in contravention of Order 32, Rule 7 of the Code. Order 32, Rule 7 clause (1) is as follows:—

"No next friend or guardian for the suit shall, without the leave of the court, expressly recorded in proceedings, enter into any agreement or compromise on behalf of a minor with reference to the suit in which he acts as next friend or guardian."

Considering the words of this rule it was held that the words with respect to the suit must be limited to the

rights put in issue in the suit. It was observed:—

"The next limitation is that the protection is only during the pendency of the suit. When does a suit come to an end? It has been held that for the purpose of the said rule an execution proceeding is a continuation of a suit: See (1902) ILR 26 Bom 109, Arunachallam Chetty v. Ramanandhan Chetty, (1906) ILR 29 Mad 309 and Mutha Lakkammal v. Narappa Reddiar, (1933) ILR 56 Mad 430: (AIR 1933 Mad 456) (FB). If it was a continuation, the rule would also apply to an agreement or compromise with reference to the said execution proceeding. But, just like in the case of a suit, in the case of execution proceedings, also, the agreement or compromise shall be one affecting rights or liabilities ascertained or declared by the decree put in execution. As in the case of a suit, so also in the case of an execution of a decree, mere procedural steps not affecting the rights or liabilities so declared are not governed by the provision. The guardian may agree to an adjournment of a sale, to a waiver of a fresh proclamation, to a reduction of upset price etc. It could not have been the intention of the Legislature that every time such a step is taken, the procedure laid down in O. XXXII, R. 7 of the Code should be complied with."

Finally it was held that the "result is that O. XXXII, R. 7 of the Code will apply only to an agreement of compromise entered into by the guardian of a party to the suit, who is the minor, with another party thereof during the pendency of the suit, and the execution proceedings." It would thus be seen that the expression with regard to matters in suit occurring in Section 2 (2) of the Code and the expression with reference to the suit occurring in Order XXXII, Rule 7 are practically the same and in regard to the final determination, according to the Supreme Court, Order XXXII R. 7 applied while it would not apply to interlocutory matters. This leads to the conclusion that the expression suit is capable of being interpreted, in a proper context, as including an execution proceeding.

28. Learned counsel for the opposite party relied on the decisions in Mohan Das v. Kamla Devi (AIR 1978 Raj 127) and Mohammad Khan v. State Bank of Travancore (AIR 1978 Ker 201 (FB)) No doubt observations in these two decisions help the opposite party. These decisions do not examine the question from the point of view which have been canvassed in this case. The aspects now presented were not presented before the Rajasthan and Kerala High Court. For the reasons already discussed I respectfully take a view different from the view taken in the aforesaid decisions.

29. In my opinion, the point of view put forth on behalf of the petitioners is preferable and therefore acceptable. It avoids all anomalies and injustice and sustains constitutionality of the amendment.

30. Consequently, I would hold that this application is not maintainable and the petitioner has right to pursue the appeal which it has already filed. This application is accordingly dismissed as not maintainable but in the circumstances without costs.

S. K. CHOUDHURI, J.:— I agree.

Revision dismissed.

AIR 1979 PATNA 314

LALIT MOHAN SHARMA, J.

Smt. Rampati Devi and another, Appellants v. Mt. Chandrika Devi and others, Respondents.

A. F. O. O. No. 24 of 1978, D/- 19-2-1979.*

Civil P. C. (1908), O. 9, R. 13, Second Proviso — Applicability — Applies only in cases of irregularity in service of summons — Does not apply where there is no service of summons at all — Burden of proving all necessary conditions is on person who claims benefit of Proviso.

What is contemplated by the Proviso to O. 9, R. 13 is merely an irregularity in the service of summons and it cannot be equated with a case where no summons had been served at all. Provisions of the Second Proviso which preclude the Court from setting aside ex parte decree merely on the ground of irregularity cannot therefore be extended where the summons had not been served at all. Besides, the Court has to be satisfied that the defendant had notice of the date of hearing and had sufficient time to appear and answer the claim of plaintiff before it can act under the new amended Proviso. The Proviso is by way of ex-

*(Against order of B. B. Prasad, Sub-J., Bihar, D/- 19-12-1977).

ception to the general rule and the burden to prove all the necessary conditions for the application of the proviso is upon a person who claims the benefit thereunder. (Para 6)

Cases Referred: Chronological Paras

AIR 1923 Pat 433 3
AIR 1916 Cal 600 3

Jugal Kishore Prasad, for Appellants; Lakshman Sharan Sinha, Pashupati Prasad Sinha and Mahesh Prasad No. 2, for Respondents.

JUDGMENT: — This appeal by the defendants in a suit in which an ex parte decree has been passed against them, has been filed against the judgment of the Court below rejecting the appellants' application under O. 9, R. 13 of the Civil P. C. (hereinafter referred to as 'the Code') for setting aside the ex parte decree. The suit was filed by the plaintiffs-respondents for cancelling a sale deed executed by them in favour of the appellants on certain grounds. The suit was decreed ex parte on 14-4-1977 and an application by the appellants was filed on 12-5-77, that is, within the period of limitation. The appellants have alleged that they were not served with the summons in the suit and had no knowledge about the same till after the ex parte decree was passed. The Court has rejected their case.

2. Admittedly, the appellants are pardanashin ladies and according to the plaintiffs' case, the serving peon served the summonses through a maid-servant. During the course of evidence, it became clear that the allegations regarding service through a maid-servant could not be established. The further evidence on behalf of the respondents that the defendants-appellants from behind a parda indicated that they would not accept the summonses, does not appear to be reliable and has been rightly disbelieved by the Court below. The evidence of service has been rejected by the Court below and the view taken appears to be correct. However, the Court assumed that in those circumstances there was merely an irregularity in the service of summons within the meaning of the Second Proviso to R. 13 of O. 9 of the Code and, consequently, the decree should not be set aside. The Court has assumed that the defendants had notice of the date of hearing and had sufficient time to appear and answer the plaintiffs' claim.

3. Mr. Jugal Kishore Prasad, appearing for the appellants, has contended that in the facts and circumstances of the case, it has to be held that the summonses were not served at all on the appellants and further that in such a case the Second Proviso to R. 13 has no application. Mr. Lakshman Sharan Sinha, appearing for the respondents, argued that the service of summonses in the case was valid inasmuch as the appellants are pardanashin ladies and the other conditions of R. 17 of O. 5 of the Code were satisfied. The said provisions are in the following terms:

"Procedure when defendant refused to accept service, or cannot be found where the defendant or his agent or such other person as aforesaid refuses to sign the acknowledgment, or where the serving officer, after using all due and reasonable diligence, cannot find the defendant, who is absent from his residence at the time when service is sought to be effected on him at his residence and there is no likelihood of his being found at the residence within a reasonable time, and there is no agent empowered to accept service of the summons on his behalf, nor any other person on whom service can be made, the serving officer shall affix a copy of the summons on the outer door or some other conspicuous part of the house in which the defendant ordinarily resides or carries on business or personally works for gain, and shall then return the original to the Court from which it was issued, with a report endorsed thereon or annexed thereto stating that he has so affixed the copy, the circumstances under which he did so and the name and address of the person (if any) by whom the house was identified and in whose presence the copy was affixed."

Relying upon the decisions in Mt. Najmunnisa v. Jagmohan Lal (AIR 1923 Pat 433) and Khiroda Sundari v. Nabin Chandra (AIR 1916 Cal 600), the learned counsel contended that R. 17 applies to a case where a defendant being pardanashin lady is not able to accept service personally and has no agent empowered to accept notice on her behalf and has no adult member in her family on whom service may be effected. As provided by the rule, service can be effected by merely affixing a copy of the summons on the outer door or some other conspicuous part of the house in which the lady ordinarily resides. It is, therefore, suggested that ignoring the story of service of notice through a maid-servant, and

further assuming that the defendants did not personally declare from behind the parda that they would not accept the summonses, still the service of summonses must be deemed to be valid to this case, as they were affixed on the house by the serving peon. It is difficult to accept the argument in the present case inasmuch as admittedly the husbands of the two ladies respectively are alive and it is not suggested that they have separated from their wives. In fact, A. W. 2 Nand Keshwar Singh, who has deposed in favour of the appellants, is the husband of the appellant No. 1 and from his and the other evidence on the record, it is clear that the respective husbands of the two appellants have been looking after the affairs of their respective wives and are their agents. The burden to prove all the necessary conditions, which permit application of R. 17 of O. 5 of the Code is upon the plaintiffs and since it has not been shown in the present case that the respective husbands of the two appellants were not available in the village when the serving peon had gone there, the service of summonses in the present case, cannot be considered to be valid. I, therefore, hold that the defendants were not served with the summonses before the suit was taken up for ex parte hearing.

4. Mr. Sinha next argued that the notice of the suit had been sent by post also and it must be presumed that there was valid service. Ramashray Singh, husband of the appellant No. 2, is said to have received the postal notice and granted receipt, which is Ext. A. The plaintiffs called for the signatures of Ramashray Singh from the records of a criminal case, which were marked as Exts. A-1 and A-2. The Court below states that the writings are similar and it has been inferred therefrom that the postal notice must have been sent. Since there was a serious denial of the genuineness of Ext. A, the plaintiffs should have examined an expert for comparing the signatures and in absence of the same I do not feel inclined to place any reliance on Exts. A-1 and A-2. Besides, Ramashray Singh cannot be said to be the agent of appellant No. 1 Smt. Rampati Devi whose husband Nandkeshwar Singh is A. W. 2. I, therefore, reject the argument on behalf of the plaintiffs on this count also.

5. The Court below appears to have taken a wrong view of the amendment of the Civil P. C. whereby the Second Proviso which is in the following terms has been introduced in R. 13 of O. 9 of the Code.

"Provided further that no Court shall set aside a decree passed ex parte merely on the ground that there has been an irregularity in the service of summons, if it is satisfied that the defendant had notice of the date of hearing and had sufficient time to appear and answer the plaintiff's claim."

6. What is contemplated by the proviso is merely an irregularity in the service of summons and it cannot be equated with a case where no summons had been served at all. The provisions of the Second Proviso, therefore, cannot be extended to a case like the present one where, I am of the view that the summonses have not been served at all. Besides, the Court has to be satisfied that the defendants had notice of the date of hearing and had sufficient time to appear and answer the plaintiffs' claim before it can act under the new amended provision. In the present case, the Court has placed the onus on the appellants to prove want of knowledge of the suit and then, after discussing the evidence, has held in para 7 that the defendants have failed to discharge this onus. The proviso aforementioned is by way of exception to the general rule and the burden to prove all the necessary conditions for the application of the Proviso is upon a person who claims benefit thereunder. The Court was, therefore, not right in placing the onus on the defendants in this regard. It has to be appreciated that the application under O. 9, R. 13 of the Code has been filed within time and the Court is not concerned with the limitation in the present case.

7. Another error has been committed by the Court when it has held that the Second Proviso can be pressed in service since the defendants were not able to prove want of knowledge before 22-4-77, the date on which they claimed to have learnt about the ex parte decree for the first time. What is essential is to establish that the defendants learnt about the suit before the date of ex parte hearing which in the present case was 14-4-77. It follows that the decision of the Court below is clearly vitiated both on facts and in law and it has to be set aside.

8. For the reasons mentioned above, this appeal is allowed, the order passed

by the Court below is set aside and the appellants' application under O. 9, R. 13 of the Code is allowed. Let the lower Court records be sent down expeditiously. The suit having been restored, the appellants should not appear in the Court below without waiting for fresh summons to be served on them. As indicated by the last portion of the first paragraph of R. 19, I fix 19-3-79 on which date the appellants must appear in the suit and file their written statement.

Appeal allowed.

AIR 1979 PATNA 317

LALIT MOHAN SHARMA, J.

Md. Ilyas, Petitioner v. Md. Hasibur Rahman and others, Opposite Party.

Civil Revn. No. 1373 of 1971, D/-27-3-1979.*

Bihar Land Reforms (Fixation of Ceiling Area and Acquisition of Surplus Land) Act (12 of 1962), Ss. 43 and 16 (3) — Jurisdiction of Civil Court when barred — Application under 16 (3) — S. 43 bars jurisdiction of Civil Court to correct erroneous decision — (Civil P. C. (1908), S. 9).

The cases dealing with the special Tribunals can be classified into three categories; (i) where the Legislature confers jurisdiction on such Tribunals to proceed in a case, conditional on the existence of certain state of facts; (ii) where a Tribunal is vested with jurisdiction including the jurisdiction to decide whether the preliminary state of facts on which the exercise of jurisdiction depends, exists; and (iii) where the existence of certain state of facts is a condition precedent to the grant of a particular relief but is not a condition for the exercise of jurisdiction by the Tribunal to entertain an application and decide it on merits. The question whether certain state of facts exists or not can be examined by the Civil Court only in the first category of cases, as the existence of the same, as a matter of fact, is a sine qua non, for the exercise of jurisdiction by the Tribunal. If the civil court comes to a conclusion that the essential facts do not exist, it can declare the Tribunal's decision as without jurisdiction. In the other two cases, the civil court has no such power. (Paras 5, 6)

The power of the Collector to entertain an application under S. 16 (3) (i) of the Act is not dependent on the applicant holding land lesser in area than the maximum ceiling area. If the authority comes to a conclusion that the area held by the applicant is not in excess, it will allow the application and if the finding is otherwise, the petition should be dismissed. If the finding recorded by the authority is wrong, the final decision in the proceeding will be rendered erroneous. But for that reason, it cannot be held to be absolutely void. The remedy of the aggrieved party would be, besides constitutional remedy, that provided by the Act itself. The civil court cannot have power to correct the error, since its jurisdiction is barred expressly by S. 43. (Para 7)

Cases Referred: Chronological Paras

1978 BBCJ (HC) 555 : AIR 1978 Pat 315 4

Krishna Prakash Sinha and Nageshwar Saran, for Petitioner; Rajendra Kishore Prasad, for Opposite Party No. 3.

ORDER:— By the impugned order, the trial court has decided a preliminary issue against the plaintiff-petitioner and has held that the suit is not maintainable. The plaintiff has challenged the correctness of the judgment by the present application under Section 115 of the Civil P. C.

2. The plaintiff-petitioner purchased some land detailed in Schedule "A" to the plaint from the defendants 2nd party (opposite party Nos. 2 and 3) on 21-9-1966 and the defendant No. 1 filed an application under Section 16 (3) of the Bihar Land Reforms (Fixation of Ceiling Area and Acquisition of Surplus Land) Act, 1961 (hereinafter referred to as "the Act") before the appropriate authority, the Sub Divisional Officer, Purnea. The plaintiff's case in the plaint is that he appeared in the proceeding and pleaded, inter alia, that since the defendant No. 1 was holding land in his own name and in the farzi name of his wife, in excess of the ceiling area prescribed by the Act, his application was bound to be dismissed. The Sub-Divisional Officer, however, did not consider this aspect of the matter, but dismissed the application on another ground, which the plaintiff states was

*(Against order of Rameshwar Narain Singh, Munsif, Sadar Purnea, D/-27-8-1971).

misconceived. The defendant No. 1 filed an appeal provided under the Act which was heard and allowed by the appellate authority, the Additional Collector, Purnea by his order dated 30th March 1968. The Additional Collector found that the total area held by the defendant was less than the ceiling prescribed by law and, as such, his application could not fail on the ground mentioned above. The plaintiff thereafter unsuccessfully moved the Commissioner, Bhagalpur and the Board of Revenue, Bihar. The plaintiff has asserted that the total holding of defendant No. 1 is, in fact, in excess of the ceiling area and his application could not have been entertained or allowed. The jurisdiction of the authorities under the Act being dependent on this issue, they cannot assume jurisdiction, where they have none, by deciding the fact wrongly. The decision of the revenue authorities is, therefore, without jurisdiction and the civil court has full power to declare it so and grant the reliefs prayed for in the plaint.

3. In his written statement, the defendant No. 1 challenged the maintainability of the suit and pleaded the bar mentioned in Section 43 of the Act, which reads as follows:—

"43. Bar of Jurisdiction of Civil Court. (1) Save and except as provided in this Act, no Civil Court shall have jurisdiction to settle, decide or deal with any question which is by or under this Act require to be settled, decided or dealt with by the Board of Revenue, the Commissioner, the appellate authority or the Collector;

(2) No order of the Board of revenue, the Commissioner, the appellate authority or the Collector made under this Act shall be questioned in any Court."

4. Mr. Krishna Prakash Sinha, appearing for the petitioner, contended that the bar created by Section 43 of the Act cannot rob the Civil Court of the jurisdiction, if the order passed by revenue authorities is void. Reliance was placed on the decision in Nand Kishore Singh v. Satya Narain Singh (1978 BB CJ (HC) 555). There cannot be any objection in accepting this proposition. But the difficulty in the way of the plaintiff in the present case is that the order impugned in the present suit cannot be held to be a nullity. The plaintiff, in the present case, has relied upon the provisions of sub-sec. (1) of Section 16 of the Act which says that no person shall acquire any land which, together with the land already held by him, exceeds, in the aggregate, the ceiling area. Sub-sec. (3) provides for the right of pre-emption of a co-sharer or a raiyat holding objecting land in case of transfer and the procedure to enforce it. If the prayer for pre-emption succeeds, the appropriate authority directs the transferee to convey the transferred land to the applicant by executing a document. The argument is that since such a transfer is not possible in favour of an applicant already holding ceiling area, in view of sub-sec. (1) his application cannot be entertained. The argument is that since, as a matter of fact, the defendant No. 1 is holding more land than the ceiling area, the revenue authority could not usurp jurisdiction to allow his prayer for pre-emption by recording an erroneous finding in regard to the area of his holding. The fact concerning the actual area held by defendant No. 1 being jurisdictional fact, the Civil Court has a duty to examine it on evidence led before it and it should declare the impugned orders as void and inoperative, if the finding, it arrives at, is against the defendant.

5. The cases dealing with the special Tribunals can be, for the purpose of appreciation of the point urged, classified into three categories;

(i) Where the Legislature confers jurisdiction on such Tribunals to proceed in a case, conditional on the existence of certain state of facts;

(ii) Where a Tribunal is vested with jurisdiction including the jurisdiction to decide whether the preliminary state of facts on which the exercise of jurisdiction depends, exists; and

(iii) Where existence of certain state of facts is a condition precedent to the grant of a particular relief, but is not a condition for the exercise of jurisdiction by the Tribunal to entertain an application and decide it on merits.

6. The question whether certain state of facts exists or not can be examined by the Civil Court only in the first category of cases, as the existence of the same, as a matter of fact, is a sine qua non for the exercise of jurisdiction by the Tribunal. If the Civil Court comes to a conclusion that the essential facts do not exist, it can declare the decision of the Tribunal as without jurisdiction. In the other two cases, the Civil Court has no such power. In the second case, the finding of the Tribunal, even if erro-

neous, will be binding on all concerned as the Tribunal is vested with the final and exclusive jurisdiction to agitate on the point. In the last case, the decision, even if incorrect, cannot be challenged collaterally since the jurisdiction is not dependent on the question in controversy. If the relevant provisions of the Ceiling Act are examined in the background of the principle mentioned above, it will be seen that the present case cannot be brought in the first category. The relevant provisions of S. 16 of the Act (omitting the words which are not necessary in the present context) are as follows:—

"16. Restriction on future acquisition by transfer, etc.: (1) No person shall, after the commencement of this Act..... acquire.....any land which together with the land, if any, already held by him exceeds in the aggregate the ceiling area.

* * * *

(3) (i) When any transfer of land is made after the commencement of this Act to any person other than a co-sharer of a raiyat of adjoining land, any co-sharer of the transferor or any raiyat holding land adjoining the land transferred, shall be entitled, within 3 months of the date of registration of the document of the transfer to make an application before the Collector in the prescribed manner for the transfer of the land to him on the terms and conditions contained in the said deed;

(iii) If the application is allowed, the Collector shall by an order direct the transferee to convey the land in favour of the applicant by executing and registering a document of transfer....."

7. The power of the Collector to entertain an application under S. 16 (3) (i) of the Act is not dependent on the applicant holding land lesser in area than the maximum ceiling area. If the authority comes to a conclusion that the area held by the applicant is not in excess, it will allow the application and if the finding is otherwise, the petition should be dismissed. If the finding recorded by the authority is wrong, the final decision in the proceeding will be rendered erroneous. But for that reason, it cannot be held to be absolutely void. The remedy of the aggrieved party would be, besides constitutional remedy, that provided by the Act itself. The Civil Court cannot have power to correct the error, since its jurisdiction is barred expressly by S. 43. The detailed provisions of Chap. II of the Act further emphasise on the exclusive jurisdiction of the authorities under the Act to determine the area held by a land owner for the purpose of finding out whether it exceeds ceiling area or not. I, therefore, hold that in the present case, the Civil Court has no jurisdiction to entertain the suit and the preliminary issue has been correctly decided by the Court below.

8. In the result, the revision application is dismissed, but without costs.

Revision dismissed.

AIR 1979 PATNA 319

LALIT MOHAN SHARMA, J.

Syed Balal Ahsan, Appellant v. Wastana Rubi and others, Respondents.

A. F. O. O. No. 27 of 1974, D/-18-5-1979.*

Civil P. C. (1908), O. 22, R. 1 — Abatement of suit — Death of defendant when the suit stood disposed of — There was no question of abatement of suit.

From the very language used in different Rules of O. 22, it is manifest that the question of abatement of a suit can arise only if a suit is pending. It is therefore futile to suggest that on the death of defendant, when the suit stood disposed of, there could be any question of abatement thereof. (Para 5)

Naseem Ahmad and H. Anzar, for Appellant; Abdus Salam and Upendra Prasad, for Respondents.

JUDGMENT: — The plaintiff appellant has in this appeal challenged the order dated 14-11-1973 passed by the Court below rejecting the plaintiff's application for substitution and holding that the suit has abated in its entirety.

2. The suit was filed in 1966 for declaration of the plaintiff's title and recovery of possession in regard to certain properties and was decreed ex parte on 7-4-1971. The defendant No. 1 thereafter died on 18-4-1971 and two applications under O. 9. R. 13, Civil P. C. for setting aside the ex parte decree were filed, one by the heirs of defendant No. 1 which was registered as Misc. Case No. 9 of 1971 and another by the other defendants which was numbered as

*Against order of Akhauri Baidyanath Prasad, Addl. Sub-Judge, Barh, D/- 14-11-1973.

Misc. Case No. 8 of 1971. On the 25th Aug., 1972, Misc. Case No. 8 of 1971 was allowed and the title suit was restored subject to payment of costs. On the 4th Sept., 1972, it was mentioned in the order-sheet that cost as directed was deposited and the suit was formally restored. Misc. Case No. 9 of 1971 filed by the heirs of deceased defendant No. 1 was taken up for hearing on 5-3-1973 when the applicants filed an application stating that since the suit had been restored, their miscellaneous application had become infructuous and should be dismissed as such. The prayer was allowed and Misc. Case No. 9 of 1971 was accordingly dismissed. The names of the applicants in Misc. Case No. 9 of 1971, that is, the heirs of the defendant No. 1, were not formally entered in the plaint and the name of defendant No. 1 continued as before. On the 24th March 1973, the plaintiff filed an application praying for expunging the name of defendant No. 1 and adding his heirs as parties in the plaint. It is said in para 4 of the application that the persons sought to be mentioned in the plaint had already been substituted.

3. The defendants opposed the application on the ground that the plaintiff was under a duty to substitute the heirs of the deceased defendant immediately after restoration of the suit.

4. The Court below has by the impugned order held that the suit has abated. The Court has observed that a proceeding under O. 9, R. 13, Civil P. C. is not in continuation of the suit and is not a stage in the suit. In that view, the substitution of the heirs made in the miscellaneous case does not amount to a substitution in the suit itself. It has further been held that the provisions of O. 22 including the provision of abatement of a suit applied to the present case.

5. The question which arises in this case is as to whether the provisions of O. 22 in regard to the abatement can be applied to the present case. From the very language used in the different rules of O. 22, it is manifest that the question of abatement of a suit arise only if a suit is pending. It is, therefore, futile to suggest that on the death of defendant No. 1 on 18-4-1971 when the suit stood disposed of, there could be any question of abatement thereof. No application for substitution of the heirs of the deceased party could have been filed. The provisions of O. 22, being applicable only to pending suits cannot be applied to the present case. Besides the effect of restoring the suit after setting aside ex parte decree vis-a-vis all the parties concerned including the heirs of defendant No. 1 is to implead them as parties to the suit and by their application dated 24th Mar., 1973, the plaintiffs were merely getting formal and consequential corrections made in the body of the plaint. If that were not so, it would have to be held as a necessary corollary, that the ex parte decree against defendant No. 1 was never set aside.

6. I, therefore, set aside the order passed by the Court below and allow the plaintiff's application for amendment of the plaint. The appeal is accordingly allowed, but in the circumstances of the case, parties are directed to bear their own costs.

Appeal allowed.

END

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PUNJAB HIGH COURT

1979

CHIEF JUSTICE

The Hon'ble Mr. Justice S. S. Sandhawalia.

PUISNE JUDGES

The Hon'ble Mr. Justice Premchand Jain.
" " Satish Chander Mittal.
" " Debi Singh Tewatia.
" " B. S. Dhillon.
" " Gurnam Singh.
" " Mela Ram Sharma.
" " R. N. Mittal.
" " Sukhdev Singh Sidhu.
" " Ajit Singh Bains.
" " Kulwant Singh Tiwana.
" " Harbanslal.
" " Surinder Singh.
" " Satya Prakash Goyal.
" " Charan Singh Tiwana.
" " Jagmohan Lal Tandon.
" " Shanti Sarup Dewan.
" " J. V. Gupta (Addl.) (From 19-2-1979).
" " S. S. Kang (Addl.) (From 19.2.1979).
" " G. C. Mittal (Addl.) (From 19-2-1979).
" " I. S. Tiwana (Addl.) (From 11.6-1979).
" " M. M. Punchhi (Addl.) (From 24-1-1979).

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50FB	(1979) 81 Pun L R 1 1979 Cur L J (Civ) 61 ILR (1979) 1 P & H 186 1979 A C J 170 1979 T A C 221
61FB	1978 Punj L J 408 ILR (1979) 1 Punj & Har 56
61FB *con*	1979 Rev L R 1 81 Pun L R 170
65FB	ILR (1978) 1 Punj & Har 64 1979 Rev L R 42 81 Pun L R 175
68	...
70	1978 Pun L J 421 (1979) 1 Ren C R 444
71	1979 Mat L R 194
72	1979 Pun L J 44 (1979) 1 Rent L R 136 ILR (1979) 1 Punj & Har 71 1979 Rev L R 111
75	1978 Rev L R 634 1979 Pun L J 38
76	1979 Hindu L R 80 (1979) 1 Rent L R 47 ILR (1979) 1 P & H 147 1979 Pun L J 562
79	(1978) 2 Tax Law Rew 208 (1979) 81 Pun L R 89 (1979) 8 Cur Tax Rep 23 119 I T R 256
80	(1979) 81 Pun L R 67 (1978) 5 Cri L T 384
81	1976 Cur L J (Civ) 295 1976 Rev L R 322 1976 Punj L J 361 ILR (1979) 1 P & H 158
91	...
94	81 Pun L R 66 ILR (1979) 1 Punj & Har 388
96	(1979) 1 Rent L R 51 (1979) 1 Ren C R 591 ILR (1979) 2 Punj 18 (1979) 81 Pun L R 502 1979 (2) Ren C J 489
98	1979 Hindu L R 155 1979 Marriage L J 232 1979 Mat L R 271
99	1978 Punj L J 422 1979 Rev L R 157
102	...
118	1979 Pun L J 157 1979 Rev L R 264
113 *con*	(1979) 81 Pun L R 808
116	1979 Pun L J 98
118FB	1979 Pun L J 89 1979 Rev L R 170 (1979) 81 Pun L R 294 ILR (1979) 1 Punj & Har 824
122	1979 Pun L J 160 1979 Rev L R 214 (1979) 81 Pun L R 340 (2) ILR (1979) 2 P & H 400
129FB	1979 Pun L R 70 1979 Rev L R 97 81 Pun L R 821 ILR (1979) 1 P & H 832
132	(1979) 1 Rent L R 58 (1979) 1 Ren C R 190 ILR (1979) 2 P & H 96 (1979) 81 Pun L R 621
138FB	(1979) 116 ITR 825 (1979) 91 Pun L R 189 ILR (1979) 1 Punj & Har 286 1979 Tax L R 867 (1979) 10 Cur Tax Rep 108 (1979) 1 I T J 887 1979 U P T C 578
142	ILR (1979) 2 Punj & Har 389
149FB	1979 Lab I C 575 ILR (1978) 2 (P & H) 414 (1979) 2 Serv L R 164 1979 Serv L J 477
154	81 Pun L R 117 (1979) 1 Rent L R 370
157	(1979) 81 Pun L R 91 1979 Cur L J (Civ) 54 (1979) 1 Ren C J 67 1979 Rev L R 293 ILR (1979) 2 Punj 177
160	81 Pun L R 148 (1979) 1 Rent L R 367 ILR (1979) 2 P & H 93
161	1979 Rev L R 19
162	1979 Hindu L R 118 81 Pun L R 118 1979 Marri L J 286
166FB	ILR (1979) 1 Punj 429
179FB	(1979) 81 Pun L R 448 1979 Pun L J 384 1979 Rev L R 391 ILR (1979) 2 Punj 77
183	(1979) 81 Pun L R 481 (1979) 1 Lab L J 414
191FB	1979 Pun L J 181 1979 Rev L R 246 (2)
192	1979 Pun L J 198 1979 Rev L R 211 (1979) 81 Pun L R 891
194	1979 Cur L J (Civ) 119 1979 Rev L R 129 (1979) 81 Pun L R 201
196	1979 Rev L R 190 (1979) 81 Pun L R 811 1979 Pun L J 472
199	...
201	1979 Pun L J 288 1979 Rev L R 299
203	(1979) 81 Pun L R 887 ILR (1979) 2 Punj & Har 428 1979 A C J 491
205FB	...
206	(1979) 81 Pun L R 882 1979 Hindu L R 840 1979 Rev L R 414 1979 Marri L J 481 1979 Hindu 598
208	1979 Pun L J 296 (1979) 81 Pun L R 886 1979 Rev L R 445
209	(1979) 81 Punj L R 422
211	1979 Rev L R 185 1979 Hindu L R 819 1979 Marri L J 488
212	1979 Rev L R 846 1979 Punj L J 444 (1979) 2 Ren C R 494
215	(1979) 81 Punj L R 867 (1979) Rev L R 892

AIR	Other Journals
215*con*	1979 Hindu L R 428
217	1979 Rev L R 351
	1979 Punj L J 510
	ILR (1980) 1 Punj & Har 64
225	ILR (1980) 1 Punj Har 26
229	(1979) 1 Rent L R 665
	1979 Cur L J (Civ) 252
	1979 Rev L R 519
	1979 Pun L J 382
	(1979) 2 Rent C J 118

AIR	Other Journals
229*con*	(1979) 81 Pun L R 581
	(1979) 2 Ren C R 257
	ILR (1979) 2 Punj & Har 474
230FB	ILR (1979) 2 Punj & Har 240
	81 Pun L R 654
	1979 Punj L J 485
	1979 Rev L R 500
231	1979 Rev L R 484
234	...
238	1979 Cur L J (Civ) 400
	(1979) 81 Punj L R 607

AIR	Other Journals
238*con*	ILR (1979) 2 Punj & Har 388
244FB	1979 Rev L R 521
	1979 Punj L J 489
	81 Pun L R 754
	ILR (1980) 1 Punj & Har 55
248	1979 Hindu L R 597
	(1979) 81 Pun L R 688
	1979 Rent Laws 20
	1979 Mat L R 891
250	1979 Pun L J 548
	(1979) 81 Pun L R 706

AIR	Other Journals
259*con*	1979 Rev L R 695
262	...
265	...
262	1979 Rev L R 529
	ILR (1979) 2 Rent L R 265
	(1979) 81 Pun L R 665
	1979 Cur L J (Civ) 497
268	(1979) 81 Pun L R 454
	1979 Punj L J 388
	1979 Rev L R 408
271	1979 Punj L J 440

Other Journals = All India Reporter

ILR (1977) 2 Punjab

ILR			AIR
20	1978	P&H	76
61	"	"	98
159	"	"	103
199	"	"	100
644	"	"	38
650	"	"	85
716	"	NOC	89
784	"	Punj	28
741	"	"	115
761	"	"	156
766	"	"	113
768	"	NOC	151
774	"	Punj	53
819	"	"	39

ILR (1978) 1 Punjab

ILR			AIR
9	1978	P&H	150
44	"	"	109
51	"	"	207
56	"	"	171
61	"	"	68
76	"	"	94
109	"	"	1
151	"	"	137
175	"	"	170
199	"	"	234
224	"	"	200
252	"	NOC	187
278	"	P&H	213
284	"	"	290
286	"	"	192
299	"	"	129
348	"	"	294

ILR (1978) 2 Punjab

ILR			AIR
8	1978	P&H	189
44	"	"	341
68	1979	NOC	96
167	1978	P&H	241
175	"	"	356
184	"	"	267
189	"	"	263
282	"	"	269
274	"	"	323
361	"	"	326
389	"	"	321
393	"	"	319
414	1979	"	49
424	"	"	16

ILR (1979) 1 Punjab

ILR			AIR
1	1978	P&H	329
13	"	"	310
36	1979	"	32
45	"	"	1
56	"	"	61
64	"	"	65
71	"	"	72
115	"	"	19
136	"	"	46
141	"	"	47
147	"	"	76
158		"	81
178	1980	"	65
186	1979	"	50
257	1980	"	43
286	1979	Punj	188
324	"	"	118
382	"	"	129
377	"	"	36
383	"	"	94
429	"	"	166

ILR (1979) 2 Punjab

ILR			AIR
18	1979	P&H	96
52	"	NOC	150
77	"	P&H	179
85	"	NOC	189
93	"	P&H	160
96	"	"	132
177	"	"	157
226	1980	"	87
240	1979	"	230
247	1980	"	94
339	1979	"	142
388	"	"	238
400	"	"	122
428	"	"	208
474	"	"	229
486	1980	Punj	1

1976 Cur L J (Civil)

CurLJ(Civ)			AIR
295	1979	P&H	81

1977 Cur L J (Civil)

CurLJ(Civ)			AIR
378	1978	NOC	89
400	"	P&H	76
490	"	"	112
501	"	"	113
506	"	"	150
522	"	"	225
539	"	"	209
546	"	"	109
577	"	"	187

1978 Cur L J (Civil)

CurLJ(Civ)			AIR
1	1978	SC	22
16	"	Punj	242
25	"	"	94
42	"	"	177
79	"	"	221
124	"	"	234
170	"	"	186
194	"	"	142
199	1977	SC	2012
208	1978	P&H	250
213	"	"	211
218	"	SC	355
226	"	"	266
232	"	P&H	189
241	"	"	253
258	"	Delhi	227
277	"	P&H	145
288	"	"	269
295	"	"	285
313	"	"	307
331	1977	SC	2191
357	1978	P&H	349
392	"	SC	1326
405	"	"	1351
426	"	"	1393
437	"	Delhi	233
451	"	P&H	258
456	"	SC	1424
504	"	"	1518
543	1979	P&H	16
584	"	SC	220

1979 Cur L J (Civil)

CurLJ(Civ)			AIR
54	1979	P&H	157
61	"	"	50
91	1978	"	171
103	1979	"	46
105	"	SC	588
119	"	P&H	194
152	"	SC	739
189	"	"	798

1979 Cur L J (Civil)

CurLJ(Civ)			AIR
192	1979	SC	1328
215	"	"	1250
224	"	"	1307
284	"	"	1622
252	"	P&H	229
330	"	SC	848
338	"	"	845
343	"	"	855
351	"	"	1066
360	"	"	1034
366	"	"	1298
378	"	"	1666
400	"	P&H	238
412	"	SC	1594
413	"	"	1911
418	1980	P&H	85
424	1979	SC	1596
452	1980	P&H	27
497	1979	"	262

1977 Hindu L R

Hindu L R			AIR
360	1978	MP	24
374	"	Guj	10
552	"	P&H	115
658	"	"	82
680	"	"	174
744	"	"	209
787	1978	All	18
793	"	P&H	112

1978 Hindu L R

Hindu L R			AIR
1	1977	AP	43
50	"	SC	2202
57	"	"	2445
78	"	Bom	298
88	1978	SC	300
97	"	P&H	146
104	"	MP	44
112	"	Guj	10
116	1977	Delhi	178
124	1978	P&H	216

1978 Hindu L R

HinduLR			AIR
188	1977	Delhi	124
166	1978	NOC	58
222	"	Mad	226
224	"	Cal	168
227	"	Mad	72
236	1977	"	228
259	1978	Kant	69
265	"	SC	1202
270	"	Guj	74
288	"	SC	504
296	1977	AP	415
316	1978	Mad	294
332	"	Delhi	296
343	"	All	270
346	"	AP	6
351	1977	"	342
358	1979	P&H	4
364	1978	All	279
367	"	AP	37
376	1977	NOC	377
393	1978	Guj	72
396	"	Kant	76
418	"	All	255
437	"	SC	1351
459	"	Mad	226
470	"	P&H	137
488	"	Mad	230
583	1977	P&H	378
591	1978	Mad	161
614	"	"	78
619	1977	"	372
680	1979	SC	145
697	1978	"	1557
726	1979	Mad	10
729	1978	SC	1239
736	1979	P&H	16
742	1975	SC	83
758	1978	"	1201
760	"	Cal	481
766	"	Punj	181
788	1977	"	97
797	1978	Cal	371

1979 Hindu L R

Hindu L R			AIR
8	1978	NOC	56 (Pat)
12	"	J&K	69
22	1979	Cal	178
30	"	P&H	76
92	"	SC	879
118	"	Delhi	78
118	"	P&H	162
136	"	All	12
148	"	Cal	172
152	"	Mad	115
155	"	P&H	98
179	"	SC	881
192	"	Cal	87
205	1978	Mad	108
218	"	Cal	525
244	1979	"	1
247	1978	SC	1791
274	1979	AP	169
288	"	Guj	98
319	"	P&H	211
340	"	"	206
344	1977	NOC	275 (H P)
352	1978	P&H	174
361	1979	SC	995
379	1978	HP	45

1979 Hindu L R

HinduLR			AIR
393	1979	SC	1393
418	"	Raj	128
423	"	P&H	215
434	"	NOC (Orissa)	100
450	"	Raj	197
454	1978	HP	45
462	1979	SC	1142
464	"	P&H	211
503	1978	MP	245
512	1978	SC	1791
593	1979	P&H	206
597	"	"	248
611	"	SC	1298
636	"	"	718
644	"	MP	15
647	1980	Bom	69
656	"	NOC (AP)	42
674	1980	Cal	1
677	1979	Mad	124
687	"	SC	993
708	1978	Bom	229
715	1979	Mad	85
719	"	Bom	14
728	"	MP	144
730	1978	J & K	4
748	1979	SC	442
751	"	P&H	248
758	"	Bom	176
766	"	MP	61
771	"	"	40
777	1977	Delhi	124
785	1979	AP	36
791	"	NOC (Delhi)	167

1978 Marriage L J

Marriage LJ			AIR
6	1978	P&H	209
19	1977	Punj	28
26	"	"	385
47	1979	"	112
84	1977	"	373
123	1978	SC	1351
159	"	P&H	181
171	"	"	115
248	1975	SC	83
260	1977	P&H	97
274	"	Punj	167
306	"	Delhi	178
323	1978	P&H	150
354	"	HP	59
360	1977	Delhi	24
411	"	HP	66

1979 Marriage L J

Marriage LJ			AIR
1	1979	SC	881
16	1978	P&H	174
40	"	HP	45
56	"	Delhi	296
220	1977	"	124
232	1979	P&H	98
257	"	SC	879
286	"	P&H	162
294	"	SC	715

1979 Marriage L J

MarriageLJ			AIR
369	1978	J&K	4
387	"	"	69
481	1979	P&H	206
488	"	"	211
513	"	SC	848
584	"	"	442

1976 Pun L J

Pun LJ			AIR
861	1979	P&H	81

1977 Pun L J

Pun LJ			AIR
151	1976	P&H	76
281	1978	NOC	89
297	"	P&H	100
320	"	"	30
372	"	"	27
413	"	"	252
458	"	"	207
479	"	"	94
486	"	"	137
492	"	"	204
509	1977	NOC	307
584	1978	P&H	107

1978 Pun L J

Pun LJ			AIR
18	1978	NOC	58
36	"	P&H	25
87	"	NOC	305
89	1	P&H	263
152	"	"	257
158	"	SC	1591
169	"	P&H	142
185	"	"	189
190	"	NOC	187
220	"	P&H	241
228	"	"	329
238	"	SC	1486
247	1977	HP	85
266	1979	P&H	16
272	"	"	46
277	"	"	19
321	"	"	82
339	"	"	5
359	"	"	47
373	"	"	326
380	"	"	39
403	"	"	61
421	"	"	70
422	"	"	99
425	1980	"	65

1979 Pun L J

Pun LJ			AIR
38	1979	P&H	75
44	"	"	72
70	"	"	129
89	"	"	118
98	"	"	116
157	"	"	118
160	"	"	122
170	"	"	118

1979 Pun L J

PunLJ			AIR
181	1979	P&H	191
182	"	SC	588
198	"	P&H	192
263	1980	"	87
282	1979	SC	845
288	"	P&H	201
296	"	"	206
310	"	"	217
352	"	"	229
334	"	"	179
338	"	"	288
342	"	SC	1066
398	1980	P&H	94
440	1979	"	271
444	"	"	212
469	1980	"	25
472	1979	"	196
478	"	SC	1594
481	1980	NOC	84
485	1979	P&H	230
489	"	"	244
495	"	SC	1911
502	1980	P&H	27
543	1979	"	250
545	1980	"	23
549	"	"	18
562	1979	"	76

(1977) 79 Pun L R

Pun LR			AIR
288	1978	P&H	103
300	"	"	166
387	"	"	199
405 (1)	"	"	52
405(2)	1978	NOC	152
406	"	"	60
456	"	Punj	55
485	"	NOC	89
494	"	Punj	33
507	"	P&H	164
510	"	Punj	27
514	"	P&H	181
555	"	"	156
570	"	"	113
574	"	"	150
598	"	"	115
601	"	NOC	151
605	"	"	158
614	"	"	174
621	"	"	112
628	"	P&H	177
654	"	"	1
667	"	"	209
737	"	"	158
741	"	"	171
745	"	NOC	59
749	"	P&H	146

(1978) 80 Pun L R

Pun LR			AIR
1	1978	P&H	137
21	"	"	225
27	"	"	107
52	"	"	207
62	"	"	242
93	"	"	195
98	"	"	94

(1973) 80 Pun L R

PunLR			AIR
164	1978	P&H	199
178	"	NOC	137
178	"	P&H	142
182	"	"	218
187	"	"	192
208	"	"	290
216	"	"	221
224	"	"	211
252	"	"	230
256	"	"	145
258	"	"	189
275	"	"	186
291	"	"	288
357	"	"	269
366	"	"	241
371	"	"	112
373	"	"	98
377	"	"	100
381	"	"	307
345	"	SC	514
390	"	P&H	285
415	"	"	257
434	"	"	260
458	"	SC	484
465	"	P&H	316
474	"	"	349
480	"	"	341
491	"	"	265
494	"	"	258
511	"	"	287
520	"	"	323
523	"	"	204
558	"	"	321
582	"	"	326
600	"	"	310
613	"	"	317
652	1979	"	5
660	"	"	19
680	1978	SC	1238
686	1979	P&H	46
728	"	"	47
746	"	"	16
766	"	"	40
780	"	"	36

(1979) 81 Pun L R

Pun LR			AIR
1	1979	Punj	50
24	1978	P&H	319
59	1979	"	79
60	1978	SC	1601
65	"	"	1542
67	1979	P&H	80
68	"	"	94
85	1979	"	268
91	"	"	157
113	"	"	162
117	"	"	154
148	"	"	160
170	"	"	81
175	"	"	85
189	"	Punj	139
201	"	P&H	194
205	"	SC	881
218	"	"	862
222	"	P&H	82
294	"	"	118
308	"	"	118
311	"	"	196
321	"	Punj	129
331	"	NOC	152

(1979) 81 Pun L R			
Pun LR			AIR
340(2)	1979	P&H	122
367	"	"	215
379	"	SC	1307
382	"	P&H	206
386	"	"	208
387	"	"	208
391	"	"	192
413	1980	"	65
422	1979	"	209
426(2)	"	NOC	189
431	"	P&H	185
448	"	"	179
454	"	"	268
472	"	SC	855
486	"	"	845
490	"	"	1066
499	"	"	1006
502	"	P&H	96
546	"	SC	1666
577	1980	P&H	85
581	1979	"	229
607	"	"	238
621	"	"	182
629	"	SC	1911
644	"	"	1544
654	"	P&H	280
656	"	SC	1494
685	"	P&H	262
686	"	"	248
706	"	"	250
725	1980	"	57
740	1979	SC	1114
754	"	P&H	244

(1978) 80 Pun L R (D)

Pun LR(D)			AIR
1	1977	Delhi	270
4	"	"	268
7	"	"	281
19	"	SC	2445
40	"	Delhi	261
64	"	SC	1986
75	"	Delhi	150
78	"	"	142
93	1978	"	44
99	"	NOC	252 (Delhi)
105	"	Delhi	236
111	"	"	86
118	"	"	107
132	"	SC	986
135	"	"	988
145	"	Delhi	114
156	"	"	112
159	"	"	296
183	"	"	162
190	"	"	167
192	"	"	283
213	"	SC	1011
219	"	Delhi	188
227	"	SC	1091
231	"	Delhi	240

(1979) 81 Pun L R (D)

Pun LR(D)			AIR
1	1980	Delhi	89
9	1979	NOC	180 (Delhi)
33	1979	Delhi	33
37	1978	"	318
43	1979	"	22
50	"	"	36
73	"	"	53

(1979) 81 Pun L R D			
Pun LR (D)			AIR
90	1979	Delhi	93
99	"	SC	1004
105	"	Delhi	81
114	"	SC	850
134	"	Delhi	108
185	"	"	167
188	"	"	217
195	"	"	220

1978 Recent Laws

RecentLaws			AIR
7	1978	SC	1542

1979 Recent Laws

Recent Laws			AIR
20	1979	P&H	248

(1977) 2 Ren CR

Ren CR			AIR
100	1978	NOC	84 (All)
168	1978	Raj	1
339	"	Kant	18
354	"	"	28
414	1979	Raj	44
512	1978	Guj	72
552	"	M P	32
559	"	NOC	82 (Kant)
595	"	Ker	21
647	1979	Raj	106
649	1978	All	86
690	"	Ker	167
697	"	Delhi	92
723	"	M P	52
726	"	NOC	88 (MP)

(1978) 1 Ren CR

Ren CR			AIR
6	1978	All	82
18	"	Kant	1
21	"	"	8
27	"	"	34
37	1977	SC	2270
41	"	"	2425
61	1978	Raj	61
72	1977	Kant	196
75	"	Guj	68
85	"	Raj	180
105	1979	"	55
132	1979	All	584
156	1978	Mad	141
165	"	HP	27
175	1977	Raj	191
199	1978	Mad	158
211	"	SC	22
220	1978	SC	287
228	"	"	259
239	"	H P	30
268	"	All	195
298	"	Bom	14
305	"	H P	2
325	1977	Raj	194
335	1978	Bom	22
356	"	Ker	22
360	"	P&H	186
367	"	SC	268
368	"	All	178
382	"	"	59
395	"	S C	252

(1978) 1 Ren CR			
Ren CR			AIR
424	1978	NOC	250 (Delhi)
450	"	NOC	257 (Guj)
461	"	Kant	81
468	"	P&H	211
472	"	S C	45
485	"	Kant	102
496	"	M P	54
506	"	Mad	147
525	"	Pat	10
548	"	NOC	119 (All)
562	1977	Mad	864
568	1978	J & K	22
572	"	S C	418
573	"	Guj	27
581	"	Delhi	58
638	1977	NOC	526 (Delhi)
642	"	NOC	245 (Guj)
659	1978	Kant	100
692	"	Guj	149
696	"	Pat	101
715	"	Ori	78
728	"	Delhi	286
734	"	NOC	136 (MP)
740	"	"	267
746	"	NOC	192 (Mad)
785	"	Delhi	107
799	"	Kant	143
808	"	P&H	307
811	"	"	260

(1978) 2 Ren CR

Ren CR			AIR
1	1979	Delhi	26
12	1978	SC	952
50	"	Delhi	286
62	"	M P	165
92	"	"	250
112	"	SC	1062
131	"	A P	319
170	1979	NOC	77 (P & H)
187	1978	SC	955
202	"	NOC	266 (M P)
209	"	M P	171
211	"	Mad	311
215	1979	All	24
216	1978	NOC	197 (All)
224	"	Raj	191
235	1979	NOC	97 (Raj)
237	1978	Raj	178
247	"	"	186
275	1979	Delhi	17
302	"	All	32
306	1978	Pat	284
308	1979	NOC	71 (M P)
313	1978	Ker	164
316	"	All	376
342	1977	NOC	861 (Cal)
352	1978	NOC	807 (Mad)
355	1979	NOC	54 (Mad)
364	1978	Guj	121
372	"	A P	277

(1978) 2 Ren C R			
Ren CR			AIR
377	1978	NOC	289 (Mad)
414	"	Cal	495
419	"	NOC	310 (Pat)
420	"	"	300
425	"	Pat	292
445	1977	S C	265
466	1978	Bom	22
473	"	S C	885
476	"	"	765
479	"	"	29
483	"	Bom	216
503	"	Pat	256
505	"	M P	143
510	"	Cal	189
536	"	"	282
541	1979	Raj	140
545	1978	Cal	285
558	1980	Raj	4
568	1979	NOC	68 (A P)
579	1978	All	507
581	1979	NOC	101 (Mad)
589	1978	S C	1518
598	1979	NOC	58 (M P)
601	1978	SC	1601
605	"	Raj	14
649	"	Cal	857
660	1979	Bom	49
692	"	Mad	47
705	"	NOC	1 (All)

(1979) 1 Ren CR

Ren CR			AIR
1	1978	Punj	269
9	1980	Delhi	59
20	1978	Ori	233
28	"	Punj	849
31	"	Delhi	318
44	1979	Raj	1
49	1978	Cal	472
55	"	Mad	89
56	"	Cal	882
62	"	Delhi	174
81	"	Mad	248
112	1979	NOC	60
114	"	All	8
144	"	SC	460
157	"	Cal	19
159	"	Pat	6
170	"	SC	272
190	"	Punj	182
204	1979	SC	1803
212	1978	All	428
220	1979	Mad	147
241	"	"	50
274	"	SC	824
275	"	Mad	11
278	"	"	26
290	"	NOC	59 (All)
314	1978	NOC	804 (Pat)
317	1979	Delhi	186
332	"	Bom	44
338	"	Cal	135
347	"	Guj	50
356	"	NOC	129 (Cal)
390	"	MP	189
401	1978	NOC	248 (Cal)
444	1979	P&H	70

(1979) 1 Ren C R			
RenCR			AIR
445	1978	All	104
447	"	SC	586
460	"	Raj	35
463	"	"	55
477	"	Bom	89
485	1977	SC	1599
492	"	"	1520
500	"	"	1483
501	1979	Pat	159
536	"	Bom	74
576	"	Delhi	171
591	"	Punj	96
596	"	Cal	185
649	"	All	353
652	"	NOC	82 (All)
654	1980	Kant	28
680	1979	Raj	68
701	"	Bom	269
708	"	SC	1132
712	"	MP	139
716	1978	Pat	158
750	1979	Ori	66
754	"	Raj	87
781	"	Ker	108
789	"	Raj	170

(1979) 2 Ren C R

Ren C R			AIR
9	1979	Cal	218
20	"	Raj	62
30	"	Cal	215
53	1980	Delhi	39
58	"	NOC	33 (Pat)
75	1979	"	195 (AP)
86	"	Ker	156
92	"	SC	1307
151	1972	Delhi	126
199	1980	"	7
239	1979	SC	1559
249	"	"	1309
257	"	P&H	239
308	"	Delhi	245
328	1980	"	1
352	1979	SC	745
391	"	Cal	367
402	"	NOC	190 (Raj)
434	"	Bom	269
441	"	Guj	178
445	1979	Cal	382
451	"	MP	148
455	"	SC	193
494	"	P&H	212
498	"	Cal	322
524	"	NOC	180 (Delhi)
535	"	MP	157
548	"	NOC	194 (All)
581	1978	SC	1436
601	1979	Bom	291
604	1978	NOC	257 (Guj)
608	1980	Delhi	68
655	"	Bom	69
674	1979	NOC	190 (Raj)
697	"	Cal	339
715	"	NOC	185 (Mad)

1977 Rent L R

Rent	L R		AIR
817	1978	P&H	108

(1977) 2 Rent L R

Rent	L R		AIR
59	1978	Raj	9
151	"	NOC (Delhi)	45
158	"	"	44
198	"	Mad	62
274	"	Delhi	53
490	"	Raj	1
653	"	HP	2
735	"	Mad	59
758	"	Cal	202
789	"	MP	32
885	"	Delhi	92

(1978) 1 Rent L R

Rent	L R		AIR
1	1977	SC	2319
11	"	"	2262
27	"	"	2429
45	"	"	2270
58	1978	"	22
64	1977	"	2425
91	"	"	2421
108	1978	HP	30
129	1977	Raj	189
141	1979	"	106
144	1977	SC	2439
158	1978	"	287
157	"	"	259
177	1979	Raj	44
191	"	All	299
202	"	MP	187
208	1978	"	218
211	1977	NOC (All)	317
218	1978	MP	52
228	"	"	89
237	"	HP	27
240	"	SC	298
246	"	NOC (MP)	88
258	1977	SC	27
279	1978	P&H	204
328	"	SC	40
349	"	Raj	61
356	1977	"	194
360	1979	"	55
369	1977	"	180
390	"	"	191
399	1974	Delhi	108
448	1978	Ker	161
484	"	SC	785
543	"	Delhi	236
577	"	SC	1062
608	"	P&H	186
632	"	"	211
646	"	SC	252
655	"	"	955
662	"	Ker	81
664	"	AP	148
666	"	MP	54
682	"	Kant	102
717	"	Raj	20
787	1977	HP	21
744	1979	Delhi	36
755	1978	SC	952
774	"	Kant	65
795	"	Delhi	233
838	"	Kant	100

(1978) 1 Rent L R

Rent	L R		AIR
846	1978	Pat	82
861	1979	Delhi	46
875	"	NOC (Cal)	18

(1978) 2 Rent L R

Rent	L R		AIR
15	1978	Kant	34
19	"	Cal	33
41	"	Delhi	286
67	1979	NOC (Cal)	18
78	1977	Mad	47
84	1978	AP	144
88	"	Raj	14
92	1979	"	140
108	1978	P&H	307
107	"	All	178
112	"	NOC (Mad)	289
119	"	Guj	121
129	"	Mad	272
149	"	MP	165
159	1977	NOC (Cal)	361
161	1978	Mad	158
164	"	"	311
166	"	MP	148
178	"	Mad	248
187	1977	Cal	243
197	1977	NOC (Guj)	245
229	"	Cal	197
237	"	Mad	218
251	1978	Delhi	318
253	1977	Kant	196
275	1978	Mad	144
278	1979	NOC (Delhi)	68
296	"	Delhi	17
307	"	NOC (Raj)	97
336	1978	Mad	39
348	"	Raj	191
359	"	Cal	247
380	"	Raj	178
436	1971	Punj	456
476	1978	NOC (MP)	266
499	"	MP	171
542	1979	All	52
545	"	NOC (Pat)	57
592	1978	Mad	188
621	"	SC	1601
685	1979	NOC (Delhi)	139
695	1978	"	927 (MP)
723	1980	Delhi	30
741	1978	P&H	269

(1979) 1 Rent L R

Rent	L R		AIR
10	1978	Mad	399
25	"	Cal	495
28	"	Mad	395
47	1979	P&H	78
51	"	"	96
58	"	"	152
93	"	SC	272
122	"	"	824
127	"	"	898

(1979) 1 Rent L R

Rent	L R		AIR
136	1979	P&H	72
149	"	SC	460
165	1978	P&H	349
189	1979	All	22
196	"	NOC (Mad)	101
219	"	Cal	185
228	"	NOC (AP)	68
235	1978	"	199 (All)
295	1979	Delhi	186
322	"	Raj	1
329	1978	Delhi	174
367	1979	P&H	160
370	"	"	154
390	"	Mad	47
397	1977	"	327
478	1979	SC	566
482	"	Delhi	171
529	"	All	299
532	"	"	104
552	"	Mad	147
556	1978	NOC (Cal)	248
560	1979	"	58 (MP)
562	"	Mad	155
591	"	"	115
658	"	SC	1507
665	1979	P&H	229
674	"	Bom	44
688	"	NOC (Mad)	101
689	"	SC	1509
696	"	"	1133
821	"	Raj	87
836	1980	Raj	4
862	1979	Mad	50
870	1978	Pat	260
877	"	MP	184
886	1979	NOC (MP)	71

(1979) 2 Rent L R

Rent	L R		AIR
31	1979	Bom	74
43	"	Guj	178
47	"	AP	162
71	"	Raj	62
75	"	"	35
86	"	Delhi	197
134	"	NOC (AP)	195
149	1973	Delhi	7
161	1979	SC	1559
199	1972	Delhi	271
209	1978	"	124
217	1980	SC	198
235	1979	"	1745
252	"	Delhi	245
265	"	P&H	262
277	1980	Delhi	1
309	"	"	7
406	"	SC	181
412	"	"	287
431	"	"	161
479	"	"	298
482	"	Mad	12
490	1978	NOC (Mad)	188
500	1980	Delhi	12
529	1978	Bom	140

(1979) 2 Rent L R

Rent	L R		AIR
540	1978	NOC (Mad)	186
545	1980	Bom	68
558	1979	Bom	48
578	1978	NOC (Cal)	109
614	1980	Raj	70
617	1979	NOC (Raj)	190

1976 Rev L R

Rev	LR		AIR
823	1979	P&H	81

1977 Rev L R

Rev	LR		AIR
334	1978	Punj	80
342	"	"	100
479	"	"	85
546	"	"	27
560	1978	Punj	158
606	"	"	112
617	"	"	174
635	"	"	107
637	"	"	204
648	"	"	187
179	1977	SC	2319
702	"	"	2001

1978 Rev L R

Rev	LR		AIR
1	1978	Pun	244
17	1977	SC	2421
22	1978	NOC (Punj)	88
33	"	P&H	207
57	"	"	146
62(1)	"	"	251
77	"	"	218
99	"	"	94
104	"	"	290
119	"	"	199
140	"	"	192
146	1977	SC	2218
152	1978	P&H	280
157	"	NOC (Punj)	187
168	1977	SC	2012
182	1978	NOC (P&H)	59
191	"	SC	356
199	"	P&H	25
224	"	"	142
238	"	"	241
258	"	"	288
275	"	SC	484
287	"	NOC (P&H)	305
298	"	Punj	242
322	"	"	267
351	"	"	257
358	"	"	288
368	"	"	289
389	"	"	189
399	"	"	145
458	"	"	285
484	"	"	329

1978 Rev L R

Rev	LR		AIR
476	1979	Punj	15
498	1978	"	256
499	"	"	310
516	"	"	272
542	"	SC	1486
549	1979	P&H	46
554	"	"	18
566	"	"	5
582	"	"	32
604	"	"	47
626	1978	SC	1587
634	1977	P&H	75
652	"	"	19

1979 Rev L R

Rev	LR		AIR
1	1979	P&H	61
19	"	"	161
42	"	"	65
76	"	"	86
97	"	"	129
111	"	"	72
118	1978	P&H	319
123	1980	"	65
129	1979	"	194
157	"	"	9
170	"	"	118
185	"	"	211
190	"	"	196
211	"	"	192
214	"	"	122
246(2)	"	"	191
256	"	SC	588
264	"	P&H	115
295	"	"	157
299	"	"	203
308	"	SC	849
312	"	"	855
319	"	P&H	229
322	"	"	215
346	"	"	212
351	"	"	217
391	"	"	179
408	"	"	269
407	"	SC	1066
414	"	P&H	207
419	"	SC	125
434	"	P&H	231
457	1969	"	37
445	1979	"	208
482	1980	"	85
521	1979	"	244
529	"	"	262
549	"	SC	1594
558	"	"	1666
586	1980	P&H	96
597	"	"	25
600	1979	"	250
602	1980	NOC (P&H)	34
611	"	P&H	27
666	"	"	10
698	1978	"	356

THE

All India Reporter

1979

Punjab and Haryana High Court

AIR 1979 PUNJAB & HARYANA 1
FULL BENCH

PREM CHAND JAIN, SURINDER SINGH AND S. P. GOYAL, JJ.

Sunder Singh and another, Petitioners v. Beas Construction Board, New Delhi and others, Respondents.

Civil Writ Petn. No. 3326 of 1977, D/-10-1-1978.*

Industrial Disputes Act (14 of 1947), S. 25-FFF — Closure of undertaking — In cases falling under S. 25-FFF payment of retrenchment compensation is not a condition precedent — Retrenchment compensation has not to be paid along with the discharge notice. (1978) 52 FJR 451 (Punj), Overruled; AIR 1969 SC 590 and AIR 1960 SC 923 Foll.; 1968 Lab IC 714 (Mad); (1970) 2 Lab LJ 206 (Mad) and 1977 Lab IC 1633 (Delhi), Ref. to. (Para 10)

Anno: AIR Manual (3rd Edn.), I. D. Act, S. 25-FFF, N. 1, 3.

Cases Referred: Chronological	Paras
(1978) 52 FJR 451 (Punj)	2, 3, 4, 6, 9, 10
1977 Lab IC 1633 (Delhi)	6
(1970) 2 Lab LJ 206 (Mad)	6
AIR 1969 SC 590 : 1969 Lab IC 867	6, 7
1968 Lab IC 714 (Mad)	6
AIR 1963 SC 1489	7
AIR 1960 SC 923	6, 7, 8, 9
AIR 1957 SC 121	7

Anand Swarup, Sr. Advocate (Gopal Mahajan with him), for Petitioners; Kuldip Singh, Bar-at-Law, for Respondents.

PREM CHAND JAIN, J.:— Sunder Singh and another have filed this petition under Art. 226 of the Constitution of India for the issuance of an appropriate writ, order or direction quashing the discharge notices dated 22nd Sept. 1977, copy Annexures 'P-5' and 'P-6', by which the services of the petitioners were terminated with effect from 28th Oct. 1977 (A.N.).

2. This petition came up for hearing before me and my learned brother Surinder Singh, J. on Dec. 12, 1977. Mr. Gopal Mahajan, Advocate, who appeared on that date for the petitioners, raised a contention that the petitioners were entitled to the payment of retrenchment compensation along with the impugned notices, as the cases of the petitioners were covered by the provisions of S. 25-F of the Industrial Disputes Act, 1947 (hereinafter referred to as the Act) and that the notices have not been served in accordance with law, inasmuch as no compensation amount in respect of retrenchment was paid at the time of the issuance of the notices. In support of his contentions, reliance was placed on an unreported decision of a Bench of this Court in Civil Writ Petition No. 3230 of 1977 (Raghubir Singh v. Beas Construction Board), decided on December 6, 1977.* On the other hand, the stand taken by Mr. Kuldip Singh, Bar-at-law, learned counsel for the respondents, was that the cases of the petitioners were covered by the provisions of Section 25-FFF of the Act and that legally it was not necessary to pay the amount of retrenchment compensation along with the discharge notices.

3. The aforesaid position had been taken by Mr. Gopal Mahajan, learned counsel, on 8th December, 1977, when the petition had come up for motion hearing. On the request of Mr. Mahajan, the petition had been adjourned to 12th

*(Decided by Full Bench on order of reference made by Prem Chand Jain and Surinder Singh, JJ. on 12-12-1977.)

*(Since reported in (1978) 52 FJR 451 (Punj).)

December, 1977. On that date the stand taken was modified by Mr. Mahajan to this extent that he claimed relief only on the ground that the case of the petitioners was a case of retrenchment of surplus labour and was covered by the provisions of Section 25-F of the Act. The learned counsel further submitted that in case it was held that the petitioners were not entitled to any relief on the basis of his submissions, then he did not claim any relief on the basis of the judgment of the Bench in Raghubir Singh's case on the ground that even in cases which fell under S. 25-FFF of the Act, a workman was entitled to the payment of retrenchment compensation along with the discharge notice.

4. After hearing the learned counsel for the parties, as is evident from our order dated 12th Dec. 1977, we did not agree with Mr. Mahajan, learned counsel, that the petitioners' case was covered by the provisions of S. 25-F of the Act. Having arrived at that finding, the petition was liable to be dismissed. But Mr. Kuldip Singh, learned counsel for the respondents, vehemently contended that in the interest of justice it was necessary to deal with the question whether it was legally essential to pay retrenchment compensation along with the discharge notices in cases falling under S. 25-FFF of the Act, as had been held by the learned Judges in Raghubir Singh's case. This contention had been advanced by the learned counsel on the basis that the view taken by the Bench in Raghubir Singh's case did not lay down the correct law and in case that view was allowed to stand then the Bhakra Construction Board was likely to suffer immensely. Mr. Kuldip Singh brought to our notice a couple of decisions of the Supreme Court to show that the view taken in Raghubir Singh's case deserved to be reconsidered. Finding some force in the contention of Mr. Kuldip Singh, we heard the learned counsel for the parties at length and ultimately prima facie found that the Bench decision in Raghubir Singh's case deserved to be reconsidered by a larger Bench. Accordingly, by our order dated 12th December, 1977, it was ordered that the papers of this case be laid before the Hon'ble the Chief Justice for appropriate orders. It is in these circumstances that the present Bench has been constituted for deciding the following question :—

"Whether retrenchment compensation has to be paid along with the notice even in the cases falling under S. 25-FFF of the Act?"

5. When we resumed hearing, Mr. Anand Swaroop, Senior Advocate, learned counsel appearing for the petitioners sought permission to argue the entire matter as his effort was to show that the case of the petitioners was covered by the provisions of S. 25-F of the Act and that the provisions of S. 25-FFF did not apply. Mr. Anand Swaroop further contended that the view taken by the Bench on Dec. 12, 1977, was not correct and that it deserved to be reviewed. On the contention that had been advanced by Mr. Mahajan on Dec. 12, 1977, the Bench had repelled the plea of the petitioners that their cases fell under the provisions of S. 25-F of the Act and in this situation we did not permit the learned counsel to re-agitate the matter and asked him to limit his arguments on the aforesaid question which had been referred to for the decision of the Full Bench.

6. We heard the learned counsel for the parties at length. Mr. Kuldip Singh, learned counsel for the respondents, submitted that payment of retrenchment compensation along with the notice of discharge was not a condition precedent in the cases which fell within the provisions of S. 25-FFF of the Act. In support of his contention the learned counsel placed reliance on the decisions of their Lordships of the Supreme Court in Hathising Manufacturing Co. Ltd., Ahmedabad v. Union of India, AIR 1960 SC 923; in Payment of Wages Inspector, Ujjain v. Surajmal Mehta, AIR 1969 SC 590; of the Madras High Court in M. Chinnappan v. Management of Kaleeswarar Mills, Ltd., Coimbatore, 1968 Lab IC 714 and in Radio and Electricals Ltd., Madras v. Industrial Tribunal Madras, (1970) 2 Lab LJ 206 (Mad) and of the Delhi High Court in Raj Hans Press v. K. S. Sidhu, 1977 Lab IC 1633. On the other hand, Mr. Anand Swaroop, Senior Advocate, relied only on the observations of the Division Bench in Raghubir Singh's case (1978-52 FJR 451) (Punj) in support of his contention that even in the cases falling under S. 25-FFF of the Act retrenchment compensation was payable along with the discharge notice.

7. In the ordinary course, I would have dealt with the matter at length in the light of the relevant provisions of the statute, but I do not propose to do so as to my mind, the controversy stands

fully settled by the decision of their Lordships of the Supreme Court in Suraj Mal Mehta's case (AIR 1969 SC 590) where on a similar question after considering the provisions of the statute, Shelat J., speaking for the Court observed thus (at p. 593):—

"The Industrial Disputes Act, which as enacted in 1947 was a piece of legislation which mainly provided machinery for investigation and settlement of industrial disputes, has since then undergone frequent modifications. In 1953, by Act 43 of that year Chap. V-A consisting of Ss. 25-A, 25-J was incorporated providing therein compensation for lay-off and retrenchment. It also provided a definition of retrenchment in S. 2 (oo). Chap. V-A, as it then stood, did not expressly provide for compensation for termination of service on account of transfer of an undertaking by an agreement or as a result of operation of law or the closure of the undertaking. Consequently, in Hariprasad v. A. D. Divelkar, 1957 SCR 121 : (AIR 1957 SC 121) this Court held that retrenchment as defined in S. 2 (oo) and the word 'retrenched' in S. 25-F meant discharge of surplus labour or staff by the employer for any reason whatsoever otherwise than as a punishment inflicted by way of disciplinary action and did not include termination of services of all workmen on a bona fide closure of an undertaking or on a change of ownership or management thereof. This decision was followed first by an ordinance and then by Act 18 of 1957 incorporating in the Act the present Ss. 25-FF and 25-FFF. It will be noticed that both these sections use the words "as if the workman had been retrenched". The intention of the legislature was, therefore, clear that it did not wish to place transfer and closure on the same footing as retrenchment under S. 25-F. This is apparent also from the fact that it left the definition of retrenchment in S. 2 (oo) untouched in spite of the decision in Hariprasad's case, 1957 SCR 121 : (AIR 1957 SC 121) (supra). The three Sections, Ss. 25-F, 25-FF and 25-FFF also show that while under S. 25-F no retrenchment can be made until conditions therein set out are carried out, the other two sections do not lay down any such conditions. All the three sections, however, involved termination of service whether it results in consequence of retrenchment or transfer or closure, and notice and compensation in both Ss. 25-FF and 25-FFF have been provided for "in accordance with the provisions of S. 25-F". (See Hathisingh Mfg. Co. Ltd. v. Union of India (1960) 3 SCR 528 : (AIR 1960 SC 923) and Anakapalle Co-operative Agricultural and Industrial Society Ltd. v. Workmen, 1963 Supp (1) SCR 780 : (AIR 1963 SC 1489). That being the position a workman whose service is terminated in consequence of a transfer of an undertaking, whether by agreement or by operation of law, has a statutory right under S. 25-FF to compensation unless such right is defeated under the proviso to that section. The same is the position in the case of closure under S. 25-FFF. Such compensation would be wages as defined by S. 2 (vi) (d) of the Act as it is a "sum which by reason of the termination of employment of the person employed, is payable under any law ... ... which provides for the payment of such sum whether with or without deductions but does not provide for the time within which the payment is to be made." Since Ss. 25-FF and 25-FFF do not contain any conditions precedent, as in the case of retrenchment under S. 25-F, and transfer and closure can validly take place without notice or payment of a month's wages in lieu thereof or payment of compensation, S. 25-FF can be said not to have provided any time within which such compensation is to be paid. It is well established that the words 'in accordance with the provisions of S. 25-F' in Ss. 25-FF and 25-FFF are used only as a measure of compensation and are not used for laying down any time within which the employer must pay the compensation."

8. In M/s. Hathising Manufacturing Co., (AIR 1960 SC 923) (supra) also, while interpreting S. 25-FFF, certain observations were made which are relevant and support the view propounded by Mr. Kuldip Singh. The said observations which appear in para 29 of the report, read as under:—

"For reasons already set out, payment of compensation and wages in lieu of notice under the impugned section are not made conditions precedent to effective termination of employment. The section only creates a right in the employees; it does not enjoin the employers to do anything before closure."

9. Mr. Anand Swaroop, Senior Advocate, learned counsel for the petitioners could not bring to our notice any decision of their Lordships of the Supreme Court taking a contrary view nor was he

able to distinguish the two authorities referred to above. He only relied on the observations of the Hon'ble Judges in Raghubir Singh's case, (1978-52 FJR 451) (Punj) which read as under :—

"Mr. Kuldip Singh, learned counsel for the respondents, urges that where an undertaking is closed down for no fault of the employer, provisions of S. 25-FFF apply and in that event the employer would be under no obligation to offer advance retrenchment compensation to the workmen who are asked to go. In support of this contention, reliance has been placed on Hathising Manufacturing Co. v. Union of India, AIR 1960 SC 923. We are not prepared to accept the contention raised by Mr. Kuldip Singh, the learned counsel for the respondents. Sub-sec. (2) of S. 25-FFF lays down that where any undertaking set up for the construction of building, bridges, canals, dams or other construction work is closed down on account of the completion of the work, the compensation payable to a workman has to be calculated in a particular manner, but the same would be deemed to be payable under S. 25-F of the Industrial Disputes Act. In other words, sub-sec. (2) of S. 25-FFF in the matter of payment of compensation adopts the procedure laid down in S. 25-F of the Industrial Disputes Act. In that view of the matter, the retrenchment compensation to the workmen had to be paid in cash before they were asked to quit. In these circumstances, it must be held that the petitioners have an undisputed right to be paid retrenchment compensation in cash before they were asked to leave the service of the project and till it is done the petitioners would be deemed to be in the service of the project."

10. In my view, the observations of their Lordships of the Supreme Court reproduced above, leave no room for any doubt and on the strength of the said observations, I find no escape from the conclusion that in cases falling under S. 25-FFF of the Act, payment of retrenchment compensation is not a condition precedent and that retrenchment compensation has not to be paid along with the discharge notice. The observations in Raghubir Singh's case (1978-52 FJR 451) (Punj) on which reliance had been placed by the learned counsel for the petitioners, in my view, go contrary to the observations of their Lordships of the Supreme Court and in this situation, with respect I find that the view taken in Raghubir Singh's case does not lay down the correct law.

11. For the reasons recorded above, the question referred to for our decision is answered in the negative.

Answer in negative.

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FULL BENCH

PREM CHAND JAIN, S. C. MITAL AND J. M. TANDON, JJ.

Mrs. Elveena, Petitioner v. Gopal Durjan Singh, Respondent.

Matrimonial Reference No. 2 of 1977, D/- 10-4-1978.*

Divorce Act (4 of 1869), Ss. 17 and 10 — Confirmation of decree for dissolution of marriage — Petition for dissolution by wife — Grounds of husband's adultery and treating the wife with cruelty held proved on appraisal of evidence — Decree of dissolution of marriage passed in favour of wife confirmed.

(Paras 5, 6)

Anno : AIR Manual (3rd Edn.), Divorce Act, S. 17, N. 1; S. 10, N. 2, 6.

Ravinder Chopra, for Petitioner.

PREM CHAND JAIN, J. :— The parties are Christians and they were married on April 16, 1971, according to Christian Marriage Act. After the marriage, both the parties lived as husband and wife at Aligarh and various other places and thereafter, they last resided at Ferozepore. Out of wedlock, three children were born, i.e., one son and two daughters. One son and one daughter are living with the respondent-husband and one daughter is living with the petitioner-wife. The petitioner was maltreated by her husband during her stay at Ferozepore. He also developed intimacy with one Miss Veenus, who was a trainee in the hospital at Ferozepore, and he started living with her in adultery. When the petitioner objected to the living of Miss Veenus, she was maltreated and given beating by the respondent. Since the respondent was torturing the petitioner, she left the house on Jan. 3, 1975, and joined service in Delhi on March 13, 1975. In her absence, the respondent and Miss Veenus resided together and cohabited as husband and wife at Fero-

*(Against order of Amrit Lal Bahri, Dist. & S. J. Ferozepur, D/- 28-9-1977.)

zepore. As the respondent was living in adultery with Miss Veenus and had treated the petitioner with cruelty, an application under S. 10 of the Indian Divorce Act, 1869, for the dissolution of her marriage with the respondent was filed. Notice of this application was given to the respondent. He filed written statement controverting the allegations.

2. On the pleadings of the parties, the following issues were framed:—

"1. Whether the respondent is living in adultery with Miss Veenus?

2. Whether the respondent treated the petitioner with cruelty, as alleged in the petition?

3. Relief."

3. The parties led evidence. On the appraisal of evidence, the learned District Judge decided both the issues against the respondent, with the result that a decree for divorce was passed in favour of the petitioner and against the respondent for dissolution of marriage. The papers have now been sent to this Court for confirmation of the decree, as required under S. 17 of the Divorce Act.

4. Gopal Durjan Singh, the respondent, though duly served with notice of the petition, has not put in appearance. Hence, ex parte proceedings have been taken against him.

5. After hearing the learned counsel for the petitioner, we find no ground to take a view other than the one arrived at by the learned District Judge. We have been taken through the entire evidence by learned counsel for the petitioner, and on its appraisal the only irresistible conclusions that can be arrived at are that the respondent was living in adultery with Miss Veenus and that the petitioner was subjected to cruelty at the hands of the respondent.

6. In the result, we allow the reference and confirm the decree of dissolution of marriage passed in favour of Mrs. Elveena and against Gopal Durjan Singh. The parties are, however, left to bear their own costs.

S. C. MITAL, J.:— I agree.

J. M. TANDON, J.:— I agree.

Order accordingly.

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J. M. TANDON, J.

Inder Singh and others, Petitioners v. The State of Punjab and others, Respondents.

Civil Writ Petn. No. 4074 of 1973, D/- 18-8-1978.

Punjab Land Reforms Act (10 of 1973), Ss. 5 (1), 17, 28 (2) — Question as to permissible area with the landowner determined finally under the Pepsu Tenancy and Agricultural Lands Act 1955 — Area cannot be re-determined and re-calculated under Reforms Act — Benefit of S. 5 (1) is not available to landowner — Scope of Ss. 17 and 28 (2) — Those provisions are not attracted.

Where the portion of the land of the petitioner was declared surplus by the order of the Collector, Agrarian Reforms, under the Pepsu Tenancy and Agricultural Lands Act, 1955, but the surplus area continued to remain in the petitioner's possession under the stay orders issued by the authorities under the Pepsu Act or the Courts during the proceedings challenging the order till the Reforms Act came into force, the benefit of permissible area, which is allowed in respect of a major son of a landowner under S. 5 (1) of the Reforms Act, cannot be given to the petitioner in respect of his adult sons. The Reforms Act did not entitle the landowner to have his surplus area, finally determined under the Pepsu Act, to be re-opened and re-determined and the order, passed by the Collector, Agrarian Reforms, to that effect cannot be held to be inconsistent with the provisions of the Reforms Act. 1975 Punj LJ 8, Foll. (Paras 6, 9, 13)

In S. 5 (2) it is specifically provided that for the purposes of making selection in terms of sub-sec. (1), the area declared surplus under the Punjab Law or Pepsu Law shall be excluded. It is, therefore, clear that the provisions contained in sub-sec. (1) of S. 5 cannot be made applicable to the surplus area that stands already determined under the Punjab Law or the Pepsu Law. (The Pepsu Act in the instant case). (Para 8)

The question of applicability of S. 17 to the instant case does not arise. (Para 9)

Sub-cl. (1) of sub-sec. (2) of S. 28 is clear that the proceedings for the determination of the surplus area pending under the old laws immediately before

the commencement of the Reforms Act are to be disposed of under the old laws and for such cases the Reforms Act shall not be taken to have been passed. It means that if a case for the determination of surplus area under the Pepsu Act was pending immediately before the commencement of the Reforms Act, then for the purposes of that case, the Reforms Act shall not be taken to have been passed. The implication of not taking into consideration the provisions of the Reforms Act in such cases would be that the landowner will not be entitled to claim benefit of permissible area in respect of his adult son under sub-sec. (1) of S. 5 of the Reforms Act. This provision negatives the contention that the petitioner has a right to get his surplus area re-determined or re-calculated in terms of sub-sec. (1) of S. 5 of the Reforms Act, in spite of the fact that the case of determination of his surplus area stands finalised under the Pepsu Act. Similarly, sub-cl. (iii) of sub-sec. (2) of S. 28 can bring no advantage to the petitioners because the surplus area already determined with the petitioner under the Pepsu Act cannot be taken as inconsistent with the provisions of the Reforms Act, inasmuch as sub-sec. (2) of S. 5 thereof provides specifically that such surplus area is to be excluded for the purposes of sub-sec. (1). 1978 Punj LJ 59, Expl. and Disting. (Para 10)

Cases Referred:	Chronological Paras
1978 Punj LJ 59	11
1975 Punj LJ 8	6, 13

M. M. Punchhi, Advocate, for Petitioners; U. S. Sahni, Advocate, for Respondents 3 to 12; N. S. Bhatia, Advocate, for State R. 1 and 2.

ORDER:— This is a writ filed by Inder Singh, his wife Shrimati Neeta Kaur, their two sons and their wives, relating to the agricultural land of Inder Singh petitioner in village Kurali, tehsil Rajpura, district Patiala, which had been declared surplus by the authorities under the Pepsu Tenancy and Agricultural Lands Act, 1955 (hereinafter referred to as the Pepsu Act).

2. Inder Singh petitioner was a big landowner and the Collector, Agrarian Reforms, Rajpura, vide his order dated January 20, 1961, declared 34.35 standard acres of land surplus with him under the Pepsu Act. Inder Singh filed objections and agitated against the order declaring his area surplus. He lost and the order of the Collector was maintained up to the Supreme Court in about 1969 or 1970. The surplus area with Inder Singh remained in his possession under the stay orders issued by the authorities under the Pepsu Act or the Courts. The Punjab Land Reforms Act, 1973 (hereinafter referred to as the Reforms Act), came into force in April, 1973, and apprehending dispossession from the land found surplus with Inder Singh under the Pepsu Act, he and his family members filed the present writ in November, 1973, wherein their substantial prayer is that the benefit of permissible area which is allowed in respect of a major son of a landowner under the Reforms Act should be given in their case as well. Karnail Singh and Nirmail Singh petitioners are major sons of Inder Singh petitioner.

3. The writ has been contested by the State as also by other respondents who have since been allotted the area found surplus with Inder Singh under the Pepsu Act.

4. The contention of the learned counsel for the petitioners is that under the Pepsu Act no area could be retained by the landowner as permissible area in respect of his adult son whereas under the Reforms Act, a landowner can retain such area under S. 5 (1) thereof. The surplus area found with Inder Singh under the Pepsu Act is still in his possession with the result that he has not been divested of its ownership either under the Pepsu Act or under the Reforms Act. It being the case, Inder Singh is as well entitled to the benefit of retention of the land to the extent of the permissible area in respect of his two adult sons under S. 5 (1) of the Reforms Act. The order of the Collector, Agrarian Reforms, Rajpura, dated January 20, 1961, declaring 34.35 standard acres of land surplus with him cannot be executed as such. As the authorities are inclined to dispossess him from that area in execution of the order of the Collector dated January 20, 1961, an appropriate writ may be issued to them for giving him the relief prayed for.

5. The case of the State and of the remaining respondents, as argued by their learned counsel is that the order of the Collector, Agrarian Reforms, dated Jan. 20, 1961, under the Pepsu Act having been maintained up to the Supreme Court has attained finality and is not subject to the provisions contained in S. 5 (1) of the Reforms Act and, therefore, the question of giving benefit to Inder Singh petitioner to the extent of permissible

area in respect of his adult sons thereunder does not arise.

6. A similar situation arose in Nachhattar Singh v. The Collector, Agrarian, Reforms, Bhatinda, 1975 Punj LJ 8. The landowner in that case was found having 9.43 standard acres of land as surplus by the Collector. Agrarian, vide order dated Dec. 30, 1960, under the Pepsu Act. The landowner did not challenge that order before the higher authorities. He continued to be in possession of the surplus area when the Reforms Act came into force. On June 25, 1974, the Collector, Agrarian, Reforms served a notice upon him to surrender the surplus area. He challenged that order calling upon him to surrender the surplus area in a writ petition on the ground that he and his sons had a right to have their surplus area determined in accordance with S. 4 of the Reforms Act, which allowed the head of the family to retain additional area. The Division Bench considered the points raised on behalf of the landowner and concluded that the Reforms Act did not entitle the landowner to have his surplus area finally determined under the old laws to be reopened and redetermined. The writ petition was consequently dismissed. This authority is fully applicable to the facts of the present petition. Feeling the difficulty on this score, the learned counsel for the petitioners has argued that the judgment of the Division Bench by which the writ petition was dismissed in limine should not be followed inasmuch as it has not laid down correct law and, in the alternative, there are a few vital aspects of the case which the Division Bench did not consider and for that purpose, this petition may be referred to a Division Bench for reconsideration of the issue involved.

7. The Division Bench dismissed the writ petition in limine but recorded a detailed and speaking order. It would, therefore, be neither appropriate nor desirable to ignore the rule laid down therein. On the alternative position taken by the learned counsel for the petitioners, his contention is that the Division Bench did not examine the implications of sub-sec. (1) of S. 5 and S. 17 of the Reforms Act. The argument advanced is that the surplus area as defined in sub-sec. (15) of S. 3 of the Reforms Act means the area in excess of the permissible area whereas the latter term stands defined in S. 4 thereof. Sub-sec. (1) of S. 5 confers a right on the landowner to retain permissible area in respect of his adult son and after allowing him such benefit, the surplus area, if any, can be vested in the States Government under S. 8 thereof. Inder Singh petitioner, therefore, can assert his right under the Reforms Act in the matter of recalculation of his land account irrespective of his surplus case having attained finality under the Pepsu Act.

8. The crucial point involved is the interpretation of S. 5 of the Reforms Act, which reads as under:—

"5. Selection of permissible area and furnishing of declaration by certain persons:—

(1) Every person, who on the appointed day or at any time thereafter, owns or holds land as landowner or mortgagee with possession or tenant or partly in one capacity and partly in another in excess of the permissible area, shall select his permissible area and intimate his selection to the Collector, and where land is situate in more than one district, to the Collectors concerned, through a declaration to be furnished in such form and manner and within such period as may be prescribed and if such person has an adult son, he shall also be entitled to select separate permissible area in respect of such son, out of the land owned or held by him, subject to the condition that the land selected together with the land already owned or held by such son, shall not exceed the permissible area of each such son:

Provided that where land is situated in more than one patwar circle, the declaration shall be supported by an affidavit in the prescribed form. (2) In making the selection, such a person, shall include firstly, land mortgaged without possession and secondly land under self-cultivation on the date of commencement of the period prescribed for furnishing the declaration under sub-sec. (1) but shall not include area declared surplus under the Punjab law, the Pepsu law or this Act, other than the area which was exempt from utilization by the State Government immediately before such commencement.

(2A) — — — — — — —".

It will be noticed that in sub-sec. (2) of S. 5, it is specifically provided that for the purposes of making selection in terms of sub-sec. (1), the area declared surplus under the Punjab law or Pepsu law shall be excluded. It is, therefore, clear that the provisions contained in sub-sec. (1)

of S. 5 cannot be made applicable to the surplus area that stands already determined under the Punjab law or the Pepsu law (the Pepsu Act). The argument of the learned counsel for the petitioners that sub-sec. (2) is only restricted to the matter of selection for retention purposes only by the landowner is fallacious on the face of it. In sub-sec. (1) it is provided that in the event of a person owning land in excess of the permissible area, he shall select his permissible area and if such a person has an adult son, he shall also be entitled to select separate area in respect of such son, of course, out of the land owned or held by the former. In sub-sec. (2) it is provided that in making the selection in terms of sub-sec. (1), the landholder shall not include the area declared surplus under the Punjab law or the Pepsu law. A harmonious reading of sub-secs. (1) and (2) of S. 5, which are patently conjunctive and not disjunctive, leaves no doubt whatsoever that in the cases of landholders where the surplus area has been finally determined under the Punjab law or the Pepsu law, the right to retain land to the extent of the permissible area in respect of an adult son shall be restricted to or exercisable out of the permissible area already allowed to him under the Punjab law or the Pepsu law. In other words, the landholder shall not be entitled to retain land to the extent of the permissible area in respect of his adult son out of the surplus area already determined under the Punjab law or the Pepsu law.

9. Another argument of the learned counsel for the petitioners is that S. 17 of the Reforms Act abrogates the order of the Collector, Agrarian Reforms, dated Jan. 20, 1961, inasmuch as it is not consistent with the provisions of this Act. This contention again has no force. Sec. 17 of the Reforms Act deals with abrogation of pending decrees, orders and notices and it reads:—

"17. Abrogation of pending decrees, orders and notices.

No decree or order of any court or authority and no notice of ejectment shall be valid save to the extent to which it is consistent with the provisions of this Act."

In the light of what has been discussed above with regard to the interpretation of S. 5 of the Reforms Act, it can hardly be said that the order passed by the Collector, Agrarian Reforms, dated Jan. 20, 1961, is inconsistent with the provisions of this Act. It being the case, the question of applicability of S. 17 to the present case does not arise.

10. The learned counsel for the petitioners has placed reliance on S. 28 of the Reforms Act to fortify his contention that the provisions contained in sub-sec. (1) of S. 5 thereof shall apply even qua the surplus area found with Inder Singh petitioner by the Collector, Agrarian Reforms, vide order dated Jan. 20, 1961. Sec. 28, which is a repealing and saving section, reads as under:—

"28. Repeal and saving.

(1) The Punjab Security of Land Tenures Act, 1953, and the Pepsu Tenancy and Agricultural Lands Act, 1955, in so far as these are inconsistent with the provisions of this Act are hereby repealed.

(2) The repeal of the enactments mentioned in sub-sec. (1), hereinafter referred to as the said enactments shall not affect:—

(i) The proceedings for the determination of the surplus area pending immediately before the commencement of this Act, under either of the said enactments, which shall be continued and disposed of as if this Act had not been passed and the surplus area so determined shall vest in, and be utilised by the State Government in accordance with the provisions of this Act:

Provided that such proceedings shall, as far as may be, be continued and disposed of, from the stage these were immediately before the commencement of this Act, in accordance with the procedure specified by or under this Act:

Provided further that nothing in this section shall affect the determination and utilisation of the surplus area, other than the surplus area referred to above, in accordance with the provisions of this Act and the cases pending before the Pepsu Land Commission immediately before the date of commencement of this Act shall stand transferred to the Collector of the district concerned for disposal;

(ii) the previous operation of the said enactments or anything duly done or suffered thereunder;

(iii) any right, privilege, obligation or liability acquired, accrued or incurred under the said enactments, in so far as such right, privilege, obligation or liability is not inconsistent with the provisions of this Act and any proceeding or remedy in respect of such right, privilege, obli-

gation or liability may be instituted, continued or enforced as if this Act had not been passed:

Provided that such proceeding or remedy shall, as far as may be, be instituted, continued or enforced in accordance with the procedure specified by or under this Act."

Sub-clause (i) of sub-sec. (2) of S. 28 is clear that the proceedings for the determination of the surplus area pending under the old laws immediately before the commencement of the Reforms Act are to be disposed of under the old laws and for such cases the Reforms Act shall not be taken to have been passed. It means that if a case for the determination of surplus area under the Pepsu Act was pending immediately before the commencement of the Reforms Act, then for the purposes of that case, the Reforms Act shall not be taken to have been passed. The implication of not taking into consideration the provisions of the Reforms Act in such cases would be that the landowner will not be entitled to claim benefit of permissible area in respect of his adult son under sub-sec. (1) of S. 5 of the Reforms Act. This provision rather negatives the contention of the learned counsel for the petitioners that Inder Singh petitioner has a right to get his surplus area redetermined or recalculated in terms of sub-sec. (1) of S. 5 of the Reforms Act, in spite of the fact that the case of determination of his surplus area stands finalised under the Pepsu Act. Similarly, sub-cl. (iii) of sub-sec. (2) of S. 28 can bring no advantage to the petitioners because the surplus area already determined with Inder Singh petitioner under the Pepsu Act cannot be taken as inconsistent with the provisions of the Reforms Act inasmuch as sub-sec. (2) of S. 5 thereof provides specifically that such surplus area is to be excluded for the purposes of sub-sec. (1).

11. The learned counsel for the petitioners has placed reliance on a Division Bench authority reported as Jagraj Singh v. The State of Punjab, 1978 Punj LJ 59, in support of his contentions. The argument raised is that the Reforms Act envisages a concept of tenant's permissible area and it has been so held in this authority. This Act further envisages a concept of allowing area to a landowner in respect of his adult son and on the same analogy this concept should be made applicable to the present case. This contention is without merit. The ratio of Jagraj Singh's case (supra), that the Reforms Act does envisage a concept of tenant's permissible area has no relevancy to the facts of the present case. In that case, the State had issued executive instructions to the field authorities wherein it was conveyed that the Reforms Act does not admit of tenant's permissible area which position was not found tenable by this Court. The issue involved in the present case is absolutely different. It is about the applicability of the provisions of sub-sec. (1) of S. 5 of the Reforms Act to the area of a landowner which has already been declared surplus under the Pepsu Act and which order has further assumed finality. The finality aspect is, however, not material because even in the absence of such finality, the case being pending immediately before the commencement of the Reforms Act, it would have been disposed of under the Pepsu Act in terms of sub-cl. (i) of sub-sec. (2) of S. 28 of the Reforms Act. It is clearly provided under sub-sec. (2) of S. 5 of the Reforms Act that such surplus area declared under the Pepsu law is to be excluded for the purposes of selection in terms of sub-sec. (1). The ratio of Jagraj Singh's case, therefore, can hardly be pressed by the petitioners to their advantage.

12. The last contention of the learned counsel for the petitioners is that the authorities cannot dispossess Inder Singh petitioner from the surplus area without following the procedure prescribed under S. 9 of the Reforms Act. The learned counsel for the respondents rightly conceded that Inder Singh petitioner can be and will be dispossessed from the surplus area after following the procedure laid down in S. 9 (read with first proviso to sub-cl. (1) of sub-sec. (2) of S. 28), of the Reforms Act which deals with the power to take possession of the surplus area.

13. In view of the discussion above, I have no hesitation in holding that the rule laid down in Nachhattar Singh v. The Collector, Agrarian, Bhatinda, 1975 Punj LJ 8 (supra), does not need reconsideration. The present writ, therefore, fails and is dismissed with no order as to costs.

Petition dismissed.

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A. S. BAINS, J.

Dalbir Singh and others, Petitioners v. Lakhi Ram and others, Respondents.

Civil Revn. No. 14 of 1976, D/- 5-5-1978.*

Civil P. C. (5 of 1908), O. 1, R. 10 — Transposition of defendant as co-plaintiff — When can be allowed.

Where the plaintiff does not oppose the application of the defendant for transposition as co-plaintiff, the court shall allow it. Even otherwise, to avoid multiplicity of the litigation the courts can suo motu allow such transposition. (Para 2)

An application was filed by the defendants under O. 1, R. 10 to transpose them as co-plaintiffs. There was no objection to the application by the plaintiff. However, the trial Court rejected the application on the ground that if it is allowed it would create clash between the plaintiffs inter se.

Held that the rejection of the application was not justified. The question of clash between the plaintiffs inter se would have arisen if the plaintiff had opposed the application for transposition. (Case law discussed.) (Para 2)

Anno: AIR Comm., Civil P. C. (9th Edn.), O. 1, R. 10, N. 35.

Cases Referred: Chronological	Paras
AIR 1977 SC 680	3
AIR 1971 Goa 35	3
AIR 1965 SC 1812	2
AIR 1939 PC 170	2
AIR 1931 PC 162	2

H. S. Sahni, for Petitioners; H. L. Sarin, for Respondents.

ORDER:— This revision petition has been filed by Dalbir Singh, plaintiff and Smt. Premwati, Brij Raj Singh and Dharampal Singh, defendants Nos. 23 to 25, respectively, against the order of the Subordinate Judge 1st Class, Ballabgarh, dated 29th Dec., 1975 vide which the application under O. 1, R. 10, Civil P. C., filed by defendants Nos. 23 to 25, has been dismissed.

2. Defendants Nos. 23 to 25, namely, Smt. Premwati, Brij Raj Singh and Dharampal Singh, filed an application under O. 1, R. 10, Civil P. C. for transposing them as co-plaintiffs. A suit for possession is pending between the parties in the trial Court on the basis of some earlier decree. It may briefly be stated here that one Samran Singh, father of defendants Nos. 23 and 24 and grandfather of defendant No. 25, the present petitioners, was the owner of the agricultural land, which is the subject-matter of the suit. The petitioners are the heirs of said Samran Singh. Said Samran Singh had mortgaged the suit land with Shiv Singh in lieu of Rs. 1,500/- without any legal necessity as per mutation No. 64, dated 28th Sept. 1934. Later on, he sold the suit land to defendants Nos. 1 to 22 or their predecessors-in-interest in lieu of Rupees 2,500/-, as per registered sale deed dated 3rd June, 1937 without any legal necessity. Dalbir Singh, plaintiff-petitioner, had challenged the mortgage and the sale in Civil Suit No. 84 of 1944 entitled "Dalbir Singh v. Samran Singh" and that suit was decreed in his favour on 12th Feb. 1945. In that suit it was held that the sale shall not take effect after the death of Samran Singh. It was also directed that the plaintiff shall be entitled to the possession of the land in dispute after the death of Samran Singh, on payment of Rupees 2,500/- to defendants Nos. 1 to 22. It was further ordered that the plaintiff shall deposit Rs. 1,500/- for payment to Shiv Singh, mortgagee and then he shall be entitled to possession of the land after the death of Samran Singh on payment of Rs. 4,000/- in all. Samran Singh died on 29th July, 1971 and defendants Nos. 1 to 22 got the suit land redeemed from Shiv Singh vide mutation No. 50. Thus Dalbir Singh, plaintiff-petitioner, brought a suit for the possession of the suit land on payment of Rs. 4,000/- to defendants Nos. 1 to 22, who are respondents in the present petition. Defendants Nos. 23 to 25, the present petitioners, were also made defendants in the present suit and it was mentioned in the plaint that they had partitioned the joint property and the suit property had fallen to the share of Dalbir Singh, plaintiff-petitioner, alone. During the pendency of the suit the present application under O. 1, R. 10, Civil P. C. was made by petitioners Nos. 2 to 4, that they may be transposed as co-plaintiffs. The plaintiff Dalbir Singh has not raised any objection to their transposition as co-plaintiffs. It is settled law that where the plaintiff does not oppose the application of any of the defendants for transposition as co-plaintiff, the courts shall allow such applications for transposition. Even otherwise, to avoid multiplicity of the litigation the courts can suo motu allow such transposition. In a case where

*(Against order of R. C. Kathuria, Sub. J., 1st Class, Ballabgarh, D/- 29-12-1975).

the defendant can separately file similar suit it is always advisable that the courts may make him as co-plaintiff, even if no application for transposition is filed. The learned Subordinate Judge has dismissed the application of defendants Nos. 23 to 25 on the sole ground that if the application for transposing defendants 23 to 25 as co-plaintiffs is allowed it would bring a clash between the plaintiffs inter se. This could be a ground for rejection of the application if the plaintiff had opposed it. But since the plaintiff has not opposed the transposition of defendants Nos. 23 to 25 as co-plaintiffs, therefore, it can hardly be a ground to reject the application of defendants Nos. 23 to 25. The view I am taking is supported by Bhupendra Narayan Sinha Bahadur v. Rajeswar Prosad Bhakat, AIR 1931 PC 162; Monghi Bai v. Cooverji Umersey, AIR 1939 PC 170 and R. S. Maddanappa v. Chandramma, AIR 1965 SC 1812. In Bhupendra Narayan Sinha Bahadur's case (supra) it was observed by their Lordships of the Privy Council as under :—

"If there was a technical objection to this, the Court clearly had power at any stage of the proceedings to remedy the defect under O. 1, R. 10, C. P. C. by adding the pro forma defendants as co-plaintiffs with the appellant. Such a course should, in their Lordships' opinion always be adopted where it is necessary for a complete adjudication upon the questions involved in the suit and to avoid multiplicity of proceedings."

In Monghibai's case (supra), their Lordships of the Privy Council observed as under :—

"One or more of several persons jointly interested can bring an action in respect of joint property and if their right to sue is challenged can amend by joining their co-contractors as plaintiffs if they will consent or as co-defendants if they will not. Once all the parties are before the Court the Court can make the appropriate order and should give judgment in favour of all the persons interested whether they be joined as plaintiffs or defendants.

A person executed mortgage in favour of a firm. Subsequently some of the partners retired assigning their interest in favour of the remaining partners by unregistered deed. The remaining partners brought a suit on the mortgage and as an objection was brought to the maintainability of the suit, the plaint was amended bringing on record the retiring partners as defendants.

Held that it would have been more satisfactory that the retiring partners should have been made as co-plaintiffs instead of co-defendants, but even otherwise as whole of the necessary parties were before the Court, appropriate relief could be granted."

In R. S. Maddanappa's case (AIR 1965 SC 1812) (supra), their Lordships of the Supreme Court observed as under (at p. 1816) :—

"Now regarding the second point (i. e. no decree can be passed in favour of a defendant who has not asked for transposition as plaintiff in a suit); this objection is purely technical. The plaintiff sued for partition of the suit properties upon the ground that they were inherited jointly by her and by the first defendant and claimed possession of her share from the other defendants who were wrongfully in possession of the properties. She also alleged that the first defendant did not co-operate in the matter and so she had to institute the suit. The first defendant admitted the plaintiff's title to half share in the properties and claimed a decree also in her own favour to the extent of the remaining half share in the properties. She could also have prayed for her transposition as a co-plaintiff and under O. 1, R. 10 (2), C. P. C. the Court could have transposed her as a co-plaintiff. The power under this provision is exercisable by the Court even suo motu. As pointed out by the Privy Council in Bhupendra v. Rajeswar, 58 Ind App 228 : (AIR 1931 PC 162) the power ought to be exercised by a court for doing complete justice between the parties. Here both the plaintiff and the first defendant claim under the same title and though defendants 2 to 8 had urged special defences against the first defendant, they have been fully considered and adjudicated upon by the High Court while allowing her appeal. Since the trial Court upheld the special defences urged by defendants 3 to 8 and negatived the claim of the first defendant it may have thought it unnecessary to order her transposition as plaintiff. But the High Court could, while upholding her claim, well have done so. Apparently it either overlooked the technical defect or felt that under O. XLI, R. 38 it had ample power to decree her claim. However that may be, the provisions of S. 99 would be a bar to interfere

here with the High Court's decree upon a ground such as this."

A close scrutiny of these authorities shows that the application of the defendants for their transposition as co-plaintiffs is allowed especially when the plaintiff does not oppose the said application and their interests are similar. Admittedly, the present petitioners had in their written statement admitted the claim of the plaintiff and there seems to be no clash between their interest and the interest of the plaintiff.

3. Mr. Sarin, learned counsel for the respondents, says that since the present petitioners admitted in their written statement that the plaintiff is the sole owner of the suit property, they may not be allowed to be transposed as co-plaintiffs. He has relied upon Francisco Xavier Antonio Nazore v. Sylvia Angela Alvares, AIR 1971 Goa 35 and Modi Spinning and Weaving Mills Co. Ltd. v. Ladha Ram and Co., AIR 1977 SC 680, but the facts of these authorities are distinguishable. There is no dispute regarding the proposition of law as laid down in these authorities. In Goa case the plaintiff had objected to the transposition of the defendants as co-plaintiffs and, therefore, the application of the defendants was rejected. In the Modi Mills case (supra), it was a case of amendment and not of transposition. Hence these authorities are not applicable to the facts of the present case.

4. No other point is urged.

5. For the reasons recorded above, this petition is allowed, the impugned order is set aside and the application of petitioners Nos. 2 to 4 for their transposition as co-plaintiffs is allowed. The trial Court is directed to proceed with the suit in accordance with law after treating defendants 23 to 25 as co-plaintiffs. The parties are directed to appear before the trial Court on 29th May, 1978. In the circumstances of the case, I make no order as to costs.

Petition allowed.

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RAJENDRA NATH MITTAL, J.

Ujagar Singh, Appellant v. Sham Singh and others, Respondents.

Second Appeal No. 748 of 1972, D/- 18-5-1978.*

(A) Evidence Act (1 of 1872), S. 115 — Estoppel — Claim of the defendant admitted by plaintiff — Mutation of that share allowed to be recorded — After lapse of many years, the plaintiff cannot be allowed to change the position.

The defendant was in possession of the whole property belonging to plaintiff's brother during his lifetime as well as during the lifetime of his wife after his death. And that after the death of that widow, the defendant who was tenant of the said widow gave possession of 3/4 of that property to the plaintiffs and both these parties got their names and shares mutated in the records. The defendant also gave certain amount to redeem the property jointly owned by the defendant and plaintiffs.

Held: After lapse of many years, the plaintiffs were estopped from challenging the 1/4 share that went to the defendant alleging that they were entitled to that share to the exclusion of the defendant. AIR 1965 SC 1055, AIR 1973 Punj & Har 126, Foll. (Paras 7, 8, 9, 10 and 11)

Anno: AIR Manual (3rd Edn.), Evidence Act, S. 115, N. 5.

(B) Evidence Act (1 of 1872), S. 115 — Civil P. C. (1908), S. 100 — Estoppel — Not a question of fact but an inference of law from proved facts — Hence open to examination by High Court in second appeal — High Court can interefere even in finding of facts if finding is vitiated. AIR 1959 SC 57; (1969) 2 SC (N) 481, Disting. (Para 12)

Anno: AIR Manual (3rd Edn.), Evidence Act, S. 115, N. 81; AIR Comm., C. P. C. (9th Edn.), S. 100, N. 52.

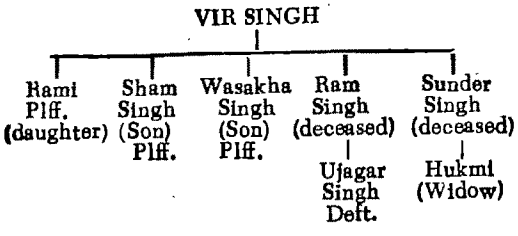
Cases Referred: Chronological	Paras
AIR 1973 Punj & Har 126	11
(1969) 2 SC (N) 481	12
AIR 1965 SC 1055	10
AIR 1959 SC 57	12

P. N. Aggarwal, with Jang Bahadur Singh, for Appellant; H. L. Sarin, Sr. Advocate with M. L. Sarin, for Respondents.

*(Against decree of Radha Krishan Battas, Sr. Sub. J. with Enhanced Appellate Powers, Amritsar, D/- 24-3-1972).

JUDGMENT:— This appeal has been filed by the defendant against the judgment and decree of the Senior Subordinate Judge, Amritsar, dated March 24, 1972.

2. The following pedigree table will be helpful in understanding the facts of the case.



3. The property in dispute belonged to Sunder Singh deceased. After his death Smt. Hukmi inherited it. She died in the year 1960. The plaintiffs claimed that they were entitled to whole of her property being the brothers and sister of her husband. It is alleged that Ujagar Singh defendant took forcible possession of 1/4th share of the land and got mutation sanctioned in his name. Consequently the present suit has been filed by them for 1/4th share of the land.

4. The suit was contested by the defendant who inter alia pleaded that the plaintiffs were estopped by their conduct from filing the present suit and that the suit was barred by limitation. The other pleas taken by the defendant are not relevant for the purpose of the decision of the present appeal. The learned trial Court held that the plaintiffs were not estopped by their conduct from filing the suit and that the suit was within limitation. It consequently decreed the suit of the plaintiffs. The defendant went up in appeal before the Senior Subordinate Judge, Amritsar, who affirmed the judgment and the decree of the trial Court. He has come up in second appeal to this Court.

5. It is contended by the learned counsel for the appellant that the plaintiffs were estopped from filing the present suit. He submits that the finding of the first appellate Court is vitiated as he did not take into consideration the admission of the plaintiffs that the defendant came in possession of property of Sunder Singh during his lifetime and continued thereafter. He further submits that in view of the family settlement arrived at between the parties the appellant retained possession of 1/4th share and surrendered possession of the remaining property to the plaintiffs. According to the learned counsel this was the material fact which the Courts below did not take into consideration. It is also urged by him that if the aforesaid circumstance along with the other circumstances which are mentioned in the judgments of the Courts below is taken into consideration then it is established that the plaintiffs are estopped from filing the suit. On the other hand Mr. Sarin, learned counsel for the respondents, has vehemently argued that the question of estoppel is a question of fact and this Court cannot interfere with the decision of the first appellate Court on this issue.

6. I have considered the respective arguments of the learned counsel for the parties. In order to determine the question, a few facts may be noticed. Sham Singh, plaintiff, admitted that Ujagar Singh was cultivating the land of Sunder Singh during his lifetime. There is nothing to show that he was dispossessed by Smt. Hukmi after his death. If he had been dispossessed the plaintiffs would have brought that evidence. It is also relevant to mention that the defendant asserted in his statement that during the lifetime of Smt. Hukmi, he was cultivating the land. From the aforesaid facts it is evident that the defendant was in possession of the land during the lifetime of Sunder Singh and Smt. Hukmi and was also in its possession at the time of her death.

7. According to the defendant he handed over possession of 3/4th share of land to the plaintiffs after the death of Smt. Hukmi, as they agreed to give him 1/4th share in the land. This fact is proved from the Jamabandi relating to year 1963-64 (Ex. D-9) wherein the parties are shown in possession of the total land left by Sunder Singh deceased, according to their shares. It is also significant that after the death of Smt. Hukmi, her land was mutated in the name of Ujagar Singh, Sham Singh, Wasakha Singh and Smt. Rami in equal shares vide mutation No. 1374 (Ex. P-4). At the time of attestation of mutation on Feb. 21, 1961, Wasakha Singh was present but he did not raise any objection. The other plaintiffs did not appear before the Attesting Officer. In case they had any objection regarding the attestation of the mutation in favour of Ujagar Singh it would have been raised at that time.

8. There are yet two other circumstances which further prove the assertion

of the appellant. The first is that some land had been mortgaged by Sunder Singh in favour of Puran Singh, D. W. 1 and Sewa Singh, D. W. 3. The plaintiff-respondents, along with the appellant paid the mortgage amounts to Puran Singh and Sewa Singh vide receipts Exhibits D-1 and D-2 both dated April 11, 1967, and redeemed the land. The appellant thus contributed his share of the redemption amount. The second is that Sham Singh, Wasakha Singh and the appellant sold a Taur belonging to Smt. Hukmi, after her death, for an amount of Rs. 500 and the appellant got his 1/3rd share of the sale consideration.

9. It has been pleaded by the appellant in the written statement that as a result of family settlement he gave up his possession of 3/4th of the land left by Smt. Hukmi which he had been occupying as a tenant. From the narration of the facts already given above, it is evident that the aforesaid plea is correct as admittedly the appellant was in possession of the land belonging to Sunder Singh in his lifetime. Thereafter, he remained in its possession even during the lifetime of Smt. Hukmi. It appears to be correct that he retained possession of the land to the extent of his share and gave the possession of the remaining land to the respondents as his title to 1/4th share had been admitted by them. If the respondents had not agreed to give him any property, he would have never given its possession to them. After the mutation, the plaintiff-respondents had been admitting his right in the property and had been joining him at the time of redeeming properties of Sunder Singh and alienating his property.

10. Enunciating the doctrine of estoppel, the Supreme Court has held in Gyarsi Bai v. Dhansukh Lal, AIR 1965 SC 1055 as follows:

"To invoke the doctrine of estoppel embodied in S. 115, Evidence Act, 1872, three conditions must be satisfied: (1) representation by a person to another, (2) the other shall have acted upon the said representation, and (3) such action shall have been detrimental to the interests of the person to whom the representation has been made. Where the first two conditions are satisfied but the third is not, there is no scope to invoke the doctrine of estoppel."

11-A. The above observations fully apply to the facts of the present case as the appellant has been successful in proving all the ingredients.

11. In addition it is relevant to highlight that the present suit has been filed after about 9 years after the attestation of mutation. This circumstance also goes a long way to show that the respondents did not want to challenge the right of the appellant as they had obtained possession of the property after giving him 1/4th share in the property. Moreover a Division Bench in Sewti Devi v. Kanti Parshad, AIR 1973 Punj and Har 126 has held that when the claim of the defendant was admitted and mutation was allowed to be attested in his name by the plaintiff, the plaintiff cannot be allowed to change the position after the lapse of many years. After taking into consideration, all the above circumstances, I am of the view that the plaintiff-respondents are estopped from filing the present suit.

12. The only contention of Mr. Sarin is that the question of estoppel is a question of fact and the finding of the first appellate court cannot be interfered by the High Court on the question of estoppel. In support of his proposition, he placed reliance on two judgments of Supreme Court in D. Pattabhiramaswamy v. S. Hanyamayya, AIR 1959 SC 57 and Bithal Dass Khanna v. Hafiz Abdul Hai, (1969) 2 SC (N) 481. I agree with the proposition that the finding of a fact arrived at by the first appellate court is binding on the High Court in second appeal but if the finding of fact is vitiated, the High Court may interfere. I, however, do not agree with the contention of Mr. Sarin that a question of estoppel is a question of fact and cannot be examined in second appeal. It is not a question of fact but an inference of law from facts proved and is, therefore, open to examination by the High Court in second appeal. In the present case as already observed, the first appellate Court omitted to take into consideration certain facts which stood proved. Therefore, even if it is assumed that it is a finding of fact it is not binding on the High Court. The cases referred by Mr. Sarin do not deal with question of estoppel and therefore, these are not applicable.

13. For the reasons recorded above, I accept the appeal, set aside the judgment and decree of the appellate Court and dismiss the suit of the plaintiffs with costs throughout. Counsel fee Rs. 150/-.

Appeal allowed.

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FULL BENCH

S. S. SANDHAWALIA, C. J., P. C. JAIN AND S. S. DEWAN, JJ.

M/s. Desh Raj Parshotam Lal and others, Petitioners v. The State of Punjab, and others, Respondents.

Civil Writ Petn. Nos. 2145, 2459 and 2198 of 1978 and 3316 of 1977, D/- 24-7-1978.

Central Sales Tax Act (74 of 1956), Ss. 8 (1), (2), (2-A) and 9 (2), (3) — Validity — The sections do not contravene Art. 301 — Nor do they abdicate legislative authority of Parliament. (1976) 38 STC 39 (Punj) Overruled. (Constitution of India, Arts. 245, 301). (1976) 38 STC 259 (Punj) and W. P. 6780 of 1976, Dated 21-7-1978 (Punj) Approved. AIR 1974 SC 1505 Foll. (Paras 3, 4)

Anno: AIR Manual (3rd Edn.), C.S.T. Act, S. 8, N. 2; S. 9, N. 2. AIR Comm. Constn. of India (2nd Edn.), Art. 245, N. 9, Art. 301, N. 10 (k).

Cases Referred: Chronological	Paras
(1978) W. P. No. 6780 of 1976, D/- 21-7-1978 (Punj)	5
(1976) 38 STC 39 (Punj)	2, 4
(1976) 38 STC 259 (Punj)	2, 4
AIR 1974 SC 1505 : 33 STC 200 : 1974 Tax LR 1995	3

R. C. Dogra with Shaukut Ali, for Petitioners; I. S. Tiwana, Addl. A. G., Punjab, for Respondents.

S. S. SANDHAWALIA, C. J.:— In this set of four Civil Writ Petitions Nos. 2145, 2459 and 2191 of 1978 and No. 3316 of 1977 the primary and indeed the only challenge laid is against the constitutional validity of S. 8 (1), (2), (2-A) and S. 9 (2), (3) of the Central Sales Tax Act, 1956 (hereinafter referred to as the Act).

2. In view of what follows, it is wholly unnecessary to advert to the facts. It would, however, suffice to mention that the primary consideration for placing these cases before the Full Bench was the apparent conflict between the Single Bench decision of this Court in Malwa Sugar Mills Co. Ltd. v. The Assessing Authority (Excise and Taxation Officer), Sangrur, (1976) 38 STC 39 (Punj), and the subsequent Division Bench judgment reported in Babu Ram Jagdish Kumar & Co. v. The State of Punjab, (1976) 38 STC 259 (Punj).

3. Mr. R. C. Dogra and Mr. Shaukat Ali, appearing for the petitioners in all the four cases, have frankly conceded their total inability to lay any challenge to the vires of S. 8 and S. 9 of the Act in face of the binding precedent of the Supreme Court. Both the learned counsel have very fairly brought to our notice that in State of Tamil Nadu v. Sitalakshmi Mills Ltd., (1974) 33 STC 200 : (AIR 1974 SC 1505), their Lordships of the Supreme Court repelled the twin challenge to their validity raised on the basis of Art. 301 of the Constitution of India and an argument of abdication of legislative authority by Parliament. It has been fairly conceded that, in view of this judgment and those referred to below, nothing now survives in the present cases.

4. All that now remains is to examine the correctness of the Single Bench judgment in Malwa Sugar Mills' case (supra) because of the observations made on the 24th of May, 1978, by the Motion Bench in Civil Writ Petition No. 2145 of 1978. It is evident on a reference to the said judgment that the same was apparently decided as a matter of first impression and the binding precedents of the earlier Supreme Court cases were not brought to the notice of the learned Single Judge. Even otherwise, it is manifest that the issue was not adequately agitated and neither principle nor authority has been adverted to in depth for arriving at the ultimate conclusion. The significant thing then is that in the Division Bench judgment in Babu Ram Jagdish Kumar's case (supra) later the issue was even considered exhaustively by the Division Bench and a wide variety of challenges to the constitutionality of the provisions assailed therein was repelled. Mr. Dogra further conceded that the identical argument raised earlier before the learned Single Judge in Malwa Sugar Mills' case (supra) was raised before the Division Bench also and rejected in terms as a contention having no substance. The significant thing is that the learned counsel for the petitioners have not even remotely raised a single argument to assail the correctness of the view expressed by the Division Bench in Babu Ram Jagdish Kumar's case (supra). It is wasteful to traverse the same ground over again and agreeing with the Division Bench, we overrule the Single Bench judgment in Malwa Sugar Mills Co. Ltd. v. The Assessing Authority (Excise and Taxation Officer), Sangrur, (1976) 38 STC 39 (Punj).

5. Lastly, we may notice the recent Division Bench judgment of this Court in

Civil Writ Petn. No. 6780 of 1976 decided on 21-7-1978 (Punj) wherein also an identical challenge directed against the very provisions of Ss. 8 and 9 of the Act has been repelled.

6. It calls for specific mention that not the least argument was raised to assail the validity of S. 5 of the Punjab General Sales Tax Act in Civil Writ Petitions Nos. 2145, 2459 and 2191 of 1978.

7. There is no merit at all in any of these writ petitions. All the four writ petitions are hereby dismissed. However, in view of the very fair stand taken by the learned counsel for the petitioners, we are disinclined to burden the petitioners with costs.

Petitions dismissed.

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FULL BENCH

S. S. SANDHAWALIA, C. J.,
S. C. MITAL AND R. N. MITTAL, JJ.

Smt. Chand Kaur, Plaintiff-Appellant v. Jang Singh and others, Defendants-Respondents.

Civil Misc. No. 458-C of 1978 (in Second Appeal No. 565 of 1973), D/- 21-8-1978.*

Civil P. C. (5 of 1908), O. 22, R. 4 (3) (as substituted by Punj. & Har. High Court) — Whether inconsistent with the provisions of the Code as amended by C. P. C. (Amendment) Act (1976) and consequently stands repealed. (Civil P. C. (Amendment) Act (104 of 1976), S. 97).

Sub-rule (3) to rule 4 of Order 22 of the Code substituted by the High Court on March 25, 1975, is not inconsistent with the provisions of the Code as amended by the Amendment Act of 1976 and consequently does not stand repealed. 1978 Cur LJ (Civil) 244 and 1978 Cur LJ (Civil) 247, Foll. (Paras 9, 11)

No doubt, S. 97 (1) of the Amendment Act provides that any amendment made or any provision inserted in the Code by a High Court before commencement of the Act shall, if it is inconsistent with the amended Code, stand repealed. But if a rule or sub-rule in Schedule I of the Code was amended or substituted by a High Court before the Amendment Act, the amended or substituted rule does not stand automatically repealed by virtue of S. 97 (1) for the reason that original rule or sub-rule as framed by the Legislature has not been amended by the Amendment Act. If it had been the intention of the Legislature, it would have stated so specifically. Therefore, it cannot be said that sub-rule (3) of R. 4 as framed by the High Court stands repealed after the Amendment Act. (Para 8)

The powers conferred by sub-rules (4) and (5) added to R. 4 by the Amendment Act of 1976 also do not come in conflict with substituted sub-rule (3). The two provisions incorporated in the sub-rules (4) and (5) are limited in applicability whereas the powers of the Court under the provisions of substituted sub-rule (3) to rule 4 are wider. (Para 10)

Cases Referred:	Chronological Paras
1978 Cur LJ (Civil) 244	9
1978 Cur LJ (Civil) 247	9

V. P. Sarda with T. S. Gujral and P. S. Sobi, for Appellant; C. B. Goel, for Respondents. D. C. Ahluwalia and M. L. Sarin, as Interveners.

RAJENDRA NATH MITTAL, J.:— The short question for determination in the present reference is whether sub-rule (3) of R. 4 of Order 22 of the Code of Civil Procedure (hereinafter referred to as the Code) substituted by this Court on March 25, 1975 is inconsistent with the provisions of the Code as amended by the Code of Civil Procedure (Amendment) Act, 1976 (hereinafter referred to as the Amendment Act) and consequently stands repealed.

2. Briefly the facts of the case are that the plaintiff instituted a suit for possession which was decreed by the trial Court. The defendant-respondents went up in appeal before the first appellate Court. The appeal was accepted by it and the suit was dismissed. The plaintiff against the judgment and decree of the first appellate Court came to this Court in second appeal. During the pendency of the appeal, defendant-respondents Nos. 1 and 3 died on Feb. 13, 1977, but their legal representatives were not brought on the record till March, 1978. On March 7, 1978, an application (C. M. No. 458-C of 1978) under O. 22 R. 4 (3) of the Code was filed by respondent No. 2 praying that on account of death of respondents Nos. 1 and 3, the appeal abated and it might be dismissed as such. It came up before Bains, J.,

*(Decided by Full Bench on order of Reference made by Ajit Singh, J., D/- 14-3-1978.)

who vide order dated March 14, 1978, referred the matter for decision to a Full Bench.

3. To appreciate the question, reference may be made to the relevant provisions of the Code and the amendments made by this Court. Order 22 R. 4 relates to the procedure in case of death of one of the several defendants or of the sole defendant. The said rule prior to the enforcement of the Amendment Act was as follows:—

"4 (1) Where one of two or more defendants dies and the right to sue does not survive against the surviving defendant or defendants alone, or a sole defendant or sole surviving defendant dies and the right to sue survives, the Court, on an application made in that behalf, shall cause the legal representative of the deceased defendant to be made a party and shall proceed with the suit.

(2) Any person so made a party may make any defence appropriate to his character as legal representative of the deceased defendant.

(3) Where within the time limited by law no application is made under sub-rule (1), the suit shall abate as against the deceased defendant."

Section 122 empowers the High Court to make rules. This section reads as under:

"122. Power of certain High Courts to make rules: High Courts not being the Court of a Judicial Commissioner may, from time to time after previous publication, make rules regulating their own procedure and the procedure of the Civil Courts subject to their superintendence, and may by such rules annul, alter or add to all or any of the rules in the first Schedule."

In pursuance of the powers conferred under S. 122, this Court substituted the following sub-rule in place of sub-rule (3) to R. 4 of Order 22:

"Where within the time limited by law no application is made under sub-rule (1) the suit shall not abate as against the deceased-defendant and judgment be pronounced notwithstanding the death and shall have the same force and effect as if it had been pronounced before the death took place."

In 1976, the Code was amended by the Amendment Act. The Amendment Act was, however, enforced with effect from Feb. 1, 1977. Sub-rules (1), (2) and (3) of R. 4 of O. 22 of the Code were retained and sub-rules (4) and (5) were added after sub-rule (3) to the said rule. The said sub-rules are reproduced below:

"(4) The Court whenever it thinks fit, may exempt the plaintiff from the necessity of substituting the legal representatives of any such defendant who has failed to file a written statement or who, having filed it, has failed to appear and contest the suit at the hearing, and judgment may, in such case, be pronounced against the said defendant notwithstanding the death of such defendant and shall have the same force and effect as if it has been pronounced before death took place.

(5) Where—

(a) the plaintiff was ignorant of the death of a defendant, and could not, for that reason, make an application for the substitution of the legal representatives of the defendant under this rule within the period specified in the Limitation Act, 1963 (36 of 1963), and the suit has, in consequence, abated, and

(b) the plaintiff applies after the expiry of the period specified therefor in the Limitation Act, 1963 (36 of 1963), for setting aside the abatement and also for the admission of that application under S. 5 of the Act on the ground that he had, by reason of such ignorance, sufficient cause for not making the application within the period specified in the said Act,

The Court shall, in considering the application under the said S. 5, have due regard to the fact of such ignorance, if proved."

4. Section 97 of the Amendment Act relates to repeal and savings. The relevant provisions of the section are reproduced below:

"(1) Any amendment made, or any provision inserted in the principal Act by a State Legislature or a High Court before the commencement of this Act shall, except in so far as such amendment or provision is consistent with the provisions of the Principal Act as amended by this Act, stands repealed."

5. It is contended by Mr. Goel that in view of S. 97 of the Amendment Act, sub-rule (3) of R. 4 of O. 22 of the Code as substituted by this Court stands repealed after coming into force of the Amendment Act as it is inconsistent with the original sub-rule (3) which had been retained by the Legislature. According to him, even if this interpretation is not accepted, language of sub-rules (4) and (5) is clearly inconsistent with the sub-

stituted sub-rule (3) and, therefore, the said sub-rule stands repealed.

6. I am not convinced with this argument of the learned counsel. Sec. 122 of the Code authorises the High Court to alter or add to all or any of the rules in the First Schedule. By virtue of powers under S. 122, sub-rule (3) of R. 4 of Order 22 of the Code was substituted by the High Court. Prior to the substitution of the sub-rule, a duty was cast upon the plaintiff to make an application for impleading the legal representatives of the deceased-defendant within a prescribed period and if he failed to do so, the suit stood abated. It was experienced that many of the cases in the trial as well as appellate Courts stood abated under this rule as the dominus litis did not make application to make legal representatives of the deceased as parties to the pending lis for the reason that either he did not know about the rule, or about the death of the defendant. In order to lessen the rigour of law, the High Court added Rules 2-A and 2-B after R. 2 of O. 22 and sub-rules (4) to (6) to R. 4 of the said Order. It also substituted sub-rule (3) to R. 4, as already stated above. Under R. 2-A it was made the duty of every Advocate appearing in a case, who became aware of the death of a party to the litigation, to give intimation about the death of that party to the Court and to the person who was dominus litis. In R. 2-B, it was provided that the duty to bring on record legal representatives of the deceased defendant would be of the heirs of the deceased and not of the person who was dominus litis. Substituted sub-rule (3) provided that if no application was made under sub-rule (1) within the prescribed period, the suit would not abate as against the deceased-defendant and the judgment pronounced, notwithstanding the death, shall have the same force and effect as if it had been pronounced before the death took place. Under sub-rules (4) and (5) legal representatives of the deceased defendant were authorised to make application for setting aside the decree qua them and if such an application was made the Court could in certain circumstances set aside the decree. By virtue of sub-rule (6) the provisions of S. 5 of the Indian Limitation Act, 1963, were made applicable to the application under sub-rule (4).

7. The main purpose for addition of Rules 2-A and 2-B and sub-rules (4), (5) and (6) to R. 4 and substitution of sub-rule (3) to R. 4, was not that the legal representatives of the deceased defendant should not be brought on the record. On the other hand, its purpose was that if through over-sight or on account of some other cause, the legal representatives of the deceased defendant could not be brought on record before the decision of the suit, the decision given should remain binding on the parites. In spite of the substituted provisions, the legal representatives of the deceased defendant even after amendment by the High Court were normally impleaded as defendants in the trial as well as appellate Courts. The intention of the High Court in making these provisions was not to penalize the legal representatives of the deceased defendant. It is on account of this reason that they have been given the right to make an application for setting aside the judgment and decree of the Court under sub-rules (4) and (5) of R. 4 and the Court has been empowered to set aside the decree if it was proved that they were not aware of the suit or that they had not intentionally failed to make an application to bring themselves on the record. The Court, however, before setting aside the ex parte decree has to satisfy further that if the legal representatives had been on the record, a different result might have been reached in the suit.

8. No doubt, S. 97 (1) of the Amendment Act provides that any amendment made or any provision inserted in the Code by a High Court before commencement of the Act shall, if it is inconsistent with the amended Code, stand repealed. But if a rule or sub-rule in Schedule I of the Code was amended or substituted by a High Court before the Amendment Act, the amended or substituted rule does not stand automatically repealed by virtue of S. 97 (1) for the reason that original rule or sub-rule as framed by the Legislature has not been amended by the Amendment Act. If it had been the intention of the Legislature, it would have stated so specifically. I am, therefore, unable to hold that sub-rule (3) to R. 4 as framed by this Court stands repealed after the Amendment Act.

9. A similar matter came up before me while sitting singly in Gian Singh v. Joginder Singh, 1978 Cur LJ (Civil) 244. In that case, a contention was raised by the learned counsel for the appellant that before ordering amendment of the plaint and decree sheet it was necessary that

all the respondents should be served. It was argued by him that O. 41, R. 14 of the Code added by the High Court, wherein it was provided that it would be in the discretion of the appellate Court to make any order at any stage of the appeal dispensing with service of such notice on any respondent who did not appear, either at the hearing in the Court whose decree was complained of, or at any proceedings subsequent to the decree of that Court stood repealed after the Amendment Act and the Court could not dispense with the service of the respondents under the said rule. After examining the contention of the counsel, it was held by me that all the amendments made by the High Court did not stand repealed by virtue of S. 97 but only those amendments stood repealed which were inconsistent with the amended provisions of the Code. It was further held by me that O. 41 R. 14 was not repealed by S. 97 of the Amendment Act. The above observations are applicable to the present case. In Bhagwan Singh v. Kalu, 1978 Cur LJ (Civil) 247, Tandon J. examined this very question i.e. whether the substituted sub-rule (3) stood repealed after the Amendment Act. The learned Judge held that the amendment made by the High Court can be given effect to even after the amendment of the Code. The learned Judge further observed that the amendment was not inconsistent with the provisions contained in the body of the Code after amendment. I am in respectful agreement with the above observations.

10. The second limb of the contention of Mr. Goyal is that in view of addition of sub-rules (4) and (5) to R. 4 by the Amendment Act, the substituted sub-rule (3) stands repealed as these sub-rules are inconsistent with substituted sub-rule (3). I am also not impressed with this contention. Sub-rule (4) provides that the Court may exempt the plaintiff from the necessity of substituting the legal representatives of any defendant who failed to file a written statement or who having filed it failed to appear and contest the suit at the hearing. Sub-rule (5) authorises a plaintiff to apply after the expiry of the period of limitation for setting aside the abatement on certain grounds and for admission of that application under S. 5 of the Act on the ground that he had, by reason of such ignorance, sufficient cause for not making an application within period specified in the Act. The two provisions incorporated in the above sub-rules are limited in applicability whereas the powers of the Court under the provisions of substituted sub-rule (3) to R. 4 are wider. In my opinion, the powers conferred by sub-rules (4) and (5) also do not come in conflict with substituted sub-rule (3). In the situation S. 97 of the Amendment Act will have no applicability.

11. For the aforesaid reasons, sub-rule (3) to R. 4 of O. 22 of the Code substituted by this Court on March 25, 1975, is not inconsistent with the provisions of the Code as amended by the Amendment Act and consequently does not stand repealed. Therefore, the application has no merit and is liable to be dismissed. I order accordingly. The matter may now be listed before the learned Single Judge for deciding regular second appeal.

S. S. SANDHAWALIA, C. J.:— I agree.

S. C. MITAL, J.:— I agree.

Application dismissed.

AIR 1979 PUNJAB & HARYANA 19

S. S. SANDHAWALIA, C. J. AND S. S. DEWAN, J.

Sri Chand and others, Petitioners v. State of Haryana and others, Respondents.

Civil Writ Petn. No. 3365 of 1977, D/- 18-8-1978.

(A) Haryana Ceiling on Land Holdings Act (26 of 1972) (as amended by Acts 40 of 1976 and 18 of 1978), S. 18 (7), (8) and (9) — Right of appeal — Regulation by legislation — Constitutionality — Right of appeal and revision against order of Prescribed Authority declaring surplus area — Imposition of condition by the Amending Act, as to deposit of sum equal to 30 times of land holding tax payable in respect of disputed surplus area — Regulation held did not violate Art. 19 (1) (f) of the Constitution — Regulation of the right of appeal held not onerous or unreasonable and so not unconstitutional — (Constitution of India, Arts. 14 and 19 (1) (f)).

It was argued for the petitioners that S. 18 (1), as originally enacted in 1972, gave an unrestricted and un-conditional right of appeal and revision to them against the orders of the prescribed or the appellate authority. That right was claimed to be a vested right which could

not be fettered or taken away. It was contended that Act 40 of 1976 by inserting sub-secs. (7) and (8) had put a clog or a fetter on their unrestricted right of appeal which the legislature was unauthorised to do. Even the mellowing down of the restrictions imposed by the aforesaid amending Act by the recent amendment vide Haryana Ceiling on Land Holdings (Amendment) Act, 18 of 1978 had not in any way removed the vice of unconstitutionality. It was argued that a vested right of appeal having been conferred on the petitioners every restriction or a clog thereon by subsequent legislation was impermissible. It was then contended that even the amended sub-secs. (7) and (8) in 1976 and the newly added sub-sec. (9) of S. 18 in 1978 were so onerous in nature that they either virtually took away the vested right of appeal or in any case rendered it illusory. (Para 7)

Held that the right of appeal is not a guaranteed or a constitutional right. There is nothing whatsoever in the constitution which may even remotely vest any such inalienable right in the citizens. That being so, it is equally evident that there is no inherent claim or right to appeal from an original forum. It is, therefore, that it has been repeatedly asserted that the right is a mere creature of the statute. If that be so, it is plain that the creator who confers such rights, namely, the legislature can equally take the same away. It inevitably follows that if the whole right can be thus taken away it can equally be impaired, regulated or burdened with conditions onerous or otherwise. (Para 8)

Therefore, the legislature is perfectly within its right to regulate the right of appeal conferred by it by imposing conditions or restrictions on its exercise. The Haryana Legislature, has, therefore, in no way transgressed the limits of its authority by the insertion of sub-cls. (7), (8) in 1972 and (9) in S. 18 of the Act in 1978. Case law ref. (Para 10)

Construing sub-sec. (7) correctly in the scheme in which it is laid along with subsecs. (8) and (9), there is no escape from the conclusion that the restrictions and the regulation of the right of appeal which the legislature has found necessary is indeed far from either being too onerous and equally far from the sentimental cry that the same renders the meaningful right of appeal given under S. 18 (1) and (2) nugatory or illusory. (Para 15)

A provision which treats all persons similarly situated with an equal hand cannot possibly be termed either discriminatory or arbitrary. (Para 18)

Against the background of the implementation of agrarian and ceiling legislation, the regulation of the right of appeal by the moderate provision of sub-sections (7), (8) and (9) was not only reasonable but indeed absolutely necessary if any meaning or content was to be given to the ceiling on land holdings within the Haryana State. (Para 19)

Anno: AIR Comm., Const. of India, (2nd Edn.), Art. 14, N. 42, Art. 19, N. 69 (Q).

(B) Constitution of India, Art. 14 — Offensive classification — Haryana Ceiling on Land Holdings Act (26 of 1972) (as amended in 1978), S. 18 (7) to (9) — Right of appeal — Imposition of condition as to deposit of certain sum for filing appeal — Argument that Art. 14 was violated because provision created, in unfair and unequal manner, two classes of persons, namely, those who can make the deposit and those who are unable to do so — Held that Art. 14 was not violated — A disability or disadvantage arising out of party's own default or omission cannot be taken to be tantamount to the creation of two classes offensive of Art. 14. AIR 1975 SC 1234, Foll. (Para 24)

Anno: AIR Comm., Const. of India, Art. 14, N. 1 (cc) & (d).

(C) Haryana Ceiling on Land Holdings Act (26 of 1972), Ss. 2 (a), 9 (4), 12 and 16 — Constitutionality of these provisions cannot be questioned as confiscatory in nature in view of AIR 1977 Punj 221 (FB) which had upheld those provisions in categoric terms — (Constitution of India, Art. 31). AIR 1975 Punj 353 and AIR 1977 SC 915, Ref. (Para 25)

Anno: AIR Comm., Const. of India (2nd Edn.), Art. 31, N. 5.

(D) Constitution of India, Art. 19 (1) (f) — Haryana Ceiling on Land Holdings Act (26 of 1972) (as amended in 1978), S. 18 (2) — Mere right of appeal is by itself not a fundamental right because at one point or another it remotely touches the right of property. (Para 27)

Anno: AIR Comm., Const. of India (2nd Edn.), Part III (Gen), N. 6; Art. 19, N. 59.

(E) Haryana Ceiling on Land Holdings Act (26 of 1972) (as amended in 1978), S. 18 (7) — Validity — Provision does not amount to interference with judicial discretion by legislature regarding determination of mesne profits — (Constitution of India, Art. 246 (3)).

What the legislature has done by sub-section (7) is merely to provide a reasonable modicum of the security to discourage frivolous appeals and to provide some assurance for the recovery of a licence fee for the unauthorised use of land on the failure of an appeal without merit. As is evident from sub-secs. (8) and (9), the amount is only to be adjusted later and this obviously involves an assessment and quantification by the authorities in doing so. The legislature cannot possibly be barred from quantifying the amount of security which it deems broadly necessary as a necessary restriction for the prevention of frivolous appeals. When after the amendment a clear provision has been made both for the refund or adjustment of the said security in the event of the success and failure of the appeal, respectively, the argument that provision amounted to inroad in judicial discretion loses content altogether.

(Para 29)

Anno: AIR Comm., Const. of India (2nd Edn.), Art. 246, N. 8.

Cases Referred: Chronological Paras

AIR 1977 SC 915 25
AIR 1977 Punj 221 : 1977 Pun LJ 230 (FB) 25
AIR 1975 SC 1234 : 1975 Tax LR 1540 10, 18, 24, 31
AIR 1975 Punj 353 : ILR (1975) 1 Punj 89 25
AIR 1974 SC 1126 10
AIR 1960 SC 980 10
AIR 1952 Punj 103 (FB) 9

Anand Swarup, R. S. Mittal, K. P. Bhandari; M. S. Ratta, G. O. Nagpal, for Petitioners; S. C. Mohunta, A. G., Haryana with Naubat Singh, Sr. D. A. G., Haryana, for Respondents.

S. S. SANDHAWALIA, C. J.:— In this set of five hundred and thirty four connected civil writ petitions ably argued by a galaxy of learned counsel, the focal point that falls for determination is indeed a single one— whether the provisions of S. 18 (7), (8) and (9) of the Haryana Ceiling on Land Holdings Act, 1972, as amended by the Haryana Ceiling on Land Holdings (Amendment) Act, 1978 suffer from the vice of unconstitutionality ?

2. As is manifest, the issue herein is pristinely legal and indeed the learned counsel for the petitioners did not even refer at all to the facts of either one of the cases. Therefore a passing reference to the main Civil Writ Petition No. 3365 of 1977 amply suffices the purpose. The three petitioners therein claim to be owners in possession of agricultural land measuring 41 Kanals 14 Marlas and are primarily aggrieved by the declaration of the said area as surplus and the vesting of the same in the State under S. 12 of the Haryana Ceiling on Land Holdings Act, 1972 (hereinafter called the Act). The petitioners consequently filed an application under S. 8 of the Act before respondent No. 3, the Collector (Prescribed Authority) under the Act seeking a relief of declaration that the land in dispute did not vest in the State and, therefore, it could not be utilised under the Act. This application was rejected by respondent No. 3 on the 16th of May, 1977. Aggrieved the petitioners preferred an appeal before respondent No. 2, the Commissioner Ambala Division who by virtue of S. 18 (2) is the appellate authority against the order of the Collector. The petitioners are primarily aggrieved by the provisions of S. 18 (7) requiring them at the time of the filing of the appeal to deposit a sum equal to thirty times of the land holding tax payable in respect of the disputed surplus area before their appeal is to be entertained. It is averred that calculated on that basis the petitioners are required to pay in all a sum of nearly Rs. 1,200/-. In substance this alleged fetter on the right of appeal and revision conferred by S. 18 of the Act is sought to be challenged as a violation of the right to hold property under Article 19 (1) (f) and on a variety of other grounds, to which reference inevitably would follow.

3. The facts are not in dispute and indeed at the stage of the Motion hearing on 25th of July, 1978, the learned Advocate General, Haryana states that the issue being purely legal, no return on behalf of the respondent-State was necessary and the same was consequently not filed. However, as regards the legal issue a reference to the legislative history of the provisions under challenge is both necessary and inevitable and may, therefore, be made at the very outset. The predecessor Land Ceiling legislation in the State of Haryana was primarily contained in the Punjab Security of Land Tenures Act, 1953 and Pepsu Tenancy and Agricultural Lands Act, 1955 as applicable to the said State. The Haryana Ceiling on Land Holdings Act, 1972 was enacted to consolidate and amend the law relating to ceiling on land holdings in the State of Haryana and after receiving the assent of the President of India it came into force on the 23rd December, 1972. Section 7 thereof imposing a ceiling on

land holdings laid down that no person shall be entitled to hold in any capacity land within the State of Haryana exceeding the permissible area on or after the appointed day. Sections 8, 9, 10 and 11 of the Act laid down the procedure for the determination and the declaration of the surplus area by the prescribed authority whilst S. 12 declared in unequivocal terms that the surplus area of a land-owner shall vest in the State Government from the date on which it is so declared free from any encumbrances.

4. The material provisions of S. 18 vide sub-secs. (1) and (2) provided for an appeal, review and revision of the orders of the prescribed authority and as originally enacted no fetter was placed on the appellate and the revisional remedy by the statute. However, by the enactment of the Haryana Ceiling on Land Holdings (Second Amendment) Act, 1976 (Act No. 40 of 1976), apart from other changes, sub-sec. (5) of S. 18 was omitted and sub-secs. (7) and (8) were added therein. The newly inserted sub-sec. (7) of S. 18 for the first time imposed a condition that all appeals or revisions under sub-sec. (1) or (2) thereof would be entertained only on the deposit of a sum equal to thirty times the land holdings tax payable in respect of the disputed surplus area.

5. The aforesaid regulation of the right of appeal and revision was made the subject-matter of challenge in Civil Writ Petition No. 3365 of 1977 preferred on the 27th of October, 1977 and many other similar writ petitions. In view of the relevant provisions of the Forty-second Amendment Act this writ petition first came up for motion hearing before a

(contd. on col. 2)

Original Act (Act 40 of 1976)

18 (1) Appeal, review and revision

Any person aggrieved by any decision or order of the prescribed authority, not being the Collector, may, within fifteen days from the date of the decision or order, prefer an appeal to the Collector in such form and manner as may be prescribed;

Provided that the Collector may entertain the appeal after the expiry of the said period of fifteen days if he is satisfied that the appellant was prevented by sufficient cause from filing the appeal in time.

(7) No appeal under the sub-sections (1) and (2) or revision under

Bench of five Judges of this Court and after a preliminary hearing the learned Advocate General, Haryana took up the stand that the respondent-State was contemplating an amendment of Ss. 18 (7) and 18 (8). The writ petition aforesaid and the other connected cases were hence adjourned sine die to await the necessary amendment. Consequent upon the repeal of the relevant provisions of the forty-second amendment Act the case reverted back to a Division Bench. On the 6th of June, 1978, the Haryana Ceiling on Land Holdings (Amendment) Act, 1978 was enacted whereby consequential changes were made in S. 18 (7) and whilst retaining sub-sec. (8) in its original form a new sub-sec. (9) was inserted thereafter. Despite the aforesaid changes introduced in S. 18 learned counsel for the petitioners pressed their attack on the constitutionality thereof and in view of the significance of the question, the writ petitions were admitted for hearing before a Division Bench.

6. Inevitably the controversy herein has to revolve around the relevant provisions of S. 18 in the context of the changes introduced therein. However, it suffices to recall that as originally enacted S. 18 had conferred an unrestricted and unfettered right of appeal, review and revision not regulated by any further conditions. Act 40 of 1976, however, imposed the condition of deposit by the insertion of sub-secs. (7) and (8) whilst the recent amendment vide Haryana Act No. 18 of 1978 has substantially watered down the rigour of the conditions imposed. To appreciate the contention in a correct perspective, it is, however, necessary to juxtapose the original and the amended relevant provisions in S. 18 of the Act :—

Amended Act (Act No. 18 of 1978)

Appeal, review and revision

Any person aggrieved by any decision or order of the prescribed authority, not being the Collector, may, within fifteen days from the date of the decision or order, prefer an appeal to the Collector in such form and manner as may be prescribed;

Provided that the Collector may entertain the appeal after the expiry of the said period of fifteen days if he is satisfied that the appellant was prevented by sufficient cause from filing the appeal in time.

No appeal under sub-sec. (1) or sub-sec. (2) or revision under sub-

sub-sec. (4) shall be entertained unless, the appellant or the petitioner, as the case may be has deposited with the appellate or revisional authority a sum equal to thirty times, of the land holdings tax payable in respect of the disputed surplus area.

(8) Notwithstanding anything contained in S. 21, a person who files an appeal or a revision against the order declaring his land as surplus area and the appeal or revision filed by him fails, shall be liable to pay, for the period he is or has at any time been in possession of the land declared surplus to which he is or was not entitled under the law, a license fee equal to thirty times the land holding tax, recoverable in respect of this area.

(9) ... ...

sec. (4) shall be entertained unless the appellant or the petitioner as the case may be, has deposited a sum equal to thirty times the land holdings tax payable in respect of the disputed surplus area or has furnished a bank guarantee of the equal amount as security with the appellate or revisional authority.

Notwithstanding anything contained in S. 21, a person who files an appeal or a revision against the order declaring his land as surplus area and the appeal or revision filed by him fails, shall be liable to pay, for the period he is or has at any time been in possession of the land declared surplus to which he is or was not entitled under the law, a license fee equal to thirty times the land holding tax, recoverable in respect of this area.

If the appeal or revision succeeds, the amount deposited or the bank guarantee furnished under sub-sec. (7) shall be refunded or released, as the case may be. If the appeal or revision fails, the amount deposited in cash or the amount of the bank guarantee furnished, shall be adjusted against the licence fee recoverable under sub-sec. (8)."

7. Now in the light of the statutory provisions aforesaid the core of the argument advanced on behalf of the petitioners by their learned counsel with considerable vehemence and eloquence, is this, that S. 18 (1) as originally enacted in 1972 gave an unrestricted and unconditional right of appeal and revision to them against the orders of the prescribed or the appellate authority. That right is claimed to be a vested right which according to the learned counsel cannot be fettered or taken away. It was contended that Act 40 of 1976 by inserting sub-secs. (7) and (8) had put a clog or a fetter on their unrestricted right of appeal which the legislature was unauthorised to do. Even the mellowing down of the restrictions imposed by the aforesaid amending Act by the recent amendment vide Haryana Ceiling on Land Holdings (Amendment) Act, 1978 has, according to the counsel not in any way removed the vice of unconstitutionality. On one extreme, it was argued that a vested right of appeal having been conferred on the petitioners every restriction or a clog thereon by subsequent legislation was impermissible. Lowering the sights a little, it was then contended that even the amended sub-sections (7) and (8) and the newly added sub-sec. (9) of S. 18 were so onerous in nature that they either virtually took away the vested right of appeal or in any case rendered it illusory.

8. Despite the vehemence with which the proposition aforesaid was advanced and pressed it appears to me that the same stems from a basic fallacy with regard to the very nature and the content of the right of appeal if at all it may be so termed. It is manifest that the right of appeal is not a guaranteed or a constitutional right. There is nothing whatsoever in the constitution which may even remotely vest any such inalienable right in the citizens. Indeed learned counsel for the petitioners were compelled to concede that the right of appeal was not a fundamental right nor a constitutional one. That being so, it is equally evident that there is no inherent claim or right to appeal from an

original forum. It is, therefore, that it has been repeatedly asserted that the right of appeal is a mere creature of the statute. If that be so, it is plain that the creator who confers such rights, namely, the legislature can equally take the same away. It inevitably follows that if the whole right can be thus taken away it can equally be impaired, regulated or burdened with conditions onerous or otherwise.

9. The legal position seems to be so manifest and supported by binding precedent that it would be obviously wasteful to launch on a long dissertation on principle as if the issue was one of first impression. A Full Bench of this Court in M/s. Gordhan Das, Baldev Das v. The Governor General in Council, AIR 1952 Punj 103, on which the learned counsel for the petitioners had themselves placed reliance for the proposition that the right of appeal was not a mere procedural right but a substantive one, has in no uncertain terms held as follows (at p. 106 of AIR):—

"*****Although the law as we understand it considers it essential that a litigant who is aggrieved by the order of one Court should be at liberty to have his case examined by a superior tribunal, it is somewhat of a paradox that appeals from one Court to another on the ground that the lower Court has given a decision erroneous in point of fact or law were entirely unknown to the common law of England. The right of appeal is not a natural or an inherent right which is available to every litigant as a matter or course; it is merely a legislative privilege which the law-making authority may confer or withhold as it may think fit. Subject to the provisions of the Constitution the Legislature possesses full powers to grant or take away the right of appeal and to prescribe in what cases, under what circumstances, in what manner and to and from what Court appeals may be taken. It is for this reason that appeals are commonly regarded as creatures of statute."

10. In this context the matter seems to be concluded by the observations of Chandrachud J. (as the learned Chief Justice then was) in highlighting the basic distinction between the right of a suit and right of appeal in Smt. Ganga Bai v. Vijay Kumar, AIR 1974 SC 1126 (at p. 1129)—

"***On this question the position seems to us well-established. There is a basic distinction between the right of suit and the right of appeal. There is an inherent right in every person to bring a suit of a civil nature and unless the suit is barred by statute one may, at one's peril bring a suit of one's choice. It is no answer to a suit, howsoever frivolous the claim, that the law confers no such right to sue. A suit for its maintainability requires no authority of law and it is enough that no statute bars the suit. But the position in regard to appeals is quite the opposite. The right of appeal inheres in no one and therefore an appeal for its maintainability must have the clear authority of law. That explains why the right of appeal is described as a creature of statute."

Once it is held, as it necessarily must be that the right of appeal stems merely from its conferment by the legislature then it is equally evident that the same authority may regulate, impair or hedge it down with onerous conditions. This position, apart from being clear on principle, is equally covered by binding precedent. In State of Bombay v. M/s. Supreme General Films Exchange Ltd., AIR 1960 SC 980 Justice S. K. Das speaking for the Court observed as follows after referring to a number of authorities on the point (at pp. 984, 985 of AIR):—

"It is thus clear that in a long line of decisions approved by this Court and at least in one given by this Court, it has been held that an impairment of the right of appeal by putting a new restriction thereon or imposing a more onerous condition is not a matter of procedure only; it impairs or imperils a substantive right and an enactment which does so is not retrospective unless it says so expressly or by necessary intendment."

The aforesaid observations can obviously leave no manner of doubt that not only is the legislature entitled to impair, imperil or restrict with onerous conditions the right of appeal but it may go further by doing so retrospectively either by an express provision or even by necessary intendment. To my mind, the matter is concluded by the weighty observations of Khanna J. in Anant Mills v. State of Gujarat, AIR 1975 SC 1234 which paradoxically was brought to our notice on behalf of the petitioners by their learned counsel. Repelling an attack under Art. 14 of the Constitution against an appellate provision which required the deposit of tax before the entertainment of the appeal it was observed (at p. 1249 of AIR):—

"The right of appeal is the creature of a statute. Without a statutory provision

creating such a right the person aggrieved is not entitled to file an appeal. We fail to understand as to why the legislature while granting the right of appeal cannot impose conditions for the exercise of such right. In the absence of any special reasons there appears to be no legal or constitutional impediment to the imposition of such conditions. It is permissible, for example, to prescribe a condition in criminal cases that unless a convicted person is released on bail, he must surrender to custody before his appeal against the sentence of imprisonment would be entertained. Likewise, it is permissible to enact a law that no appeal shall lie against an order relating to an assessment to tax unless the tax had been paid. Such a provision was on the statute book in S. 30 of the Indian Income-tax Act, 1922. The proviso to that section provided that — 'no appeal shall lie against an order under sub-sec. (1) of S. 46 unless the tax had been paid.' Such conditions merely regulate the exercise of the right of appeal so that the same is not abused by a recalcitrant party and there is no difficulty in the enforcement of the order appealed against in case the appeal is ultimately dismissed. It is open to the legislature to impose an accompanying liability upon a party upon whom a legal right is conferred or to prescribe conditions for the exercise of the right. Any requirement for the discharge of that liability or the fulfilment of that condition in case the party concerned seeks to avail of the said right is a valid piece of legislation, and we can discern no contravention of Art. 14 in it."

On this aspect, therefore, there is no choice but to conclude that the legislature is perfectly within its right to regulate the right of appeal conferred by it by imposing conditions or restrictions on its exercise. The Haryana Legislature has, therefore in no way transgressed the limits of its authority by the insertion of sub-cls. (7), (8) and (9) in S. 18 of the Act.

11. Now the second but an equally substantial limb of the main argument is to the effect that the restrictions imposed on the right of appeal by sub-sec. (7) of S. 18 are so onerous in nature as to virtually render the right of appeal as nugatory. Learned counsel for the petitioners waxed eloquent in contending that sub-sec. (7) takes away with one hand what the earlier sub-sec. (1) had given with the other. Particularising the argument it was said that sub-sec. (7) was so vague in content that it did not specify the quantum of the land holding tax which was payable by the appellant or the number of years wherefor it was to be deposited. Relying on the amended provisions of S. 12 it was then contended that since the surplus land vested in the State from the date of its original declaration as such even under the previous statute, therefore, a particular appellant may in such a situation be compelled to deposit the land holdings tax for a number of years rising up to ten years or more. In this context it was lastly submitted that in the case of large land-holders who might well be owning hundreds of acres of land which might be declared surplus it would become too burdensome to pay the land holdings tax aforesaid with regard to such areas.

12. It appears to me that the contentions aforesaid spring from some misconception or misinterpretation of the plain provisions of sub-sec. (7) and in any case raise bogies stemming from a fertile imagination to visualise situations which hardly arise or are even likely to arise. The submission that sub-sec. (7) is vague on the ground that it does not specify either the quantum or the period for which the land holdings tax is to be deposited as security cannot hold water even on the plain reading of the statute. It is specified therein that a sum equal to thirty times of land holdings tax payable in respect of the disputed surplus area is to be deposited. A mere reference to the Haryana Land Holdings Tax Act, 1973 makes the position crystal clear. Section 5 thereof and the other provisions of the Act leave no manner of doubt that the land holdings tax which consolidates a variety of taxes imposable upon land holdings is an annual tax. Schedule I to the said Act specifies in great detail the quality of the land, the kind of the soil etc. for classifying the incidence of the tax whilst Schedule II meticulously prescribes the rates of land holdings tax in the greatest detail. It is more than manifest, therefore, that the deposit contemplated by sub-section (7) is clearly based on the annual land holdings tax which again is precisely determined by the detailed provisions of the Haryana Land Holdings Tax Act, 1973. Apart from the plain interpretation of the statute, the learned Advocate General Haryana himself took a fair and firm stand that the deposit was related to the annual tax and the quantum thereof was

precisely fixed by the statute. It was the common case before us that the annual tax under the said provision varied around the paltry figure of Rs. 8/- only with regard to one acre of agricultural land. It is thus plain that the argument of vagueness with regard to sub-section (7) is patently ill-founded.

13. Again the imaginary bogey being raised to the effect that in a particular case the appellants may be required under sub-section (7) to deposit the land holdings tax for a number of years stands on a similar footing and is equally misconceived. As already noticed, the language is plain and the intention of the legislature is manifest to the effect that what is required to be deposited as security is thirty times the annual land holdings tax. There is nothing in the relevant provision which can possibly be construed to imply a requirement to deposit more than the annual levy. Merely because under Section 12 land may have been deemed to be vested in the State from an earlier date has not the least relevance with regard to the quantum of the deposit required under sub-section (7). Once it is so, it is plain that by reference to the Land Holdings Act, 1976 when the amount is quantified, it comes to no more than about Rs. 240/- per acre in all. In view of the present agricultural production from land in a progressive State like Haryana it would indeed be a bold man who can say that a mere payment of this amount required against an acre of agricultural land would render the right of appeal nugatory. That the petitioners themselves clearly understand the implications of the quantum of deposit is plain from the averments in the closing part of the paragraph 7 of the writ petition to the effect that they are required to deposit an amount of Rs. 1200 for nearly five acres of surplus land. To repeat, it can hardly be ever said that the aforesaid quantum of deposit as security against the filing of frivolous appeals and in most cases the retention of the land during the pendency thereof is either unreasonably onerous or of a nature as to erode the very right of appeal itself.

14. Yet again the argument that a particular appellant may under sub-section (7) be compelled to deposit the annual land holdings tax with regard to hundreds of acres or more seems to turn a blind eye to the preceding history of the agrarian legislation within the State of Haryana and perhaps over the whole of the country. The present Act is merly a successor provision to the earlier provision with regard to the ceiling of land holdings contained the Punjab Security of Land Tenures Act as applicable to the State of Haryana. The permissible area therein, both of the land owners and the tenants did not in any case exceed thirty standard Acres. Equally well it is to recall that ceiling and agrarian legislations have progressively been enforced in the Punjab and Haryana for a period of nearly thirty years beginning with 1949 onwards. In this context to now imagine land-holdings of hundreds or thousands of acres is nothing but allowing one's imagination to run riot.

15. Repelling the argument alleging the illusory nature of the right of appeal, I am inclined to hold that construing sub-section (7) correctly in the scheme in which it is laid along with sub-sections (8) and (9), there seems to be no escape from the conclusion that the restrictions and the regulation of the right of appeal which the legislature has found necessary is indeed far from either being too onerous and equally far from the sentimental cry that the same renders the meaningful right of appeal given under Section 18 (1) and (2) nugatory or illusory.

16. Learned counsel for the petitioners had then attempted to assail the restrictive sub-sections (7), (8) and (9) of Section 18 on the ground that the legislature had not vested any discretion in any authority to relax the same or to grant exemption in an individual case to an appellant or petitioner. It was half heartedly argued on behalf of the petitioners that in all statutes which fetter the right of appeal without vesting a corresponding discretion in an authority to relax the same it must necessarily be held that the fetter is unconstitutional and should therefore be struck down.

17. I am unable to find much substance in this contention either. The galaxy of Advocates appearing on behalf of the petitioners, despite pressing could produce no authority in support of the proposition that unless discretion to exempt is vested in an authority every fetter on a right of appeal or revision is unwarranted. Indeed, as already

noticed in the earlier part of this judgment, precedent runs rather entirely to the contrary, nor could learned counsel cite any cogent principle in support of the aforesaid contention.

18. Learned Advocate General Haryana whilst meeting the aforesaid argument on behalf of the petitioners forthrightly contended that a regulation of the right of appeal cannot merely be challenged on the sole ground of the absence of the vesting of discretion for exempting appellants or petitioners from the restrictions imposed. Counsel highlighted in particular section 30 of the Indian Income-tax Act, 1922 which required the deposit of the tax before an appeal could be entertained and which had held the field for well-nigh forty years before it was replaced by the Indian Income-tax Act, 1961. Reliance was also rightly placed on the observations of their Lordships in this particular context in Anant Mills' case, (AIR 1975 SC 1234) (supra). This apart, the learned Advocate General, Haryana had plausibly pointed out to a number of factors which had motivated and indeed compelled the legislature to avoid the vesting of any such power at the level of the Collector who in most cases may well be the appellate forum from the decision of the prescribed authority. He pointed out that in the context of thousands or even tens of thousands of appeals which may inevitably come to be filed against the order of the prescribed authority it would be practically impossible for the appellate Court to examine the status and ability of each of the appellants or petitioners to deposit or not to deposit the security required under sub-section (7). Learned counsel appeared to be on firm ground that the launching of such inquiries by the Collector in the context of thousands of appeals pertaining to innumerable landholders would by itself bog down and delay the process of ceiling and agrarain legislation at that very stage and thus defeat the very purpose and intent of the legislature to expeditiously implement what appeared to be as a progressive measure of social engineering. It was further contended that in such a situation exemption of one or the other of the land-holders by a collector may be construed as an invidious distinction or an uncalled for discretion in their favour. Shri Mohunta even went to the length of contending that the Collectors though exercising quasi-judicial functions under the Act were nevertheless primarily executive officers and to vest them with such a discretion might needlessly imperil the same due to pressure from a variety of sources to exercise the said discretion in favour of the favoured few whilst refusing the same in the case of others. It was further pointed out that an indiscriminate grant of exemptions by the Collector by following a precedent of having granted it once to one or the other of the land-holders would again defeat the very purpose and intent of the legislature to ensure some security against the filing of frivolous appeals. It was, therefore, pointed out that the legislature had designedly found it necessary to avoid vesting of any such discretion which might be capable of arbitrary exercise and, therefore, to make no exceptions in the case of anyone of the appellants or the petitioners in these proceedings and to treat them all with an even hand. It was, therefore, forcefully and rightly submitted that a provision which treats all persons similarly situated with an equal hand cannot possibly be termed either discriminatory or arbitrary, and the more so in the peculiar context of the facts delineated above.

19. Indeed when the matter is viewed against the background of the implementation of agrarian and ceiling legislation, the learned Advocate General of Haryana seems to be on very firm ground in contending that the regulation of the right of appeal by the moderate provisions of sub-sections (7), (8) and (9) was not only reasonable but indeed absolutely necessary if any meaning or content was to be given to the ceiling on land holdings within the State. Counsel drew our attention to the natural desire and the inevitable attempts of the large landholders to cling to the surplus area from which they were divested and in some cases to thwart the actual implementation of all the progressive legislation. That this has been sometimes done with a degree of success in individual cases and even collectively cannot perhaps be lost sight of. It was rightly pointed out that by virtue of the earlier provisions of the Punjab Security of Land Tenures Act and the Pepsu Tenancy Act as also by Section 12 of the Haryana Ceiling on Land Holdings Act the surplus area so declared vests automatically in the State for the avowed object of utilisation by allotment

to landless persons. That being so, the learned Advocate General was forcefully able to contend that the divested big landlords had neither a moral nor a legal right to continue in possession of the surplus area. Nevertheless past experience has shown that this object had been achieved sometimes by filing frivolous appeals and thereafter revisions by the landlords lured obviously by the desire to continue in possession of the surplus area. It was to mitigate this evil and to discourage the filing of frivolous appeals and revisions as a subterfuge for remaining in possession of land which in the eye of law stood vested in the State that the legislature had been compelled to step in to regulate the right of appeal and revision. All that has been done is that the entertaining of all these appeals and revisions has been made conditional upon the appellant or the petitioner furnishing some security in proof of the genuineness of their claim. Reference was made to the plain provisions of the statute which made the intent of the legislature clear but this nevertheless appears to have been made more explicit by the statement of objects and reasons which was appended to the Bill, which culminated in the enactment of Act No. 40 of 1976. These deserve express notice as published in the Haryana Government Gazette dated the 2nd of July, 1976—

"As a result of the deliberations of the conference of the Chief Ministers held in March, 1976, the Government of India suggested inter alia that the Haryana Ceiling on Land Holdings Act, 1972 should be amended so as to reduce the period of appeal and revision, to discourage the institution of appeals on frivolous ground by prescribing payment of deposit money, to bar appearance of lawyers, and also to provide that no compensation should be paid for a part of the surplus land of landowners who fail to furnish declarations or furnish declarations containing false information and the landowners should be made to pay licence fee in the event of the failure of their appeal/revision.

The above recommendations were considered by the State Government and it was decided to carry out the above amendments along with amendments of S. 12 and S. 15 of the Act. The latter section is to be amended to clarify the position of allotment of surplus land to certain specified categories of tenants as also to reduce the measure of allotment of surplus land so that the benefit of the scheme of allotment is extended to the maximum number of eligible persons. Accordingly, the Haryana Ceiling on Land Holdings (Second Amendment) Ordinance, 1976 was promulgated on the 5th May, 1976, as the Vidhan Sabha was not in session at that time. It is now proposed to replace the said ordinance with the present legislation."

The manifest and the twin intent of the legislature, therefore, being to prevent frivolous appeals and revisions for retaining the possession of land and in the event of their failure to have some security as a licence fee for the unauthorised continuance in possession of the same, was therefore spelled out in sub-secs. (7) and (8) of S. 18 which were inserted by the aforesaid Amending Act. The learned Advocate General was further able to point out that in most of the cases for the very valuable right of remaining and continuing in possession of surplus agricultural land, during the pendency of the appeal the appellants have to pay no court-fee as such and all that the regulation of the right of appeal herein requires is a deposit of thirty times the land holdings tax primarily in the nature of a security against frivolous appeals and their failure. This was so at the stage of the original insertion of subsecs. (7) and (8) and counsel highlighted the fact that by the recent amendment indeed the aforesaid regulation of the right of appeal has been further liberalised and mellowed down in favour of the subject.

20. However, in view of the recent amendment, particular reference is called for to the provisions, objects and the manner of the enactment of the Haryana Ceiling on Land Holdings (Amendment) Act, 1978 (Haryana Act No. 18 of 1978). It deserves recalling that this Amending Act was patently a response by the legislature to the challenge made in this Court to the then existing sub-secs. (7) and (8). It was before this Court that the learned Advocate General, Haryana, had himself fairly taken the stand that the legislature would itself modify the provision if at all necessary in order to mitigate the alleged stringency thereof and to bring the same in consonance with the law laid down by their Lordships of the Supreme Court. It was patently in pursuance of that assurance that sub-sec. (7) was amended and a new sub-sec. (9) was inserted. To put the matter beyond

doubt, reference may be made to the Statement of Objects and Reasons which ultimately culminated in the enactment of the new provision. This calls for quotation in extenso :—

"The existing sub-sec. (7) of S. 18 of the Haryana Ceiling on Land Holdings Act, 1972, lays down that before filing an appeal/revision, a landowner shall deposit with the appellate/revisional authority an amount equal to 30 times the land holdings tax in respect of the disputed surplus area, which has been challenged in the Punjab and Haryana High Court through a number of writ petitions wherein it has been alleged that the said provision does not indicate as to whether the amount to be deposited thereunder is a court-fee or any other fee to be charged for filing an appeal/revision, or the said amount will be refunded in case the appellant succeeds. In order to clarify the said provision beyond any doubt, it is proposed to amend sub-sec. (7) of Section 18, and to add a new sub-sec. (9) to Section 18 of the Act so as to provide that the amount to be deposited or the bank guarantee of an equal amount to be furnished thereunder will be treated as a security, which will be refunded or released as the case may be if the appeal/revision succeeds, and if the appeal/revision fails, the said amount will be adjusted against the amount which would become due under sub-sec. (8) of Section 18 of the Act."

21. Highlighting the position subsequent to the 1978 Amending Act, the learned Advocate General, Haryana, has rightly pointed out that the provisions have now been altered entirely and substantially in favour of the petitioners. Apart from the deposit required with the appeal or revision being a mere security, an alternative therefor has been provided by the provision regarding the furnishing of a bank guarantee of equal amount. With plausibility it was argued that with the coming into being of the land mortgage and co-operative banks and other commercial facilities, a bank guarantee was available against land and property instead of depositing any hard cash. The counsel further highlighted the provision of sub-sec. (9) which in terms provided for the refund of the whole amount or the bank guarantee, as the case may be, in the case of success of the appeal or revision. Particularly highlighted on behalf of the respondent State is the fact that the deposit of the bank guarantee is neither a court-fee nor one which may be lost altogether once the appeal or revision has been filed along with it. It is rightly a quantified amount of licence fee which under the provisions of sub-secs. (8) and (9) is refunded entirely to the successful appellant and even in the event of the failure of the appeal or revision, all that is to be done is that the said amount would be adjusted as licence fee for the unauthorised use and occupation of the land during the pendency of the same and the amount whereof would be determined accordingly.

22. The learned Advocate General then rightly pointed out that the deposit under sub-sec. (7) is called for in the case of an area declared surplus over and above the permissible area. It was contended with obvious plausibility that the appellants and petitioners herein by and large are a class of landlords whose holdings exceed the permissible area provided under the legislation. It cannot, therefore, be said that the persons aggrieved by the declaration of their area surplus are a class of paupers who are unable to make even a reasonable deposit of money. It was submitted that the right of appeal involved no court fee related to the value of the land (which is even elementary in the case of an ordinary suit for possession), and the appellants and petitioners herein, in the total absence thereof, have to make a reasonable deposit of money as licence fee in the event of the failure of the appeal which can hardly be termed as onerous. It was rightly contended that with the endemic love of land engrained in the land-holders within the State of Haryana, it cannot possibly be said that a deposit of the sum of Rs. 240/ per acre by a land-owner who holds an area over and above the permissible one is a condition which takes away his right of appeal.

23. I am of the view that in the larger perspective the regulation of the right of appeal, in particular after its recent amendment by way of sub-secs. (7), (8) and (9) of S. 18 against the background of Haryana ceiling legislation, is not only wholly moderate and reasonable but perhaps necessary to secure the objects of that legislation.

24. In fairness to the learned counsel for the petitioners, one feels compelled to refer to some of their contentions which on the face of them appear to be wholly untenable. It was urged before us that

Art. 14 was attracted to the situation and stood violated because sub-sec. (7) to (9) of S. 18 treated the two classes of persons—namely those who can make the deposit and those who are unable to do so in an unequal and unfair manner. It is unnecessary to examine this rather curious contention on principle because it appears to me as concluded against the petitioners by the following observations of their Lordships of the Supreme Court in The Anant Mills Co. Ltd. etc. etc. v. The State of Gujarat, AIR 1975 SC 1234 (at p. 1249):—

"Any requirement for the discharge of that liability or the fulfilment of that condition in case the party concerned seeks to avail of the said right is a valid piece of legislation, and we can discern no contravention of Art. 14 in it. A disability or disadvantage arising out of a party's own default or omission cannot be taken to be tantamount to the creation of two classes offensive to Art. 14 of the Constitution, especially when that disability or disadvantage operates upon all persons who make the default or omission."

25. We were then pressed repeatedly and persistently to retread afresh the well trodden ground of the unconstitutionality or otherwise of the land ceiling legislation. Counsel then raised the bogey that Ss. 2 (a), 9 (4), 12 and 16 of the Haryana Ceiling on Land Holdings Act, 1972, were confiscatory in nature and patently violative of the right of property guaranteed under Art. 31. We cannot possibly be drawn afresh into this controversy in view of the fact that a Five Judge Bench of this Court in Smt. Jaswant Kaur v. The State of Haryana, 1977 Pun LJ 230: (AIR 1977 Punj 221) (FB), has upheld in categoric terms the aforesaid provisions. Even the correctness of that view was not seriously challenged before us. Being bound by that decision, we are unable to entertain or consider afresh the constitutionality of the same provisions. Equally it is fit to recall in this context that the similar, if not identical, provisions of the Punjab Land Reforms Act, 1973, have been upheld by the Division Bench decision in Saroj Kumari etc. v. The State of Haryana etc., ILR (1975) 1 Punj 89: (AIR 1975 Punj 353). This apart, it deserves notice that the aforesaid Division Bench of this Court had struck down the definition of "family" as laid out in the Punjab Land Reforms Act, 1973, which in turn was reversed by their Lordships of the Supreme Court in D. G. Mahajan etc. v. State of Maharashtra, AIR 1977 SC 915, and the validity of the whole Act had been upheld.

26. Based primarily on the alleged inherent unconstitutionality and confiscatory nature of the Haryana ceiling legislation, it was then contended that the right of appeal, when it touches this right of property, by itself is transformed more or less in the nature of a fundamental right to hold the said property and, therefore, any unreasonable restrictions placed on the right of appeal would involve a violation of the fundamental right under Art. 31.

27. Whilst we are slightly amused by the ingenuity of counsel on this score, it is almost manifest that the submission is fallacious. For the detailed reasons recorded above I have already found that the regulation of the right of appeal is far from being unreasonable. This apart, once it is held that the basic provisions of the Haryana legislation in the Haryana Ceiling on Land Holdings Act, 1972, are constitutional, then it is hardly possible to hold that the mere right of appeal with regard to the declaration of surplus area would by itself become a fundamental right or be violated on the same grounds on which the challenge to the substantive provisions has been repelled. Mr. K. P. Bhandari clearly conceded before us that he could not cite any authority which has held that the mere right of appeal is by itself a fundamental right because at one point or another it remotely touches the right of property. To me it appears that there is neither principle nor precedent for the rather curious contention raised before us at the cost of considerable Court time.

28. Another curious contention raised on behalf of the petitioners was that sub-sec. (7) was in fact a great inroad into the judicial jurisdiction. It was contended that this was an uncalled for attempt on the part of the legislature to determine the mesne profits from the land during the pendency of the appeal which according to the counsel was a province of the Court and not that of the law-makers.

29. The plain provisions of sub-sec. (7) as also the broad construction I have earlier placed thereon need reference only to summarily negative this contention. What the legislature has done by sub-sec. (7) is merely to provide a reasonable modicum of the security to dis-

courage frivolous appeals and to provide some assurance for the recovery of a licence fee for the unauthorised use of land on the failure of an appeal without merit. As is evident from sub-secs. (8) and (9), the amount is only to be adjusted later and this obviously involves an assessment and quantification by the authorities in doing so. The legislature cannot possibly be barred from quantifying the amount of security which it deems broadly necessary as a necessary restriction for the prevention of frivolous appeals. When after the amendment a clear provision has been made both for the refund or adjustment of the said security in the event of the success and failure of the appeal, respectively, the argument aforesaid on behalf of the petitioners loses content altogether. It has to be borne in mind that not in one but innumerable tax statutes the appellate right has been fettered with the requirement that the assessed tax or part thereof may be first deposited before the appeal can be entertained. Reference in this context may be made to S. 25 of the Punjab General Sales Tax Act or the provisions of S. 265 of the Indian Income-tax Act, 1961.

30. It was then stated that it was unreasonable for the State to ask for a security from the appellant or the petitioner because in cases of surplus area the State was bound to pay compensation in graduated instalments and, therefore, could well adjust the amount of licence fee out of the said compensation in the event of the failure of the appeal. It is difficult to sustain such a contention. Firstly, it is for the legislature to consider as to the nature of the amount and the mode and manner of the payment of security or the regulation of the right of appeal which it deems necessary. Secondly, no provision in the Act was brought to our notice which entitled the State to deduct or adjust anything from the compensation payable to the land-holders. In fact, it was argued on behalf of the petitioners themselves that the persons, who are merely allottees, tenants or otherwise unauthorised occupants and who are not landlords entitled to compensation, may come to be aggrieved by the declaration of surplus area against which they may wish to file appeals. No question, therefore, of the adjustment of the licence fee out of the compensation due to the land-holders would arise in such a case.

31. Counsel then contended that reference to or reliance on S. 30 of the Indian Income-tax Act, 1922, was not well founded. It was pointed out that the requirement to deposit the tax under the first proviso to sub-sec. 30 (1) was related only to the default under S. 46 of the same statute. Whilst there is some substance in the contention that the deposit visualised by S. 30 aforesaid operated in the limited field aforesaid, it is equally manifest and deserves to be highlighted that the condition laid therein with regard to that area was at least absolute and no discretion was conferred on any appellate authority to exempt or negative the deposit of tax required by the said provision. Despite the absence of this discretion, their Lordships of the Supreme Court in The Anant Mills's case (AIR 1975 SC 1234) (supra) approvingly referred to the validity of such a provision with regard to the appellate jurisdiction. On reading the aforesaid case closely, I am wholly unable to subscribe to the view that the real ratio of the judgment is that the regulation of the right of appeal can be upheld only if a matching discretion is vested in the appellate authority to exempt or waive the same in individual cases. As I read that judgment, the observations with regard to the right of appeal recognise a virtually unfettered right to regulate the same by conditions howsoever onerous.

32. Lastly, in this context even a more curious argument was raised that the security required by sub-sec. (7) was a tax and not a fee. Frankly, I have been unable to wholly appreciate the rather glib argument repeating a cliche with regard to the well-known distinction between the two as regards the constitutionality of legislation. I am unable to agree that in the context of sub-secs. (7), (8) and (9) of S. 18 any issue with regard to the distinction between a tax or a fee even remotely arises.

33. For the reasons recorded, I am unable to find any merit in this set of writ petitions which I hereby dismiss, leaving the parties to bear their own costs.

34. It may, however, be pointedly noticed that the writ petitioners herein, who had challenged the regulation of their right of appeal, were primarily aggrieved by the declaration of surplus area by the prescribed authority either actually or in prospect. The dismissal of

the writ petitions would in no way affect their legal right to resort to the remedy by way of appeal and revision conferred on them by S. 18 (1) and (2) of the Act. They are all, therefore, relegated to their ordinary statutory rights if the same are attracted to the case of an individual petitioner.

S. S. DEWAN, J.:— I agree.

Petitions dismissed.

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S. S. SANDHAWALIA, C. J. AND S. S. DEWAN, J.

The Mathana Ex-Serviceman Co-operative Tenants Farming Society, Village Mathana, Petitioner v. The State of Haryana and others, Respondents.

Civil Writ Petn. No. 6485 of 1976 and L. P. A. No. 15 of 1977, D/- 24-7-1978.*

East Punjab Utilisation of Lands Act (38 of 1949), S. 7 — Notice by Collector calling upon ex-servicemen tenants to show cause against their dispossession — Does not violate directions of Supreme Court in AIR 1974 SC 1121. 1976 Pun LJ 451, Overruled.

In AIR 1974 SC 1121 the Supreme Court had observed that the Collector would have no jurisdiction to order dispossession of the aggrieved Ex-Servicemen Societies from the land unless he had found after requisite investigation that the land had been leased out to them under the Act. No such finding having been recorded by the Collector the Supreme Court, in that case, quashed the orders directing dispossession. For lack of material on the record to enable it to find for itself, the Supreme Court formulated the questions arising out of the conflicting claims of the parties and directed the Collector to settle them with a view to ultimately decide whether or not the land had been leased out under the Act. The Court did not either place the onus of proof on the Collector himself in respect of the facts which the question involved nor did it in terms direct that the Collector should himself collect evidence unaided by the parties. (Para 11)

The wording of the questions formulated by the Supreme Court by itself does not necessarily suggest that the burden of proving the various pleas which the questions involve had been laid on the Collector. Even otherwise the onus of proof cannot be laid on the authority itself. Thus the notice calling upon the members of the Ex-Servicemen Co-operative Tenants Farming Society, to file their reply, along with documents in proof thereof does not violate the observations in the judgment of the Supreme Court. The Collector therefore, had jurisdiction to issue the notice to the petitioner-society the object of which was to require it to take part in the proceedings proposed to be initiated by him in terms of the judgment of the Supreme Court with a view to decide the question formulated by it and to decide whether or not the land had been leased out to the petitioner-society under the Act and thereafter take appropriate action. Such a notice was in fact in the interest of the parties themselves which provided them an adequate opportunity to produce the necessary evidence if any in their possession to support the claim of either. 1976 Pun LJ 451, Overruled; 1977 Pun LJ 211, Affirmed.

(Paras 11, 13, 16)

Cases Referred:	Chronological Paras
1976 Pun LJ 451	2, 8, 10, 12
AIR 1974 SC 1121	2

Anand Swaroop with I. S. Vimal and M. L. Bansal, for Petitioner; A. S. Nehra, Addl. Advocate General Haryana, P. S. Jain with V. M. Jain, for Respondents.

S. S. DEWAN, J.:— Letters Patent Appeal No. 15 of 1977 (The Prem Ex-Servicemen Tenants Farming Society v. Haryana State) and Civil Writ Petition No. 6485 of 1976, in view of the similarity of the material facts and the questions arising therein for our determination are being disposed of together by this judgment.

2. Letters Patent Appeal is directed against the judgment, dated December 20, 1976, delivered by Gurnam Singh J., in Civil Writ Petition No. 947 of 1975,* by which he upheld, inter alia, the legality of the notice (Annexure P-2) dated July 5, 1974, issued to the petitioner by the Collector, Kaithal. The learned Judge found that the notices were not contrary to the directions of the Hon'ble Supreme Court contained in its judgment in the case of M/s. Prem Ex-Servicemen Co-operative Tenants' Farming Society Ltd. v. State of

*(Decided by Division Bench on order of reference made by K. S. Tiwana J. on 19-1-1978).

JV/JV/E423/78/GDR

* Reported in 1977 Pun LJ 211.

Haryana reported as AIR 1974 SC 1121, Civil Writ Petition has been placed before us for disposal on reference by K. S. Tiwana J. in view of the conflict of opinion on the legality of the notice expressed in the two judgments, one under appeal and another dated May 12, 1976, by M. R. Sharma J., in the case of Mohanpur Ex-Servicemen Co-operative Tenants Farming Society Ltd. v. State of Haryana reported as 1976 Pun LJ 451, whereby the learned Judge quashed the notice on the ground that it did not strictly comply with the observations of the Supreme Court made in the aforesaid judgment.

3. It will be convenient at this stage to state in brief the facts of the case decided by the Supreme Court and the observations and directions given by it in its judgment.

4. On the assumption that the provisions of the East Punjab Utilization of Lands Act, 1949 (hereinafter referred to as the Act) applied, the Collector Kaithal issued orders to a bunch of Ex-Servicemen Co-operative Tenants Farming Societies, directing their dispossession from the lands and their delivery to the rightful owners on the ground that the period of their leases had expired. The Societies including the present appellants and the writ petitioner approached the Hon'ble Supreme Court by way of appeals and writ petitions and challenged the legality of the orders on the ground that the lands had not been allotted to them under the said Act. No pattas or lease deeds were forthcoming. The respondents-State and the landowners contended that there was other ample documentary evidence to establish that the lands had been leased out to the Societies under the Act. The Supreme Court held that eviction of the Societies could not be ordered unless it was found after necessary investigation that the lands had been allotted to them under the Act. The Supreme Court, therefore, quashed the orders made by the Collector and remanded all the cases to the Collector for decision with these observations (at pp. 1122, 1123 of AIR):—

"After having been taken through the provisions of the Act, we find that the provisions for eviction could only apply to cases where it is clear or there is no dispute that the person to be evicted was a lessee under S. 5 of the Act. In the instant case, the learned counsel for the alleged lessees points out that there were a number of enactments under which the land could be given. They were said to be; Colonization of Govt. Lands Act, 1912; the East Punjab Displaced Persons Resettlement Act, 1949; East Punjab Reclamation of Land Act, 1941 and the Security of Land Tenures Act, 1953. Certain rules were also said to have been made in 1897 for utilization of waste land in Punjab. It was not clear under which provision the land was allotted to the alleged lessees. Hence, at the very threshold, the power of the Collector to proceed under the Act is challenged. It is true that the Act does not give power to the Collector to adjudicate on questions of right and title where these properly and really arise. Nevertheless, the Collector, when proceeding to take steps under the Act, must determine the source and extent of his power and jurisdiction, where these are questioned, so as to decide whether the Act relied upon by a party before him could be applied at all. This is a question on which there are conflicting assertions and pieces of evidence which seem difficult to reconcile with each other. Hence, we think that these are fit cases in which the Collector may himself go into the following questions before passing any further orders:

1. Was the possession of any of the lands in dispute taken by the State Government under the Utilization of Lands Act and Pattas duly executed under S. 5 of the Act in favour of the alleged lessees?

2. Were any proceedings for awarding compensation under S. 4 of the Act taken in respect of the land alleged to have been leased, and, if so, on what basis were the persons dispossessed compensated? In other words, are there grounds to believe that the persons to whom the lands were directed to be handed over were no longer owners?

3. If no legally valid leases were executed in favour of the alleged lessees, what could be their legal status and rights by reason of long possession?

4. What was the nature of the claims to any land put forward by the Gaon Panchayats?

5. Is this a case in which the Collector can interfere or pass any order under any provision of law or should the matter be left to be decided between the alleged lessees, the alleged private owners and the Panchayats by such other legal proceedings as may be open to them for the purpose of getting their claims adjudicated upon?"

5. In view of the arguments advanced before us by Mr. Anand Swaroop, learned counsel for the petitioner, which were adopted by Mr. Kuldip Singh who appeared on behalf of the appellants, it is necessary to refer to the relevant contents of the notices issued by the Collector, which were assailed. Notice, dated June 10, 1974, issued to the petitioner, copy of which is Annexure P-1 on the record, runs thus :—

"The petitioner has filed a petition against you under the above title in connection with which you are directed to appear before me on 20th June, 1974, at 7-00 A.M. and produce your reply along with all the documents in proof of your reply. You are further informed that in case you fail to attend this office on the above day, ex parte proceedings will be taken against you and case will be decided accordingly."

6. The notice, dated July 5, 1974, issued in the case of the appellants, copy of which has been produced as Annexure "P-2", is as under :—

"By means of this notice (in duplicate) you are hereby informed that you should appear before me personally or through an Advocate at the Rest House Pehowa on 26-7-1974 for furnishing evidence, documents or any other material and submission in support of your contentions and proof in relation to and having bearing on the aforesaid questions. In the event of your non-appearance it will be understood that you have no submissions to make nor you wish to furnish any evidence and an ex parte decision would be taken as regards the various questions referred to above and consequential orders passed."

7. Before dealing with the arguments urged before us by the learned counsel it may be mentioned that in response to the notices issued to them, the appellants and the petitioner appeared before the Collector and contested the claims of the owners that their lands had been taken over by the Collector under the Act and thereafter leased out to them. They asserted that they were in possession of the lands by virtue of allotments made in favour of the members constituting the Societies by the Government of India under a Scheme framed by the Ministry of Defence with a view to rehabilitate the ex-servicemen. The Collector in each case found the assertion to be baseless and by a reasoned order rejected it, holding that they were in possession of the lands by virtue of the lease granted to them under the provisions of the Act.

8. Arguments of the learned counsel may now be noticed. It was contended that the notice such as was issued to the petitioner, could not be competently issued by the Collector until in accordance with the observations and directions contained in the judgment of the Supreme Court extracted by us above, he had himself in the first instance gone into the question formulated by the Supreme Court and found that the land in dispute had been leased out to the petitioner under the provisions of the Act. The learned counsel emphasised that in view of what had been said by the Supreme Court in its judgment, the Collector was required to collect evidence on his own, which would show that the lands had been leased out to the petitioner under the Act. The Collector, he submitted, had not done so before he issued the notice. By the notice issued, he further submitted, the Collector had placed the onus of proof on the petitioner in respect of the questions formulated by the Supreme Court, which by virtue of the judgment of the Supreme Court lay upon him. Consequently, he contended that the notice was in violation of the directions of the Supreme Court and without jurisdiction; was liable to be quashed along with the proceedings taken upon it and the orders made by the Collector, the appellate and the revisional authorities. In support of this contention, learned counsel also placed reliance on the judgment of Sharma J., reported as 1976 Pun LJ 451. In this case, the learned Judge quashed an identical notice issued by the Collector. After referring to the judgment of the Supreme Court and reproducing the questions formulated by it, the learned Judge assigned the following reasons for setting aside the notice :—

"It is apparent that these issues have been worded in such a manner that the burden of establishing the pleas raised therein has been placed on the Collector himself. He is, of course, to decide these facts with a view to determine whether he has the jurisdiction to act under the Act. The wording of the notice served upon the petitioner-Society shows, that the Collector has assumed the fact that he has jurisdiction to decide the matter unless the petitioner-Society produces sufficient evidence before him to prove that he had no jurisdiction to take action in the matter. The proper manner in which

the Collector should have acted in this case is that he should have collected all the evidence in support of the plea that the land had been allotted to the petitioner-Society under the Act and then he should have called upon the said Society to explain that evidence. If the petitioner-Society wishes to cross-examine any witness, upon whose statement the Collector relies, or wishes to produce any witness in defence the Collector has to accede to such a request before deciding that the land had been leased out to the petitioner-Society under the Act. It is only after such a decision that a notice under S. 7 of the Act can be issued against the petitioner-Society."

9. There can be no doubt that the judgment delivered by Sharma J., fully helps the petitioner.

10. However, as stands noticed at the very outset there is a patent conflict of opinion the point which in terms has been noticed by K. S. Tiwana J., in making the reference and directing that the writ petition should be considered along with the letters patent appeal. The rival views expressed in the Mohanpur Ex-Servicemen Co-operative Tenants Farming Society Ltd. v. State of Haryana, 1976 Pun LJ 451 and that in the Prem Ex-Servicemen Co-operative Tenants' Farming Society Ltd., Bakhli v. State of Haryana, 1977 Pun LJ 211 therefore vie for acceptance.

11. To recall, the Supreme Court had observed that the Collector would have no jurisdiction to order dispossession of the aggrieved Ex-Servicemen Societies from the land unless he had found after requisite investigation that the land had been leased out to them under the Act. No such finding having been recorded by the Collector the Supreme Court, therefore, quashed the orders directing dispossession. For lack of material on the record to enable it to find for itself the Supreme Court formulated the questions arising out of the conflicting claims of the parties and directed the Collector to settle them with a view to ultimately decide whether or not the land had been leased out under the Act. As we read that judgment, the Court did not either place the onus of proof on the Collector himself in respect of the facts which the question involved nor did it in terms direct that the Collector should himself collect evidence unaided by the parties. Learned counsel have been wholly unable to point out to any such necessary direction either express or implied in the judgment of the Supreme Court or to anything said therein relating to the question of onus.

12. Coming now to the judgment of Sharma J., in Mohanpur Ex-Servicemen Co-operative Tenants Farming Society's case (1976 Pun LJ 451) it would appear from the operative part thereof reproduced above that the learned Judge expressed the view that the manner in which the issues (apparently meaning thereby the questions) had been worded in fact placed the burden of establishing the pleas raised therein on the Collector himself. In effect, therefore, it was said as if the onus of proving the same lay upon him alone. On this footing the learned Judge proceeded further to set down the procedure for the Collector to be followed in the enquiry which alone in his view would accord with the obligation to discharge this onus. The notice issued in that case which is similarly worded as the one issued in the present writ petition was interpreted by the learned Judge to mean that the Collector had thereby assumed jurisdiction to decide the matter.

13. With great respect to the learned Judge we are unable to agree with the view of the matter taken by him. In our view the wording of the questions formulated by the Supreme Court by itself does not necessarily suggest that the burden of proving the various pleas which the questions involve had been laid on the Collector. Even otherwise we think it rather unusual (though perhaps not impossible) that the onus of proof should be laid on the authority itself. We do not find anything in the language of the questions formulated by their Lordships of the Supreme Court which would deviate from the ordinary rule that the burden of proving the pleas forming the subject-matter of the question would lie on the party by which it was raised. If this be the correct reading of the questions — and we feel no doubt it is so — it is unnecessary to proceed further to examine the propriety of the procedure which the learned Judge desired the Collector to adhere to for the purpose of enquiry in to the question. Therefore, the criticism levelled against the notice issued in that case was perhaps uncalled for. The Collector had jurisdiction to issue the notice to the petitioner the object of which appears no other than to require it to take part in the proceedings proposed to be initiated by him in terms of the judg-

ment of the Supreme Court with a view to decide the question formulated by it and to decide whether or not the land had been leased out to the petitioner under the Act and thereafter take appropriate action. Such a notice would in fact be in the interest of the parties themselves and provide them an adequate opportunity to produce the necessary evidence if any in their possession to support the claim of either. We are unable to see as to how the Collector should be barred from inviting the parties to produce any evidence in their possession or be necessarily compelled to ferret all such evidence by himself alone unaided by them.

14. Even if it be assumed that the observations of the Supreme Court that the Collector may himself go into the question which may enable him to collect the material and evidence therefor it would not mean that he could not seek the assistance of one or other of the parties in collecting the necessary information or evidence. Nor would it prevent him from inviting or requiring the parties to appear before him for furnishing such material as may be in their possession. The wording of the notice in the present as also in the previous cases cannot possibly raise any inference that the Collector had placed any onus of proof merely by issuance of the same on either of the parties.

15. For the aforesaid reasons we are compelled to conclude with great respect that the judgment of Sharma J. in Mohanpur Ex-Servicemen Co-operative Tenants Farming Society (1976 Pun LJ 451) does not proceed on a correct assumption and has, therefore, to be overruled. We agree with the reasoning of Gurnam Singh J. in paragraph 18 of the report in Prem Ex-Servicemen Co-operative Tenants' Farming Society Ltd.'s case (1977 Pun LJ 211) and affirm the same.

16. Consequently we are satisfied that the notice does not in any way violate the observations in the judgment of the Supreme Court. It was issued plainly to enable the petitioner to take part in the proceedings which the Collector was required to take in order to decide the questions formulated by their Lordships. The notice is in keeping with the judgment of the Supreme Court and is not questionable for any other reasons advanced by the learned counsel.

17. No other point was urged by the learned counsel for the parties.

18. In the result we find no substance in the writ petition as well in the appeal. Both are, therefore, dismissed but without any order as to costs.

S. S. SANDHAWALIA, C. J.:— I agree.

Appeal and petition dismissed.

AIR 1979 PUNJAB & HARYANA 36

RAJENDRA NATH MITTAL, J.

Smt. Parkash Kaur, Petitioner v. Smt. Sandhooran and another, Respondents.

Civil Revn. No. 206 of 1978, D/- 6-10-1978.

(A) Civil P. C. (5 of 1908), O. 21, Rr. 89, 90 — Application under R. 89 subsequent to application under R. 90 — Not maintainable.

From a reading of Rr. 89 and 90 of O. 21, it is apparent that the judgment debtor has no right to apply for setting aside a sale under O. 21, R. 89, in case he had filed an application for setting it aside under O. 21, R. 90, and in case he first filed an application under O. 21, R. 89 and thereafter an application under O. 21, R. 90, he has no right to prosecute the earlier application. AIR 1975 SC 957, Foll. (Para 6)

Where the judgment-debtor first filed an application under O. 21, R. 90 and subsequently also filed an application under R. 89 but withdrew the application under R. 90 only after expiry of limitation for filing of application under R. 89, the application under R. 89 was not maintainable. In such a case, the application under R. 89 would be deemed to have been filed on the date on which the application under R. 89 was withdrawn. (Para 7)

Anno: AIR Comm., C. P. C. (9th Edn.), O. 21, R. 89, N. 24; O. 21, R. 90, N. 1B.

(B) Civil P. C. (5 of 1908), O. 21, Rr. 89, 90 — Application under R. 89 subsequent to application under R. 90 — Court whether obliged to enquire about applicant's option.

Where the judgment-debtor in her application under O. 21, R. 89, filed subsequent to application under O. 21, R. 90 that she wanted to proceed with her earlier application under R. 90 for setting aside the sale, the question of Court asking the judgment-debtor for her option with regard to her applications did not arise as the application under R. 89 was not maintainable. AIR 1925 All 778, Disting. (Para 8)

KV/LV/E920/78/SNV

Anno: AIR Comm., C. P. C. (9th Edn.), O. 21, R. 89, N. 24; O. 21, R. 90, N. 1B.

Cases Referred: Chronological Paras

AIR 1975 SC 957 6
AIR 1925 All 778 8

D. N. Awasthy, for Petitioner; Kuldip Singh Bar-At-Law, for Respondents.

ORDER:— This revision petition has been filed by the judgment-debtor against the judgment of the Additional District Judge, Amritsar, dated December 9, 1977.

2. Briefly the facts are that on October 16, 1970, Smt. Parkash Kaur mortgaged a house situated in Katra Sher Singh, Amritsar, to Smt. Sandhooran, for an amount of Rs. 5,000/- vide a registered mortgaged deed. There was an arbitration clause in the deed wherein it was provided that any dispute arising between the parties would be referred to arbitration. A dispute arose between the parties regarding the payment of the amount and consequently the matter was referred to the arbitration of Mr. Kartar Singh Bagga, who held that Smt. Sandhooran was entitled to recover the amount of Rs. 5,812.50, with interest thereon by sale of the mortgaged property. The award was filed in the Court and it was made a rule of the Court. Smt. Sandhooran filed an execution application against the judgment-debtor in the Court of Subordinate Judge First Class, Amritsar, who on July 27, 1974, ordered sale of the property. In pursuance of that order the property was sold on August 30, 1974 and was purchased by Suresh Kumar respondent.

3. On the same day, that is, Aug. 30, 1974, Smt. Sandhooran, judgment-debtor filed an application under Ss. 47, 60 and 151 read with O. 41, R. 6 of the Civil P. C., stating that no notice under O. 21, R. 66 of the Code had been served on her and consequently the property could not be sold. She prayed that the sale be stayed. In spite of the application, the property was sold. Thereafter on September 16, 1974, another application was filed by the judgment-debtor alleging that the sale of the property was null and void, that there had been material irregularities and fraud in publishing and conducting the sale and that the petitioner's interest had been seriously affected on account of irregularities and fraud. She prayed that the sale of the house be set aside. While the above application was pending, she moved another application on September 23, 1974, under O. 21, R. 89 of the Code stating that she was ready to deposit the decretal amount of Rs. 5,846.50 and Rs. 3,800/-, 5% of the sale proceeds, and she may be allowed to do so. She further prayed that the sale of the property be set aside. On January 25, 1975, she moved yet another application that the decree-holder had withdrawn the amount deposited by her and, therefore, the sale was liable to be set aside. On November 23, 1974, the counsel for the judgment-debtor made a statement that he did not want to pursue his application dated September 16, 1974. The applications were opposed by the decree-holder.

4. The executing Court held that notice under O. 21, R. 66 had been served upon the judgment-debtor and that application under O. 21, R. 89 was not maintainable. Consequently it dismissed the objection petition of the judgment-debtor. She went up in appeal before the Additional District Judge, Amritsar, who dismissed it. She has come up in revision to this Court.

5. The first contention of the learned counsel for the petitioner is that the application under O. 21, R. 89 was maintainable as the petitioner had not filed any application under O. 21, R. 90 of the Code. He argues that the application dated September 16, 1974 could not be treated under O. 21, R. 90 of the Code. He also submits that in case that application was to be treated under O. 21, 90, then the Court should have given option to the petitioner to withdraw either that application or the application under O. 21, R. 89 and to pursue the other application.

6. I have given a thoughtful consideration to the argument of the learned counsel but regret my inability to accept it. Before discussing the facts of the case, it will be appropriate to refer to the provisions of O. 21, Rr. 89 and 90. Rule 89 relates to the applications to set aside sale on deposit and R. 90 to applications to set aside sale on the ground of irregularity or fraud. Rule 89 (2) provides that if a person had made an application under R. 90 to set aside the sale of immovable property, he shall not be allowed to make an application under R. 89 unless he withdrew the former application. The said rule reads as follows:—

"89 (2). Where a person applies under R. 90 to set aside the sale of his immovable property, he shall not, unless he withdraws his application, be entitled to make or prosecute an application under this rule."

Under R. 90, the judgment-debtor or any other person whose interests are affected by the sale, can apply to the Court to set aside the sale on the ground of a material irregularity or fraud in publishing or conducting the sale. From a reading of the above two rules it is apparent that the judgment-debtor has no right to apply for setting aside a sale under O. 21, R. 89, in case he had filed an application for setting it aside under O. 21, R. 90, and in case he first filed an application under O. 21, R. 89 and thereafter an application under O. 21, R. 90, he has no right to prosecute the earlier application. The aforesaid two provisions came up for interpretation before the Supreme Court in Shiv Prasad v. Durga Prasad, AIR 1975 SC 957, wherein it was held:—

"An application under R. 89 validly made on the date of its presentation cannot be allowed to be prosecuted until the subsequent application filed under R. 90 is withdrawn. But it cannot be allowed to be made or be deemed to have been made unless the prior application filed under R. 90 is withdrawn.

The words used in the sub-rule are "make or prosecute". If it were to be held that the applicant is not entitled merely to prosecute his application under R. 89 unless he withdraws his application under R. 90, then the word 'make' would become redundant. In order to bring about the true intention of the Legislature, effect must be given to both the words. If a person has first applied under R. 90 to set aside the sale, then, unless he withdraws his application, he is not entitled to make and prosecute an application under R. 89. The application even if made will be deemed to have been made only on withdrawal of the previous application. If, however, a person has filed an application under R. 89 first and thereafter another application under R. 90, he will not be allowed to prosecute the former unless he withdrew the latter."

Now it is to be seen whether the application dated September 16, 1974, was under O. 21, R. 90 or not. No doubt it is true that in the application it has been stated that the sale of the property was void. The reason for saying that it was void, was stated to be that there had been material irregularities and fraud in publishing and conducting the sale. These words are the same which have been used in O. 21, R. 90. Merely from the fact that particulars of fraud or irregularities have not been given, it cannot be held that the application was not under O. 21, R. 90 of the Code. After a reading of the application no doubt is left in my mind that it was an application for setting aside sale under O. 21, R. 90. It may also be mentioned that the petitioner also treated it as such as in her application dated September 23, 1974, under Order 21, rule 89, she reserved her right to the objections filed by her in the Court to set aside the sale. The contention of Mr. Awasthy, learned counsel for the petitioner, that the application dated September 16, 1974, cannot be treated under Order 21, rule 90, has, therefore, no substance.

7. In view of Order 21, rule 89, if an application under Order 21, rule 90 was pending in the executing Court, the petitioner had no right to make an application under O. 21, R. 89. If she wanted to do so, she should have withdrawn first the application under O. 21, R. 90. The petitioner filed an application under O. 21, R. 89, in spite of the fact that an application under O. 21 R. 90 was pending. The limitation for filing an application under O. 21, R. 89, or rule 90, is 30 days from the date of the sale. She filed both the applications within 30 days of the sale and thus these were within limitation. But as already observed above, the application dated September 23, 1974 was not maintainable in view of the pendency of the application under O. 21, R. 90. The counsel for the petitioner withdrew that application on November 23, 1974. On that date, the time for filing an application under O. 21, R. 89, had passed. The application under O. 21 R. 89 can be said to be duly presented on Nov. 23, 1974 but as the limitation for filing that application had expired, consequently it cannot be treated to be within limitation and is liable to be dismissed as such.

8. The contention of the learned counsel that it was the duty of the Court to ask for the option of the petitioner as to whether she wanted to proceed with the application under O. 21, R. 89 or under O. 21, R. 90, has also no substance. The petitioner while making an application under O. 21, R. 89, stated specifically therein that she wanted to pursue the earlier application for setting aside the sale. In the circumstances the application under O. 21, R. 89, was not maintainable. The question of option therefore did not arise. Mr. Awasthy referred to a Division Bench judgment of the Allaha-

bad High Court in Mt. Sarvi Beqam v. L. Ram Chandar Sarup, AIR 1925 All 778. In that case the judgment-debtor had in the first instance filed an application under O. 21, R. 89 and then an application under O. 21, R. 90 of the Code. The facts of that case are, therefore, distinguishable. At the time when an application under O. 21, R. 89 was filed, the judgment-debtor had the right to do so, but after filing an application under O. 21, R. 90, he could not prosecute it. Therefore, the observations in that case will not have any applicability to the facts of the present case. I, therefore, reject the contention of the learned counsel.

9. In the end it may be mentioned that the learned counsel for the petitioner sought to argue that she was not served with a notice under O. 21, R. 66 of the Code. This question, however, cannot be gone into in the revision petition as both the Courts, after taking into consideration the evidence, held that notice under the said rule had been served upon the petitioner. Mr. Awasthy brought to my notice various orders of the Court. I am also convinced that the notice had been served upon her. Therefore the contention is rejected having no substance.

10. For the reasons recorded above, the revision petition fails and the same is dismissed with no order as to costs.

Revision dismissed.

AIR 1979 PUNJAB & HARYANA 39

SURINDER SINGH, J.

Mana, Petitioner v. Dalel, Respondent.

Civil Revn. No. 434 of 1978, D/- 27-9-1978.*

Civil P. C. (5 of 1908), Ss. 10, 151 — Stay of suit — Propriety — Application for stay filed when the suit had reached concluding stage — Earlier suit in regard to same property between the same parties pending in second appeal — Earlier suit for declaration of title and later suit for possession — Point in issue in the later suit largely depending upon result of second appeal — Held the suit was rightly held under S. 10.

(Para 2)

Anno: AIR Comm. C.P.C. (9th Edn.), S. 10 Notes 3-A, 4, 4-A, 7.

*(Against order of P. L. Ahuja, Sub. J., 3rd Class, Karnal, D/- 24-1-1978.)

KV/KV/E928/78/AGT

S. S. Rathor, for Petitioner; N. C. Jain, for Respondent.

ORDER:— Mana petitioner in this Revision Petition filed a suit against the respondent Dalel for possession of some agricultural land. When the suit reached the concluding stage, an application was filed by the defendant-respondent under Section 10 read with Section 151, Code of Civil Procedure, with a prayer that the proceedings in the suit may be stayed and the reason given for this was that in an earlier suit in regard to the same property between the same parties, a declaratory decree had been passed in favour of the petitioner by the trial Court which decree was affirmed by the First Appellate Court. The respondent had, however, preferred a Regular Second Appeal No. 19 of 1977 — Dalel v. Mana which was admitted by this Court on Jan. 13, 1977 and was pending disposal. The contention was that the point in issue in the present case largely depended upon the result of the Regular Second Appeal which is pending in this Court and hence the proceedings in the suit should be stayed. The matter was considered by the trial Court and by means of the impugned order dated Jan. 24, 1978, the prayer made in the application was allowed and the proceedings in the suit were stayed pending disposal of the Regular Second Appeal mentioned above. It is this order of the trial Court which is impugned in the Revision Petition.

2. Mr. S. S. Rathor, learned counsel for the petitioner has contended that the relief for possession which is prayed for by the petitioner in the latter suit is on a different cause of action and even the relief prayed is for possession whereas the decree in the earlier suit was for a declaration. It is submitted that in such a situation the provisions of S. 10 of the Code could not be invoked. I am unable to agree with this contention. The property in dispute is the same in both the suits and so are the parties. It cannot be disputed that the result of the Regular Second Appeal would determine as to whether the petitioner is really entitled to the relief of possession and it was precisely for this reason that the trial Court thought it fit to stay the proceedings in the suit. I am, however, in agreement with the submission of the learned counsel that the disposal of the Regular Second Appeal in this Court may take a very long time and this would unnecessarily delay the disposal of the

suit for possession and would also keep the question of inheritance to the property in abeyance. It is stated by the learned counsel for the petitioner at the bar that in the suit for possession the entire evidence by both the parties has been completed and the suit was at the stage of arguments. In order to provide relief to the petitioner, all that can be done is to expedite the disposal of the Regular Second Appeal. The office shall place the Regular Second Appeal before Hon'ble the Chief Justice who may consider the desirability of expediting the appeal in view of the circumstances noticed above.

3. So far as the present Revision Petition is concerned, it merits dismissal and it is ordered accordingly. There will be no order as to costs of the same.

Petition dismissed.

AIR 1979 PUNJAB & HARYANA 40

RAJENDRA NATH MITTAL, J.

Mathra Singh and another, Appellants v. Arjan Singh and others, Respondents.

Second Appeal No. 477 of 1968 and C. M. Nos. 3117-C and 3258-C of 1972, D/- 12-9-1978.*

Civil P. C. (5 of 1908), O. 22, Rr. 11, 3, 4; O. 1, R. 10 — Second appeal arising out of dismissal of a suit as well as first appeal therefrom — Suit, one for dissolution of partnership and rendition of accounts — Suit filed by an original partner transferring his share and his transferee against other original partners and their transferees — During pendency of appeal two original partners (appellant as well as respondent) died — Business of firm commenced long prior to transfer — Accounts claimed in suit from the very inception of partnership — Original partners were necessary parties — Legal representatives of deceased original partners not brought on record — Held, appeal abated and was liable to be dismissed as such. AIR 1941 Sind 73 and AIR 1957 SC 875, Foll. (Partnership Act (9 of 1932), S. 29).

(Paras 9 to 12)

Anno: (1) AIR Comm. C.P.C. (9th Edn.), O. 22 R. 11 N. 3-A; O. 22 R. 3 N. 9 & 23; O. 22 R. 4 N. 8 & 17 and O. 1 R. 10 N. 15.

(2) AIR Manual (3rd Edn.), Partnership Act, S. 29 N. 1.

Cases Referred: Chronological Paras

AIR 1957 SC 875 : 1958 SCA 412 11
AIR 1941 Sind 73 9
AIR 1927 PC 70 11

K. S. Thapar with Deepak Thapar (H. L. Sarin with Ashok Bhan), for Appellants; D. N. Awasthy with Suresh Amba, for Respondents Nos. 14 to 17.

JUDGMENT:— This second appeal has been filed by the plaintiffs against the judgment and decree of the Additional District Judge, Gurdaspur, dated Dec. 11, 1967.

2. Briefly the facts are that Mathra Singh, plaintiff No. 1 and defendant Nos. 1 to 13 were partners in an ice factory, known as Modern Ice Factory, at Gurdaspur. Arjan Singh, defendant No. 1 and Hakam Singh, defendant No. 8, were running the factory on behalf of the partners till 1955. Thereafter it was taken by Gurbachan Singh, defendant No. 10 and Kesar Singh, defendant No. 5, who ran it for about one year. It is alleged that they were of the opinion that the business could not be run profitably. They, in 1956, gave it on lease in favour of Hardev Sahai and Amolak Raj, defendants Nos. 14 and 15, employees of Bakhshish Singh, plaintiff No. 2, for a period of one year on a rent of Rs. 3,900. It is further alleged that the said defendants were in possession of the factory and were running the same. The case of Bakhshish Singh is that the said defendants were holding leasehold rights as Benamidars for him as he had provided the entire investment for running the business.

3. From 1956 to 1960, defendants Nos. 14 and 15 purchased the shares of Mohinder Singh, Ram Singh, Gurbachan Singh, Harbans Lal, Kesar Singh and Nanak Singh and got them transferred either in their own names or in the names of their respective wives, Smt. Mansa Devi, defendant No. 16 and Smt. Satwati, defendant No. 17. Plaintiff No. 2 claims that purchase money for the abovesaid shares was paid either out of the business of the factory or from his funds in the hands of defendants Nos. 14 and 15 and, therefore, he was the real owner of the same and defendants Nos. 14 to 17 were Benamidars. Plaintiff No. 2 also purchased 5/64th share in the ice factory from plaintiff No. 1 vide sale deed dated Oct. 19, 1963 and thus became partner with regard to 30/64th share in it.

*(From decree of Dev Raj Saini, Addl. Dist. J., Gurdaspur, D/- 11-12-1967.)

4. Mathra Singh, plaintiff No. 1, had appointed Ganda Singh, defendant No. 19, as General Attorney to manage his share in the ice factory. It is stated that Ganda Singh leased out 5/64th share belonging to plaintiff No. 1 in the ice factory in favour of Joginder Singh, defendant No. 18, for ten years, vide lease deed dated March 20, 1957. The plaintiffs have challenged the said lease deed, inter alia, on the ground that plaintiff No. 1 did not appoint defendant No. 19 as General Attorney.

5. Defendants Nos. 14 and 15, after 1961, also purchased the shares of the remaining partners in the ice factory. It was alleged by the plaintiffs that the business of the ice factory could not be carried on in profit. Consequently they filed a suit for dissolution of the partnership and rendition of accounts. The suit was resisted by defendants Nos. 14 to 17, who inter alia, pleaded that they were the real lessees of the ice factory and were not Benamidars for plaintiff No. 2; that they were owners of 59/64th share of the ice factory and were not Benamidars for 25/64th share as alleged by the plaintiffs and that no amount was invested by plaintiff No. 2 in the business. Regarding lease by plaintiff No. 1 in favour of defendant No. 18, they averred that it was valid. They also denied that plaintiff No. 2 purchased share of plaintiff No. 1.

5-A. The trial Court held that plaintiff No. 1 validly transferred his 5/64th share in favour of plaintiff No. 2 and that defendants Nos. 14 to 17 were not Benamidars for plaintiff No. 2 regarding 25/64th share. It also held that defendants Nos. 14 and 15 were not Benamidars regarding lease in the factory of Bakhshish Singh, plaintiff No. 2, but they were real lessees. In view of the aforesaid finding, the Court dismissed the suit of the plaintiffs. They went up in appeal before the Additional District Judge, Gurdaspur, who affirmed the judgment and decree of the trial Court and dismissed it. They have come up in second appeal to this Court.

6. During the pendency of the appeal Harnam Singh, respondent No. 13 died on November 9, 1968. Mr. K. S. Thapar, counsel for the appellants, moved an application dated March 6, 1969, stating that Harnam Singh had died on Dec. 9, 1968. He consequently prayed that his legal representatives be ordered to be brought on record. The application came up before H. R. Sodhi, J., on April 1, 1969, and the learned Judge allowed the same subject to just exceptions. Mathra Singh, appeallant No. 1 also died on Sept. 22, 1969, leaving behind one son and one daughter as his legal representatives, but no application was filed by the appellants to bring them on record. Civil Miscellaneous Application No. 3117-C of 1972 was moved on behalf of the respondents that in view of the death of Mathra Singh, the appeal had abated and it might be dismissed as such.

On Oct. 26, 1972, another Civil Miscellaneous Application No. 3258-C of 1972 was filed on behalf of the respondents that Harnam Singh, respondent No. 13, had actually died on Nov. 9, 1968 and that an application had been filed by the appellants to bring his legal representatives on the record, stating therein that he had died on Dec. 9, 1968. It is further asserted that the date of death of Harnam Singh had intentionally been given wrongly because otherwise the application would have been beyond limitation. In the circumstances it was prayed that the appeal be dismissed as having abated as the legal representatives of Harnam Singh had also not been brought on record within the period of limitation.

7. A preliminary objection has been raised by Mr. D. N. Awasthy that on account of death of Mathra Singh, plaintiff-appellant and Harnam Singh, respondent No. 13, the appeal stood abated and is liable to be dismissed as such. On the other hand, Mr. Thapar, learned counsel for the appellants states that the aforesaid persons were not necessary parties to the appeal and consequently it will not abate on account of their death.

8. I have heard the learned counsel for the parties at a considerable length. The facts required to decide this matter are not disputed. Mathra Singh and Harnam Singh were partners along with others in Modern Ice Factory. Mathra Singh sold his 5/64th share in favour of Bakhshish Singh vide sale deed dated Oct. 19, 1963 and Harnam Singh sold his share in favour of defendants 14 & 15. The suit was filed by the plaintiffs for dissolution of partnership and rendition of accounts in March, 1964. In para. 11 of the plaint the plaintiffs stated that the original partners had transferred their respective shares, but under law transferees alone could not

bring a suit for dissolution of partnership and for accounts etc. and therefore the suit had been filed by Mathra Singh, plaintiff No. 1, the original partner and Bakhshish Singh, plaintiff No. 2, his transferee against defendants Nos. 1 to 13, original partners and defendants Nos. 14 and 15, the alleged transferees of the other shares.

It is further stated that defendants Nos. 16 and 17 had been impleaded because they also claimed to be purchasers of some of the shares and defendant No. 18 had been impleaded as he claimed to be a long time lessee of the share of plaintiff No. 1, through his Attorney, defendant No. 19. From a perusal of the above said paragraph it is evident that the plaintiffs admitted that the original partners in the firm were necessary parties for the purpose of institution of a suit for dissolution of partnership and rendition of accounts. This proposition of law is also admitted correct by Mr. Thapar, learned counsel for the appellants and in my view he has done so rightly, as there cannot be any dispute about this proposition. In this regard reference may be made to S. 29 of the Indian Partnership Act (hereinafter referred to as the Act), which is as follows :—

"29 (1). A transfer by a partner of his interest in the firm, either absolute or by mortgage, or by the creation by him of a charge on such interest, does not entitle the transferee, during the continuance of the firm, to interfere in the conduct of the business, or to require accounts, or to inspect the books of the firm, but entitles the transferee only to receive the share of profits of the transferring partner, and the transferee shall accept the account of profits agreed to by the partners.

(2) If the firm is dissolved or if the transferring partner ceases to be a partner, the transferee is entitled as against the remaining partners to receive the share of the assets of the firm to which the transferring partner is entitled, and, for the purpose of ascertaining that share, to an account as from the date of the dissolution."

9. A bare perusal of the section shows that a transferee of a share in a partnership business cannot ask for accounts of the firm. He is entitled to the share of profits of the transferring partner and has to accept the account of profits agreed to by the partners. It further provides that after the dissolution of the firm, the transferee is entitled to receive the share of the assets of the firm to which the transferring partner is entitled. From the above discussion it emerges that a transferee of share of a partner has limited rights in the partnership business. Therefore, in a suit for dissolution of partnership and rendition of accounts of a firm, the original partners are necessary parties and a suit cannot be instituted without them.

In the aforesaid view I get support from the observations of a Division Bench of the Sind High Court in Mulchand Tagiomal v. Shamdas Jethanand, AIR 1941 Sind 73. It was observed by the Bench that in a suit, by a transferee or an assignee from an ex-partner in a firm after the dissolution of the partnership, for accounts of the dissolved partnership as a whole the assignors are necessary parties. I am in respectful agreement with the above observations. In that case the assignors were not made parties till more than three years after the dissolution of the partnership. The suit was consequently dismissed on this ground.

10. Faced with this difficulty, Mr. Thapar, learned counsel for the appellants, sought to argue that Mathra Singh sold his share in the partnership to Bakhshish Singh and Harnam Singh to some of the defendants. He submits that the transferees are parties to the litigation. According to him, the transferees would be legal representatives of the deceased and consequently the appeal would not abate. Prima facie the argument appeared to be very plausible but when examined minutely, it was found to be without substance. The partnership business started long before the shares were purchased by the transferees. By virtue of the sale deeds, only their shares in the partnership were transferred and not the profits made out prior to the transfer of the shares. The suit has been filed for dissolution of the partnership and rendition of the accounts. An enquiry was made from Mr. Thapar, learned counsel for the appellants as to from which date the rendition of the accounts had been sought.

He made a statement that the plaintiffs sought rendition of accounts from the defendants from March 31, 1961. He, however, was unable to explain from where he had taken the afore-

said date. Plaintiff No. 2 had purchased 5/64th share from Mathra Singh deceased vide sale deed dated Oct. 19, 1963 as stated above. It is not mentioned in the plaint that accounts had been settled between the parties at any time. If the accounts had been settled between them up to a certain date, it could be taken that the rendition of accounts was being claimed thereafter. Such being not the case, it cannot be held that the plaintiffs were claiming rendition of accounts from March 31, 1961. As accounts were being claimed from the very inception of the partnership, the legal representatives of the deceased partners were necessary parties to the litigation as they are interested in the accounts prior to the date when the shares were transferred. It, therefore, cannot be held that the transferees of the deceased partners are their legal representatives qua the accounts prior to the date of the transfer of share by the deceased. For the said reasons, I reject the contention of the learned counsel.

11. The learned counsel then argued that the partnership between the parties was a partnership at will and the institution of the suit for dissolution of partnership and rendition of accounts amounted to dissolution of partnership. He also urged that after the dissolution, the transferors ceased to be necessary parties. He made a reference to a judgment of a Privy Council in Sathappa Chetty v. S. N. Subrahmanyan Chetty, AIR 1927 PC 70, wherein it was observed that filing plaint in a suit for dissolution by one partner is enough of itself to put an end to a partnership at will. There is no quarrel with the proposition as enunciated by their Lordships.

The question to be determined in the present case however is, whether the transferors were necessary parties to the litigation after filing of the suit or not? If the partnership is dissolved on the date of filing of the suit, it cannot be held that the transferors ceased to be necessary parties thereafter. It has been held by the Supreme Court in Surinder Kumar v. Gian Chand, 1958 SCA 412 : (AIR 1957 SC 875) that hearing of an appeal is under the processual law of the country in the nature of re-hearing. In my view an appeal is a continuation of suit and if a person is a necessary party in the suit, he will be deemed to be a necessary party in the appeal also. So I do not find any substance in this contention of the learned counsel as well.

12. It is a settled law that if a necessary party dies and his legal representatives are not brought on the record, the suit/appeal abates. In the present case, as stated above, Mathra Singh appellant died on Sept. 22, 1969 leaving one son and one daughter. No application was filed to implead his legal representatives. Harnam Singh died on Nov. 9, 1968. The appellants by wrongly representing that he died on Dec. 9, 1968, got his legal representatives brought on the record vide order of this Court dated April 1, 1969. This order was however passed subject to just exceptions. In Civil Miscellaneous No. 3258-C of 1972, the respondents have challenged the correctness of the date of death. They have filed a copy of the death entry wherein Harnam Singh is shown to have died on Nov. 9, 1968. Mr. Thapar could not challenge the correctness of the said date.

The application for bringing on record the legal representatives of Harnam Singh deceased, was filed on March 6, 1969. The application could be filed for that purpose within 90 days of the date of death. Thus that application was barred by limitation. It is the duty of the appellants to file application for impleading the legal representatives within time. In case they fail to do so, they have to show that there are sufficient reasons for not making the application in time. Mr. Thapar has however not been able to show any reason for not filing the application for bringing on record the legal representatives in time. Therefore, in view of the death of Mathra Singh appellant and Harnam Singh respondent, the appeal abates and is liable to be dismissed as such.

13. For the reasons recorded above, the appeal is dismissed as having abated. In the circumstances of the case, I make no order as to costs.

Appeal dismissed.

AIR 1979 PUNJAB & HARYANA 44

B. S. DHILLON AND S. S. DEWAN JJ.

Shiromani Gurdwara Parbandhak Committee, Amritsar, Appellant v. Ishar Dass, Respondent.

F. A. F. O. No. 180 of 1966, D/- 5-9-1978.*

Sikh Gurdwara Act (8 of 1925), S. 16 (2) (iii) — Institution in a village founded by an Udasi — Succession thereto has been from Guru to Chela — No evidence to show that institution was founded in memory of any of ten Gurus or any tradition connected therewith — Documents showing that institution was Dera of Udasi Sadhus — Requirements of S. 16 (2) (iii), not satisfied — Held, institution was not a Sikh Gurdwara within the meaning of S. 16 (2) (iii) — Scope of S. 16 (2) pointed. (Paras 7, 8)

Narinder Singh, for Appellant; T. S. Mangat, for Respondent.

S. S. DEWAN, J.:— This is an appeal against the decision of Sikh Gurdwaras Tribunal, Punjab, Chandigarh. The Tribunal has held that the institution was a Dera of Udasi Sadhus and not a Sikh Gurdwara within the meaning of Section 16 (2) (iii) of the Sikh Gurdwara Act, 1925 (hereinafter called the Act) and accepted the petition with no order as to costs.

2. More than 50 persons claiming to be the residents of village Ghurani Kalan, Tehsil Sirhind, District Patiala, in which the institution is situate, applied to the Government to have the institution taken as a Sikh Gurdwara. They claimed that the institution is known as Gurdwara Guru Granth Sahib. The State Government issued a notification No. 1108-G-P dated March 29, 1963, under S. 7 (3) of the Act. The respondent who is the Mahant of the institution forwarded a petition to the Government under S. 8 of the Act that he was a hereditary office-holder of this Dera, that the institution described as Gurdwara Guru Granth Sahib was in fact an Udasi institution in which succession had been from guru to chela and that it was not a sikh Gurudwara within the meaning of S. 16 of the Act. The Government forwarded this petition to the Tribunal for disposal under S. 14 of the Act. Notice was issued to the Committee to enquire whether it wanted to be made a party. The Committee was impleaded and the Tribunal raised the following issues:—

1. Whether the petitioner is a hereditary office-holder ?
2. Whether the institution in dispute is a Sikh Gurdwara?

3. Shri Gurcharan Singh, one of the members of the Tribunal, in his judgment dated (sic) Dec., 1965, held that the institution was a Dera of Udasi Sadhus and not a Sikh Gurdwara within the meaning of S. 16 (2) (iii) of the Act and accepted the petition with costs. Shri Sarup Singh, the other member of the Tribunal differed from the judgment delivered by Shri Gurcharan Singh. Shri Shamsher Bahadur who was the President of the Tribunal agreed with the findings given by Shri Gurcharan Singh, member of the Tribunal and by a majority decision, the petition was allowed with no order as to costs. Feeling aggrieved, the Committee filed F. A. O. No. 180 of 1966, through Shri G. S. Aulakh, Advocate.

4. Shri Narinder Singh, the learned counsel for the Committee, urged that the majority decision of the Tribunal is wrong on both the issues. He contends that there has been deviation from the line of succession and, therefore, it cannot be said that the petitioner is a hereditary office-holder. In order to appreciate this contention, it is necessary to see how the succession has taken place. Reference may be made to pedigree table Ex. P. 3 attached to the settlement file for the years 1960-61 Bkt. According to this pedigree table, first Mahant of this institution was Brahm Lal and thereafter the office devolved on to Chela Salig Ram. Salig Ram was succeeded by Atma Ram. Atma Ram was followed by Bhagat Ram. Bhagat Ram died on Sept. 17, 1952, and was succeeded by his Chela Ishar Dass (now petitioner). The objection of Shri Narinder Singh with regard to the succession of the petitioner is that he was nominated to the office and it cannot be said to be a case of succession to the office. Both of these contentions are not well founded.

5. In the present case, it is significant that succession to this institution has been from Guru to Chela right up to

*(From order of Sikh Gurdwara Tribunal, Punjab at Chandigarh, D/- 30-6-1966).

the petitioner. The factum of the petitioner being hereditary office-holder is further confirmed from the certified copy of the Jamabandi for the year 1960-61 BK, (Exhibit P.2), besides the oral evidence adduced by him. His status as Chela cannot be disputed. To rebut this documentary evidence of the petitioner, the Committee examined some witnesses who were disbelieved by the Tribunal on the ground that their evidence was inconsistent in material particulars. We have gone through the evidence and do not see any reason to take a different view of the same. The learned counsel for the Committee has not given any specific reasons to make us depart from the assessment of this evidence by the Tribunal. We, therefore, find no merit in the contention of Shri Narinder Singh. In our opinion, the majority decision of the Tribunal on issue No. 1 must be upheld.

6. So far as the second issue is concerned, the contention of Shri Narinder Singh is, that the Tribunal has gone wrong in holding that the institution in question is not a Sikh Gurdwara. Section 16 (1) and (2) of the Act which is relevant on the point at issue is as under:—

"16 (1) Notwithstanding anything contained in any other law in force, if in any proceedings before a Tribunal it is disputed that a gurdwara should or should not be declared to be a Sikh Gurdwara, the tribunal shall, before enquiring into any other matter in dispute relating to the said gurdwara, decide whether it should or should not be declared a Sikh Gurdwara in accordance with the provisions of sub-sec. (2).

(2) If the tribunal finds that the gurdwara—

(i) was established by, or in memory of any of the Ten Sikh Gurus, or in commemoration of any incident in the life of any of the Ten Sikh Gurus and was used for public worship by Sikhs, before and at the time of the presentation of the petition under sub-s. (1) of S. 7; or

(ii) owing to some tradition connected with one of the Ten Sikh Gurus, was used for public worship predominantly by Sikhs, before and at the time of the presentation of the petition under sub-sec. (1) of S. 7; or

(iii) was established for use by Sikhs for the purpose of public worship and was used for such worship by Sikhs, before and at the time of the presentation of the petition under sub-sec. (1) of Section 7; or

(iv) was established in memory of a Sikh martyr, saint or historical person and was used for public worship by Sikhs, before and at the time of the presentation of the petition under sub-section (1) of S. 7; or

(v) owing to some incident connected with the Sikh religion was used for public worship predominantly by Sikhs, before and at the time of the presentation of the petition under sub-s. (1) of S. 7;

the tribunal shall decide that it should be declared to be a Sikh Gurdwara, and record an order accordingly."

7. This postulates that any one of the five conditions or circumstances as contained in S. 16 (2) of the Act has to be proved or the Tribunal is to be satisfied about it before an institution can be held to be a Sikh Gurdwara. In the case in hand there is no evidence if this institution was founded in the memory of any of the ten Gurus or any tradition connected with any of the Gurus. It is not even connected with any tradition of the Sikh religion. It has been clearly established from the record that this institution was founded by Brahm Lal. The petitioner says that he was Udasi. It is also supported by the certified copies of the pedigree tables Exhibits P. 3 and P. 4. Exhibit P. 5 is a certified copy of Khatauni Paimaish. This document reveals that Bhagat Ram Chela Atma Ram Sadhu Udasi of village Ghurani Kalan was owner of certain land. Exhibit P. 10 is a certified copy of the order passed by the Commissioner, Patiala Division in appeal, Tara Singh v. Ishar Dass on 17th Oct., 1956.

This order indicates that on the death of Mahant Bhagat Ram, land measuring 76 bighas and 8 biswas situated in the revenue estate of Ghurani Kalan was mutated in favour of the petitioner vide mutation dated 20th May, 1955. This mutation was, however, set aside by the Collector Fatehgarh Sahib. Mahant Ishar Dass went up in appeal which was allowed by the Commissioner and direction was issued to attest the mutation de novo in accordance with the existing law and provisions of the wajib-ul-Arz of the village and the custom prevailing there. Exhibit P. 13, certified copy of jamabandi of village Ghurani Kalan for the year 1963-64, reveals that Mahant Ishar Dass Chela Bhagat Ram son of Atma

Ram Udasi is entered owner of the land attached to the institution in dispute.

All this documentary evidence produced on behalf of the petitioner clearly shows that the institution was a Dera of Udasi Sadhus. It was then urged on behalf of the Committee that the institution was founded by the Sikhs for the purpose of worship as village Ghurani Kalan was predominantly populated by the Sikhs. Even if it is so, that is not of any material consequence. It is well known that Udasis do worship Guru Granth Sahib and its recitation is usually performed. There is no evidence led in the case that this institution was founded by the Sikhs for public worship. Thus the requirements of S. 16 (2) (iii) of the Act are not satisfied. It is well settled that before the institution could be declared a Sikh Gurdwara, the requirements set out in the provision have to be satisfied. It is not disputed that the appellant Committee can only succeed if this case falls within the ambit of S. 16 (2) (iii).

8. We are, therefore, clearly of the view that the evidence on the record conclusively proves that this is a Udasi institution and was established by the Udasi Sadhus. For the reasons recorded, we affirm the majority decision of the Tribunal on issue No. 2.

9. In the result, we find no merit in this appeal and the same is hereby dismissed. However, in the circumstances of the case, we make no order as to costs.

B. S. DHILLON J.:— I agree.

Appeal dismissed.

AIR 1979 PUNJAB & HARYANA 46

PREM CHAND JAIN AND J. M. TANDON, JJ.

The State of Punjab, Appellant v. Dewan Chand, and others, Respondents.

Letters Patent Appeal No. 348 of 1975, D/- 23-8-1978.*

Punjab Municipal Act (3 of 1911), S. 10 (1) — Power under to abolish Municipal Committee — Is ultra vires Arts. 14 and 19 of the Constitution. (Constitution of India, Arts. 14, 19, 245).

As no guideline is provided in the matter of exercise of power to abolish a Municipal Committee under S. 10, the same is ultra vires of Arts. 14 and 19 of the Constitution. (Para 4)

Under S. 10 which gives powers to withdraw municipal area altogether from the operation of the Act, a blanket power is given to the State Government and the right of an inhabitant of that area to raise an objection has been denied. It has been left completely to the whim of the State Government to withdraw any municipal area from the operation of the Act. No guideline at all has been prescribed or indicated as to in which cases, and under what circumstances the State Government could resort to the provisions of Sec. 10, which are so drastic in nature that by exercising power under that section, a fully grown committee can be abolished. C.W. P. No. 2328 of 1966, D/- 23-4-1975 (Punj) Affirmed. (Para 4)

Anno : AIR Comm. Const. of India, Art. 14, N. 1 (f); Art. 245 N. 16.

M. P. Singh Gill Dy. Advocate General (Punjab), for Appellant; M. M. Punchi, for Respondents.

PREM CHAND JAIN, J.:— The State of Punjab has filed this appeal under Cl. X of the Letters Patent against the judgment of a learned single Judge of this Court, dated 23rd of April, 1975 by which C.W.P. No. 2328 of 1966 filed by Dewan Chand and others, respondents, was allowed and the notification issued under S. 10 of the Punjab Municipal Act (hereinafter referred to as the Act), which reads as under, was quashed:—

"In exercise of the powers conferred by sub-sec. (1) of S. 10 of the Punjab Municipal Act, 1911, the President of India is pleased to withdraw the area of Narot Jaimal Singh Municipal Committee, District Gurdaspur from the operation of the said Act with effect from the 31st of Oct., 1966."

It was by virtue of the aforesaid notification that the area of Narot Jaimal Singh Municipal Committee, District Gurdaspur, was withdrawn from the operation of the Act. Two contentions were raised before the learned Single Judge, that no notice was ever given to the petitioners (now respondents) before passing the impugned notification, and that S. 10 of the Act was unconstitutional. Both these contentions prevailed with the learned Single Judge, who, as earlier observed, allowed the petition.

*(Against judgment of Ajit Singh Bains J. in C. W. P. No. 2328 of 1966, D/- 23-4-1975).

2. Mr. M. P. Singh Gill, learned Deputy Advocate General, Punjab, challenged the correctness of the findings of the learned Single Judge and submitted that S. 10 of the Act provided sufficient guidelines as to in which cases the area from the municipal committee could be withdrawn from the operation of the Act. After hearing the learned counsel for the parties, we are of the view that there is no merit in this contention of the learned counsel. S. 10 of the Act reads as under :—

"(1) The State Government may, by notification withdraw from the operation of this Act the area of any municipality constituted thereunder.

(2) When a notification is issued under this section in respect of any municipality this Act and all notifications, rules, bye-laws, orders, directions and powers issued, made or conferred under this Act, shall cease to apply to the said area; the balance of the municipal fund and all other property at the time of the issue of the notification vested in the committee shall vest in the State Government and the liabilities of the committee shall be transferred to the State Government."

From a bare perusal of this Section, it is evident that no guideline is provided as to in which cases the area of any municipality could be withdrawn from the operation of the Act. S. 10 forms part of Chap. II which relates to the constitution of municipalities. S. 4 provides a detailed procedure for constituting a municipality. Under this section the State Government is required to issue a notification when it proposes to constitute a municipal committee in respect of any local area. Such a notification is required to define the limits of the local area to which it relates. A detailed procedure is prescribed for the publication of the notification. The inhabitants of the area, who may object to the notification, are entitled to file objections in writing. The objections have to be disposed of by the State Government by passing orders. It would thus be seen that a municipality can be constituted only after following a detailed procedure and nothing has been left to the whim of the State Government.

3. Further if the State Government intends to alter the limits of any municipality, then again a detailed procedure is prescribed under S. 5 of the Act. In S. 7, procedure is given with regard to cases covered by S. 6 which relates to the exclusion of local area from any municipality. It would thus be clear from the perusal of these sections, that a mandatory formality of inviting objections from the inhabitants of the local area, is required to be complied with and that before taking any action, the Government is duty bound to consider those objections. Surprisingly, under S. 10 which gives powers to withdraw municipal area altogether from the operation of the Act, a blanket power is given to the State Government and the right of an inhabitant of that area to raise an objection has been denied. As observed by the learned Single Judge, it has been left completely to the whim of the State Government to withdraw any municipal area from the operation of the Act. No guideline at all has been prescribed or indicated as to in which cases, and under what circumstances the State Government could resort to the provisions of S. 10, which are so drastic in nature that by exercising power under that Section, a fully grown committee can be abolished. In this view of the matter, we agree with the learned Single Judge that as no guideline is provided under S. 10 of the Act, the same is ultra vires of Arts. 14 and 19 of the Constitution.

4. In view of the aforesaid finding, no other question arises for consideration.

5. For the reasons recorded above, this appeal fails and is dismissed. But in the circumstances of the case, we make no order as to costs.

Appeal dismissed.

AIR 1979 PUNJAB & HARYANA 47

GURNAM SINGH, J.

Mohinder Singh and others, Petitioners v. Teja Singh and others, Respondents.

Civil Revn. No. 660 of 1976, D/- 29-8-1978.*

Civil P. C. (5 of 1908), S. 152 — Clerical mistakes and errors arising from accidental slip — Powers of Court under S. 152 to rectify — Scope of.

*(Against order of Beharilal, Sub. J. 1st Class, Dasuya, D/- 29-1-1976).

LV/LV/F174/78/SSG

Section 152, C. P. C. gives power to rectify any mistake in the judgment, decree or order or errors arising therein from accidental slip or omission and it must include an accidental slip or omission traceable to the conduct of the parties themselves. No doubt the Court cannot go into the disputed questions regarding the principle in dispute, but if a mistake is so palpable that nobody can possibly have any doubt as to what the parties meant or what the Court meant when it passed judgment, decree or order such correction can be made even under S. 152, C.P.C. AIR 1952 Cal 86; AIR 1960 J & K 37; AIR 1957 All 133; ILR (1951) 2 Cal 407 and AIR 1950 Mad 751 Foll. AIR 1946 Cal 336 and AIR 1959 Punj 88, Dist. (Para 8)

When the mistake in the judgment and the decree in a suit for possession occurred due to an accidental slip, by writing Khasra No. "20" instead of Khasra No. "24" in the plaint and its notice was not taken even by the defendants during the course of the trial, and when in fact there was no doubt about the identity of the land in dispute, as the same had been kept for establishing a school, in such a case necessary correction could be made in the plaint, judgment and decree under Sec. 152, C.P.C., because the corrections of the Khasra number would not affect the identity of the field in dispute. (Para 13)

Anno: AIR Comm. C. P. C. (9th Edn.), S. 152, Notes 3, 4, 5.

Cases Referred : Chronological	Paras
AIR 1960 J & K 37	9
AIR 1959 Punj 88	5, 6
AIR 1957 All 133	10
AIR 1952 Cal 86	8
ILR (1951) 2 Cal 407	11
AIR 1950 Mad 751	12
AIR 1946 Cal 336	5, 6

R. N. Aggarwal and M. L. Gupta, for Petitioners; Om Parkash Hoshiarpuri, for Respondents.

ORDER :— Teja Singh, Harbhagat Singh, Firu, Saudagar Singh and Karnail Singh filed a suit for possession of the land measuring 12 kanals comprising of kila Nos. 17 and 20, rectangle No. 15, khewat No. 95 and khatauni No. 251 as per entries in the jamabandi 1966-67, situate in village Galowal, Tehsil Dasuya, in a representative form, alleging that the land belonged to them and the other owners of the village, a list of which was attached with the plaint. The suit was decreed by Sub-Judge 1st Class, Dasuya, vide judgment dated 31-5-1973.

2. In the execution proceedings filed by the decree-holders, warrant for possession of the land was issued, but it could not be executed as khasra number was not correctly recorded in the decree-sheet. The decree-holders submitted an application in the Executing Court for the correction of the khasra number and for the issue of a fresh warrant but it was found that khasra No. 20 was correctly given in the decree-sheet in accordance with the plaint. The decree-holders then prayed that in fact the khasra number in the revenue record was 24 and it was wrongly recorded as 20, therefore, correction be made in the plaint, judgment and the decree-sheet under S. 152, Civil P. C.

3. The prayer made by the decree-holders was contested by the judgment-debtor and his counsel urged that under S. 152, Civil Procedure Code, the Court is only empowered to make corrections of clerical mistakes in the judgment and decree-sheet and that the mistakes occurring in the pleadings cannot be corrected.

4. The Executing Court allowed the application of the decree-holders and directed that the correction of the khasra number be made in the plaint, the judgment and the decree. It is against this order that Mohinder Singh and others, the judgment-debtors, have filed this civil revision.

5. The learned counsel for the petitioners vehemently contended that under S. 152, Civil Procedure Code, clerical or arithmetical mistakes in judgments, decrees or orders or errors arising therein from any accidental slip or omission only can be corrected and the corrections sought to be made in the instant case are in the plaint, judgment and decree which is not permissible under law. He relied upon Hamiduddin Ahmad v. Moyesuddin Mondal, AIR 1946 Cal 336 and Tarsem Singh Major v. Sm. Jagindro, AIR 1959 Punj 88.

In case Tarsem Singh Major v. Sm. Jagindro (supra), it was observed that if the decree is not drawn up in harmony with the judgment, the Court has no alternative but to rectify the mistake which has been committed. It was further observed therein that the object of allowing amendment under S. 152, Civil Procedure Code, is to provide a remedy

for casual omission or negligence of ministerial officers of the Court in preparing decrees of Courts even though they bear the signatures of the Presiding Officers concerned. It was further observed therein that as the power to amend is exercised for the promotion of justice, it should be exercised liberally so as to make the decree conform to the judgment on which it is founded.

6. Thus it is apparent that in case Tarsem Singh Major v. Sm. Jagindero (supra), the point as to whether correction can be made in the pleadings or not was not considered. In Hamiduddin Ahmad v. Moyesuddin Mondal (supra), the property in dispute was described wrongly in the schedule attached with the plaint. The plaintiff, in the said case, had claimed the portion being on the East but the decree was regarding the Western portion and it was held that without amending the plaint and thereby reopening the defence, he could not get any relief at all and the prayer was rejected.

7. In the instant case the claim for possession of the land was based on the basis of the jamabandi for the year 1966-67, the copy of which was attached with the plaint. In the jamabandi, the khasra numbers are 17 and 24 but instead of khasra No. 24, the scribe of the plaint wrongly mentioned it as khasra No. 20, while the other description of the property in dispute was correctly given. The defendants in their written statements denied the title of the plaintiffs over the suit land. They did not point out the wrong description of the khasra numbers in the plaint.

The issues were framed and the parties adduced their evidence and ultimately the suit was decreed. All this shows that there was no controversy as regards the identity of the property in dispute, at the time of the suit. The application filed by the decree-holders is only to amend the description of an item of the property in the plaint and in the decree by substituting the correct number for the wrong number and as such it would not amount to amending the pleadings and it was simply an accidental mistake. In the course of proceedings the parties were not under any misapprehension as to the real subject-matter in controversy and no prejudice has been caused to the judgment-debtors because of the mentioning of the wrong khasra number.

8. Section 152, Civil Procedure Code, gives power to rectify any mistake in the judgment, decree or order or errors arising therein from accidental slip or omission and in my opinion it must include an accidental slip or omission traceable to the conduct of the parties themselves. No doubt the court cannot go into the disputed questions regarding the principle in dispute, but if a mistake is so palpable that nobody can possibly have any doubt as to what the parties meant or what the Court meant when it passed judgment, decree or order, such correction can be made even under S. 152, Civil Procedure Code. In Bela Debi v. Bon Behary Roy, AIR 1952 Cal 86, it has been observed that (at pp. 89, 90):—

'A mistake made by the parties in a deed upon which the suit is founded, and repeated in the judgment, decree or order, may or may not be an 'accidental slip or omission'. Where it is clear, that such is the case, the Court can set it right. In doing so, what is going to be rectified is the judgment, decree or order, and it is not at all necessary to rectify either the pleadings or the deed. In making such corrections, however, the Court can only proceed on the footing that there could be no reasonable doubt as to what it really intended to say in its judgment, decree or order. It cannot go into any disputed questions. If there is a particular description of a property in a deed, and a suit has been instituted on the strength of that description, and a decree passed, it is not permissible in proceedings under S. 152 to go into disputed questions as to what property was intended to be dealt with by the parties in the deed. But if the mistake is so palpable that nobody can possibly have any doubt as to what the parties meant or what the Court meant when it passed its judgment, decree or order, the Court has power to correct the judgment, decree or order which has repeated the mistake. Apart from this exceptional case the Court cannot correct errors anterior to the proceedings before it. For such a purpose, the proper proceeding is by way of a suit under S. 31, Specific Relief Act."

9. In Ghulam Ahmad v. Khizar Joo, AIR 1960 J and K 37, plot of land was correctly described except in regard to survey number and it was held that (at p. 38):—

"Where in the plaint, the plan attached to it and the decree, the property

was correctly described by metes and bounds in all the particulars, except in one particular, namely that of correct survey number, and the correction of the survey number would not affect the identity of the plot, it is a fit case where the Court should under S. 152, allow amendment of the survey number in the decree."

16. In Shahzad Khan v. Pt. Sheo Kumar, AIR 1957 All 133, V. D. Bhargava J., observed as under (at p. 134):—

"Under S. 152 it is open to the appellate Court to correct mistakes and do justice in the case. The Court can under that section amend a clerical error in a decree although the error may have occurred on account of a mistake of the parties themselves in their pleadings and this mistake in the decree was on account of its being copied from the plaint. In such cases it is not necessary to amend the plaint itself. It is enough to amend the decree."

11. In Lakshmi Nath Sarma Thakur v. Ghanakanti Kalitani, ILR (1951) 2 Cal 407, it has been held that:

"Where as a result of mutual mistake, a wrong plot number was inserted in the plaint, but the parties knew about the real subject-matter and rights of third parties had not intervened, the Court has power to amend the decree by substituting the correct plot number."

12. In Appat Krishna Poduval v. Lakshmi Nathiar, AIR 1950 Mad 751, also, in similar circumstances, the observation was made as under (at p. 752):

"Where an application is filed for correction of an error as regards the survey numbers of an item of property in the plaint schedule and the decree schedule and there is no dispute as regards the identity of the property or boundaries to it, the amendment may be allowed under S. 152. The fact that the assignment deed of the property also has the same errors cannot disentitle the applicants to have the errors set right if they are entitled to it under the Code. So also, the amendment cannot be refused on the ground that the decree sought to be amended is barred by limitation."

13. In the instant case, the mistake in the judgment and the decree, occurred due to an accidental slip, by writing Khasra No. '20' instead of Khasra No. '24' in the plaint and its notice was not taken even by the defendants while contesting the suit. In fact there was no doubt about the identity of the land in dispute, as the same had been kept for establishing a school. The correction of the khasra number, thus will not affect the identity of the field in dispute. Justice, therefore, requires that the necessary correction be made in the plaint, judgment and decree, under S. 152, Civil Procedure Code. Thus I do not see any illegality in the order under revision. The result is that this civil revision petition is dismissed. No order as to costs.

Petition dismissed.

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FULL BENCH

S. S. SANDHAWALIA, C. J.,
S. C. MITAL, D. B. LAL,
HARBANS LAL, S. P. GOYAL, JJ.

Lachhman Singh and others, Appellants v. Gurmit Kaur and others, Respondents.

First Appeal No. 336 of 1964, D/- 12-10-1978.*

Fatal Accidents Act (13 of 1855), Section 1-A — Damages — Mode of assessment of compensation — Principles.

Per Full Bench: — The following principles should be observed and followed while assessing the compensation:

(1) The compensation to be assessed is the pecuniary loss caused to the dependents by the death of the person concerned, and no compensation is to be assessed on any extraneous consideration like love, affection, mental agony or any such similar consideration. Solatium is alien to the concept of compensation.

(2) For the purpose of calculating the just compensation, annual dependency of the dependants should be determined in terms of the annual loss accruing to them due to the abrupt termination of life. For this purpose, annual earning of the deceased at the time of the accident and the amount out of the same which he was spending for the maintenance of the dependents will be the determining factor. This basic figure will then be multiplied by a suitable multiplier;

(3) The suitable multiplier, as referred to in 2 above, shall be determined as held in Sudhakar's case (1977 ACJ 290) decided by the Supreme Court as well as in Mallet's case (1969 ACJ 312 (HL)) by tak-

*(Decided by Full Bench on order of reference made by S. S. Sandhawalia, C. J. and S. P. Goyal, J. on 20-9-1977).

ing into consideration the number of years of the dependency of the various dependents, the number of years by which the life of the deceased was cut short and the various imponderable factors such like early natural death of the deceased, his becoming incapable of supporting the dependants due to illness or any other natural handicap or calamity, the prospects of the remarriage of the widow, the coming up of age of the dependants and their developing their independent sources of income as well as the pecuniary benefits which might accrue to the dependants on account of the death of the person concerned. Such benefits, however, should not include the amount of the insurance policy of the deceased to which the dependants may become entitled on account of its maturity as a result of the death.

(4) The method adopted in certain decisions of Punjab High Court of multiplying the amount of the annual loss to the dependants with the number of years by which the life has been cut short without anything else cannot be sustained and all those decisions in which this view has been taken are hereby overruled;

(5) The compensation cannot be assessed on the basis of the so-called interest theory as the same provides the dependents with the capital as well as the amount of annual loss earned by way of interest and it also suffers from a number of other defects. AIR 1977 Punj & Har 214 (FB), Rel. on. and

(6) Considerations of ever growing inflation and the decrease in the money value are also not relevant for the purpose of assessment of compensation. Case law reviewed. (Paras 27 and 32 to 35)

K aged 23 years, was murdered by the appellants on Sept. 30, 1960. Suit for damages was filed by the parents, widow, two minor sons and two minor daughters of the deceased. A total compensation to the tune of Rs. 57,200/- was claimed. On the evidence adduced the trial Court determined the annual dependency of the claimants at Rs. 600/- and the life expectancy of 60 years that is 37 years more. Multiplying the two figures a total sum of Rs. 22,000/- was awarded as compensation. On appeal.

Held that the decree of the trial Court should be modified by reducing it to Rs. 15,660/-. The annual dependency of the claimants should be fixed at Rs. 560/- and in the circumstances of the case 16 would be the proper multiplier instead of 37. (Para 31)

Anno: AIR Manual (3rd Edn.), Fatal Acc. Act, S. 1-A, N. 5.

Cases Referred: Chronological Paras

AIR 1977 SC 1158 : 1977 Acc CJ 134 10
AIR 1977 SC 1189 : 1977 Acc CJ 290 9, 27
AIR 1977 Punj & Har 214 : 79 Pun LR 328 (FB) 19, 26
1975 Acc CJ 26 (Him Pra) 19
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(1974) 76 Pun LR 353 19
1973 Acc CJ 531 (Punj) 17
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(1970) 1 All ER 365 : (1970) 2 WLR 472, Taylor v. O'Connor 25
1969 Acc CJ 312 (HL) : 1970 AC 166, Mallett v. McMonagle 8, 9, 20, 27
AIR 1966 SC 1750 7
AIR 1962 SC 1 6, 12
1951 AC 601 : (1951) 2 All ER 448, Nance v. British Columbia Electric Ry. Co. Ltd. 6
1942 AC 601 : (1942) 1 All ER 657, Davies v. Powell Duffryn Associated Collieries Ltd. 5, 7

B. S. Jawanda with Maharaj Baksh Singh, for Appellants; N. K. Sodhi and K. T. S. Tulsi, for Respondents.

HARBANS LAL, J.: — The subject-matter of the present reference is important but quite baffling a question, as to how the damages should be quantified which the offender, who is held responsible for terminating prematurely the life of another person by this culpable act, negligence or default is liable to pay to the legal representatives or the dependants of the deceased or, in other words, the determination of the amount of compensation which the legal representatives or dependants are entitled to get from such offender.

2. The injured person, who was the victim of any injury at the hands of another person which resulted in permanent or temporary incapacity causing thereby some loss of earning, has always been held to be entitled to get damages against the offender under the law of torts, but there was no specific provision for getting damages before 1855 in India if such injury resulted in the death of the injured person, nor was there any legal provision as to who will be entitled to get the damages or the compensation in such a contingency. The

Indian Fatal Accidents Act, 1855 (hereinafter to be called the Act), for the first time provided for such damages or compensation and also enumerated the parties entitled to the same in S. 1-A of the Act, which is reproduced below:

"Whenever the death of a person shall be caused by wrongful act, neglect or default, and the act, neglect or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, the party who would have been liable if death had not ensued shall be liable to an action or suit for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony or other crime.

Every such action or suit shall be for the benefit of the wife, husband, parent and child, if any, of the person whose death shall have been so caused, and shall be brought by and in the name of the executor, administrator or representative of the person deceased;

and in every such action the Court may give such damages as it may think proportioned to the loss resulting from such death to the parties respectively, for whom and for whose benefit such action shall be brought, and the amount so recovered, after deducting all costs and expenses, including the costs not recovered from the defendant, shall be divided amongst the before-mentioned parties, or any of them, in such shares as the Court by its judgment or decree shall direct."

Section 2 similarly provides for the recovery of pecuniary loss to the estate of the deceased in an action or a suit by the executor, administrator, or the representative of the deceased. The preamble of the Act which gives the background and the purpose for enacting the legislation is to the following effect:

"An Act to provide compensation to families for loss occasioned by the death of a person caused by actionable wrong."

3. The Motor Vehicles Act, 1939, also provided for compensation arising out of the fatal accidents by motor vehicles, in Ss. 110-A and 110-B. Under these provisions, all claims are to be decided by the claims tribunal, but no specific guidelines have been enacted for determining the amount of compensation. These only enable the claims tribunal to make an award "determining the amount of compensation which appears to it to be just and specifying the person or persons to whom compensation shall be paid." It is provided under S. 110-A that the application for compensation should be made by or on behalf of all the legal representatives of the deceased.

4. However, S. 1-A of the Act is more detailed and exhaustive inasmuch as it has specified the claimants being the wife, husband, parent and the child. It has also been provided that the amount of damages which will be awarded, will be in proportion to the loss resulting from such death. However, determination of the amount of loss in suits or actions, from the death to the dependants has also been found to be quite a ticklish question by the Courts when the cases involving the same come up before the Accidents Claims Tribunals or the Courts. As soon as the authority, whether the tribunal or the Court, is called upon to determine the loss resulting from premature termination of life on account of the fault or negligence of another person, naturally, the first question falling for determination is: What was the salary or earning of the deceased at the time of his premature death? The other relevant matters for determination and adjudication are the life expectancy of the deceased by which the life has been cut short, the ages of the dependants, the prospects of increase in earnings, the contingency of the widow of the deceased remarrying and a host of other allied factors which may even come in the category of speculations or general estimates.

5. Section 1 of the Act is, in substance, reproduction of the English Fatal Accidents Act, 1846 (9 and 10 Vict. C. 93), known as the Lord Campbell's Acts, the scope of which was under discussion by the House of Lords in Davies v. Powell Duffryn Associated Collieries Ltd., 1942 AC 601. Lord Wright in his judgment while dealing with the question relating to the determination of the amount of wages which the deceased was earning, held —

"There is no question here of what may be called sentimental damage, bereavement or pain and suffering. It is a hard matter of pounds, shillings and pence, subject to the element of reasonable future probabilities. The starting point is the amount of wages which the deceased was earning, the ascertainment of which to some extent may depend on the regularity of his employment. Then there is an estimate of how much was required or expended for his own personal and living

expenses. The balance will give a datum or basic figure which will generally be turned into a lump sum by taking a certain number of years' purchase. That sum, however, has to be taxed down by having due regard to uncertainties, for instance, that the widow might have again married and thus ceased to be dependant, and other like matters of speculation and doubt."

According to Lord Russell, in the said case, the balance of loss and gain to the dependant by the death under question has to be determined. It was held as under:

"The general rule which has always prevailed in regard to the assessment of damages under the Fatal Accidents Acts is well settled, namely, that any benefit accruing to a dependant by reason of the relevant death must be taken into account. Under those Acts the balance of loss and gain to a dependant by the death must be ascertained, the position of each dependant being considered separately."

6. In Nance v. British Columbia Electric Rly. Co. Ld., 1951 AC 601, Viscount Simon was of the opinion that the claim to damages in cases of death fell under two separate heads: first, what sums the deceased would have probably applied out of his income to the maintenance of his wife and family if the deceased had not been killed and would have lived the full span of life; second, what would have been the additional savings which the deceased would or might have accumulated during the period he would have lived but for the premature death, which would probably have accrued to his wife and family. For the purpose of arriving at the correct assessment under these two heads, Viscount Simon laid down the following principles:

"Under the first head — indeed, for the purposes of both heads — it is necessary first to estimate what was the deceased man's expectation of life if he had not been killed when he was: (let this be 'x' years) and next what sums during these x years he would probably have applied to the support of his wife. In fixing x, regard must be had not only to his age and bodily health, but to the possibility of a premature determination of his life by a later accident. In estimating future provision for his wife, the amounts he usually applied in this way before his death are obviously relevant, and often the best evidence available; though not conclusive, since if he had survived, his means might have expanded or shrunk, and his liberality might have grown or wilted."

Their Lordships of the Supreme Court in Gobald Motor Service Ltd. v. R. M. K. Veluswamy, AIR 1962 SC 1, relied upon the principles as enunciated and reproduced above in the two English cases. Therein, one passenger going in a bus was killed when the bus met with an accident. The victim was 34 years of age at the time of his death and his annual earning was estimated at Rs. 3,000/-. The suit for damages had been filed by his widow, father and his children. The Claims Tribunal had awarded a sum of Rs. 25,000/- as compensation. The following principles as laid down by Viscount Simon in Nance's case (supra) were relied upon:

1. The deceased man's expectation of life has to be estimated keeping in view his age, his bodily health and the possibility of premature determination of his life by subsequent accident;

2. The amount required for the future provision of his wife should be estimated having regard to the amount the deceased used to spend on her during his life time;

3. This estimated annual sum should be multiplied by the number of years of the man's estimated span of life.

4. The said amount must be discounted so as to arrive at the correct equivalent in the form of lump sum payable on his death, after making deductions for the benefit accruing to the widow for the acceleration of her interest in the estate, and.

5. Deductions should also be made for the possibility of the wife dying earlier if the husband had full span of his life and also for the possibility that in case the widow remarries, that may result in improvement of her financial position.

It was also held therein that any mode of estimation of damages has to take into account a number of imponderables. It was held, —

"The actual extent of the pecuniary loss to the respondents may depend upon data which cannot be ascertained accurately, but must necessarily be an estimate, or even partly a conjecture. Shortly stated, the general principle is that the pecuniary loss can be ascertained only by balancing on the one hand the loss to the claimants of the future pecuniary benefit and on the other any pecuniary advantage which from what-

ever source comes to them by reason of the death, that is, the balance of loss and gain to a dependant by the death must be ascertained."

Their Lordships in the above case approved the award of Rs. 25,000/- and dismissed the appeal by the bus company for reduction of the amount. In the opinion of their Lordships, this sum would have been sufficient for the expenditure of the dependants for just over eight years and as such, it was held to be a "moderate sum; rather a conservative estimate."

7. In the Municipal Corporation of Delhi v. Subhagwanti, AIR 1966 SC 1750, the Clock Tower in Chandni Chowk, Delhi, owned by the Municipal Corporation, had collapsed resulting in the death of three persons. Three separate suits had been filed by the dependants in each case. In one case, it was found that the deceased was spending about Rs. 150/- per mensem for the subsistence of his wife and children, and was 30 years of age at the time of the accident. His widow was aged 28 years and his son and 2 daughters' age ranged from 2 years to 14 years. A total compensation of Rs. 27,000/- was awarded by capitalising the yearly loss for a period of 15 years. Relying on the above referred to two decisions of the English Courts, this award was approved thus approving the principles of law laid down by Lord Wright in Davie's case (1942 AC 601) (supra) that at first the basic figure regarding the annual loss to the dependants should be worked out and the same should be capitalised into a lump sum by taking a certain number of years' purchase. While doing so, regard has to be taken for the various possibilities including the one that the widow may remarry and then cease to be dependant. This method has been generally termed as a 'multiplier theory.'

8. Though the basic principles regarding the annual earnings of the deceased and on that basis the estimate of the annual dependency of the dependants and thereafter working out the lump sum payable to the dependants by taking into consideration the various possibilities and uncertainties like widow remarrying, were laid down in the abovementioned two English cases, but the principle of arriving at the lump sum payable to the dependants by following the multiplier doctrine was not expressly laid down although the final amount payable was arrived at in terms of the annual dependency by multiplying the same by a number of years' purchase. However, in Mallet v. McMonagle, 1969 Acc CJ 312 (HL), after taking into consideration all the previous decisions, it was held as under by the Court of Appeal, Northern Ireland:

"Thus, the usual method in our Courts to arrive at Fatal Accidents Act damages is to settle on the basic annual figure of dependency and then apply a multiplier which affects to take care of the uncertainties and vicissitudes of life, also the fact that the widow is getting an immediate lump sum which can be invested." When the appeal went before the House of Lords, Lord Diplock laid down the following principles for the purpose of working out the annual dependency, in paragraph 42:

"To assess the damages it is necessary to form a view on three matters each of which is in greater or less degree one of speculation: (i) the value of the material benefits for his dependants which the deceased would have provided out of his earnings for each year in the future during which he would have provided them had he not been killed, (ii) the value of any material benefits which the dependents will be able to obtain in each such year from sources (other than insurance) which would not have been available to them had the deceased lived but which will become available to them as a result of his death, (iii) the amount of the capital sum which with prudent management will produce annual amounts equal to the difference between (i) and (ii) (i.e., 'the dependency') for each of the years during which the deceased would have provided material benefits for the dependents had he not been killed."

The effect of inflation was also considered, but he was of the opinion that the same can be set off to some extent at any rate by prudent investment in buying a home, in growth stock, or in the short-term high-interest bearing securities. After considering the argument that along with the inflation the rate of bank interest had also been rising and the investment of the amount in bank was likely to produce enhanced income, he came to the following conclusions in para 47:

"In my view, the only practicable course for Courts to adopt in assessing damages awarded under the Fatal Accidents Acts is to leave out of account the risk of further inflation on the one hand and the high interest rates which reflect the fear of it and capital appreciation of property and equities which are the con-

sequence of it on the other hand. In estimating the amount of the annual dependency in the future, had the deceased not been killed, money should be treated as retaining its value at the date of the judgment, and in calculating the present value of annual payments which would have been received in future years, interest rates appropriate to times of stable currency such as 4 per cent to 5 per cent should be adopted."

According to the learned Judge, for the purpose of determining the multiplier to be applied to the annual dependency the factors like prospects of increase in wages, recession in trade, spells of unemployment, possibilities of the children beginning to earn when grown up, remarriage of the widow as well as the presence of the children diminishing the chances of remarriage have to be taken into consideration.

9. In Madhya Pradesh State Road Transport Corporation, Bairagarh v. Sudhakaran 1977 Acc CJ 290 : (AIR 1977 SC 1189), one woman aged 23 years and one year's old son had died while travelling in a bus as a result of an accident. At the time of her death, she was a physical instructress and drew Rs. 190/-. Claim application had been filed by her husband. The tribunal assessed the monthly dependency to the husband at Rs. 50/- and awarded the sum of Rs. 15,000/- as compensation. In appeal, the High Court enhanced this amount to Rs. 50,000/-. The Supreme Court in appeal against the decision affirmed the award of the tribunal by adopting 20 years' multiplier. The principle regarding the application of multiplier doctrine as laid down in Mallett's case (supra) was approved and it was held (at p. 1191 of AIR):

"A method of assessing damages usually followed in England, as appears from Mallett v. McMonagle (supra), is to calculate the net pecuniary loss upon an annual basis and to arrive at the total award by multiplying the figure assessed as the amount of the annual 'dependency' by a number of 'year's purchase', that is, the number of years the benefit was expected to last, taking into the consideration the imponderable factors in fixing either the multiplier or the multiplicand. The husband may not be dependent on the wife's income, the basis of assessing the damages payable to the husband for the death of his wife would be similar. Here, the lady had 35 years of service before her when she died. We have found that the claimant's loss reasonably works out to Rs. 50/- a month i. e. Rs. 600/- a year. Keeping in mind all the relevant facts and contingencies and taking 20 as the suitable multiplier, the figure come to Rs. 12,000/-. The Tribunal's award cannot therefore be challenged as too low though it was not based on proper grounds."

10. In Mrs. Manjushri Raha v. B. L. Gupta 1977 Acc CJ 134 : (AIR 1977 SC 1158) the deceased was 37 years of age who had died in the bus accident. His monthly salary was assessed at Rs. 620/-. Award of the tribunal for Rs. 60,000/- in favour of the widow and the children was affirmed by the High Court. In appeal by the claimants, the Supreme Court enhanced the amount from Rs. 60,000/- to Rs. one lac. According to their Lordships of the Supreme Court, the lower Courts while fixing the annual salary of the deceased as yearly dependency for the purpose of determining the lump sum to be awarded to the claimants, had not taken into account the salary which he would have earned while reaching the maximum of his grade long before his retirement. It was estimated that the deceased would have reached the maximum grade of Rs. 900/- at the age of 45 years before his superannuation. However, a close scrutiny of the entire judgment shows that the doctrine of multiplier for the purpose of capitalising the annual dependency was neither argued, nor considered.

11. In C. K. Subramonia Iyer v. T. Kunhikuttan Nair AIR 1970 SC 376, a child of eight years was hit by a bus with the result that he sustained very serious injuries; was rendered unconscious and died in the hospital on the next morning. Claim application filed by the parents was allowed. The principles for assessing the damages were laid down as under (at p. 380):

"There can be no exact uniform rule for measuring the value of the human life and the measure of damages cannot be arrived at by precise mathematical calculations, but the amount recoverable depends on the particular facts and circumstances of each case. The life expectancy of the deceased or of the beneficiaries whichever is shorter is an important factor. Since the elements which go to make up the value of the life of the deceased to the designated beneficiaries are necessarily personal to each other, in the very nature of things, there can be no exact or uniform rule for measuring the

value of human life. In assessing damages, the Court must exclude all considerations of matter which rest in speculation or fancy though conjecture to some extent is inevitable. As a general rule parents are entitled to recover the present cash value of the prospective service of the deceased minor child. In addition they may receive compensation for loss of pecuniary benefits reasonably to be expected after the child attains majority."

Its perusal shows that for the purpose of determination of damages not only the actual earning of the deceased at the time of his death is to be taken into consideration, but also the present cash value of the prospective earning of the deceased is also a relevant and essential factor for consideration.

12. In Sheikhupura Transport Co. Ltd. v. Northern India Transporters Insurance Co. Ltd. AIR 1971 SC 1624, two persons Bachan Singh and Narinder Nath, aged 42 and 43 years respectively, travelling in a passenger bus died as a result of the accident to the bus. The owner and the driver of the bus were held liable to pay damages to the dependents claimants. Though the accidents claims tribunal assessed the monthly loss to the dependents at less amount, the High Court in appeal keeping in view the earning of the deceased, came to the conclusion that the monthly dependency in each case was Rs. 200/- and fixed the total amount of compensation by capitalising this amount on the basis of 15 years' purchase. This was challenged in appeals by the bus company and the insurance company. The same were dismissed. The following general principles of law as laid down in Gobald Motor Service's case (AIR 1962 SC 1) (at p. 6) (supra), were reiterated (at pp. 1626-27):

"The general principle is that the pecuniary loss can be ascertained only by balancing on the one hand the loss to the claimants of the future pecuniary benefit and on the other any pecuniary advantage which from whatever sources come to them by reason of the death, that is, the balance of loss and gain to a dependent by the death must be ascertained."

13. From a close scrutiny of the various judgments of the Supreme Court, as referred to above, it can be safely held to have been settled that in order to determine the quantum of damages in case of fatal accidents, a basic figure indicative of the annual loss to the dependents from the premature death has to be arrived at. This amount is to be worked out not only on the basis of the salary or earning of the deceased at the time of the accident but also by taking into consideration the entire relevant data regarding the future prospects of increase in the course of employment or business, as the case may be. This basic figure has then to be converted into a lump sum by applying a suitable multiplier. In order to arrive at the correct multiplier, a number of factors which have been indicated in various judgments, as discussed above, have to be borne in mind. Whereas the Courts in England have so far gone to the extent of multiplying the basic figure of annual dependency by 16 years' purchase, the Supreme Court approved in one case 20 times as the suitable multiplier.

14. A perusal of the various judgments of this Court from time to time, however, shows that no uniform principle has been followed.

15. In Smt. Jaswant Kaur v. Ratti Ram 1971 Acc CJ 31 (Punj), the deceased at the time of the accident was 44 years old. His life expectancy was determined at 65 years. The amount of total claim was arrived at by multiplying the annual loss by 21, that is, by the number of years by which the life had been cut short. It was held by Sodhi, J., that it was not necessary to make any deduction on account of the fact that the amount was being paid in lump sum.

16. In Damyanti Devi v. Sita Devi 1972 Acc CJ 334 (Punj), similarly, a Division Bench of this Court also held that it was not necessary to make any deduction on account of the lump sum payment and the amount of annual loss was multiplied by the number of years by which the life had been cut short.

17. In another Division Bench judgment of this Court as reported in Parsani Devi v. State of Haryana 1973 Acc CJ 531 (Punj) the amount of damages was arrived at by multiplying the annual dependency by the number of years till the age of retirement. From its perusal it appears that no arguments were addressed on the principle of applicability of multiplier to determine the damages, nor was any deduction made in lieu of payment of compensation in lump sum.

18. However, in the State of Haryana v. Balbir Singh Hooda 1975 Acc CJ 1 (Punj) the Claims Tribunal after determining the total amount of damages reduced the same by 15 per cent on ac-

count of payment of lump sum and the learned Single Judge approved the principle of reduction of lump sum by 15 per cent. though the amount was reduced on account of other relevant considerations.

19. The learned counsel for the appellants, placed strong reliance on Surjit Singh v. The Co-operative General Insurance Society Ltd., 1974-76 Punj LR 353, for the proposition that only such amount should be allowed to the claimants which will ensure the amount of interest equal to the annual dependency if the same were invested on a long-term basis in some bank. In the said case, the Tribunal had awarded compensation amounting to Rs. 50,000/-. In appeal, the learned Single Judge reduced the said amount to Rs. 10,000/- only. In L. P. A., the Division Bench upheld the decision of the learned Single Judge holding that the claimants' dependency was Rs. 50/- per mensem which will be ensured by the total amount of Rs. 10,000/- as the same will yield this much interest if it were invested in a bank on a long-term basis. This is quite a short judgment. Its perusal shows that no arguments had been addressed against the application of the principle in such matters, nor was the same considered in the background of the multiplier theory. This judgment was followed in Sukhdev Raj Jain v. Shanti Devi 1975 Acc CJ 246 (Punj), by a learned single Judge of this Court, and in Jagir Kaur v. Uttam Singh Chatter Singh 1975 Acc CJ 26 (Punj), by a single Judge of the Himachal Pradesh High Court, without going into the merits of the principle. These decisions, however, were not agreed to by a Full Bench of this Court in the Vanguard Insurance Co. Ltd. v. Smt. Naresh Kanta 1977-79 Pun LR 328 : (AIR 1977 Punj & Har 214), wherein after scrutinising these judgments, it was held (at p. 219 of AIR) :

"However, this interest theory cannot be adopted as an inflexible principle for the purpose of assessing the compensation specially in these days when the purchasing power in terms of money is being eroded after short intervals on account of run away inflation."

The judgment in the aforesaid Full Bench case was also rendered by me. After closely considering the arguments by the learned counsel in the present case, I am still of the view that the interest theory ought not be made the basis of determining the quantum of compensation due to the claimants.

20. In Mallet's case (1969 Acc CJ 312 (HL)) (supra), the appellate Court in England also held that both the inflation and the high bank interest rates which are adopted to curb the same should not be taken into consideration for the purpose of arriving at the correct amount of compensation. It was also held that for the purpose of calculating the present value of annual payments to which the claimants will be entitled in future, interest rates in times of stable currency such as 4 per cent to 5 per cent, may be relevant considerations,

21. In present day India when our economy is not so highly developed as in western countries and the banking system has not taken deep roots especially in the villages, it is too unrealistic to adopt interest theory for determining the damages. In a large number of villages, there are neither any banks nor are the people accustomed to make investments therein. Besides, bank interest rates are not stable and static and the same go on fluctuating in view of the inflationary trends in the economy. Only a decade back, the normal bank interest rate did not exceed 4 per cent. As inflation in course of time becomes an essential part of the economy, the banks, in order to mop up the surplus money in the hands of the people, contrived of the inducement to pay higher rates of interest and these interests have been going up from time to time. The adoption of interest theory presumes that the claimant will invest the amount of claim in the bank which will ensure the amount of monthly dependency. In this manner, the claimants while getting the monthly interest will also be having the capital invested in the bank as intact. This argument may be further advanced for the purpose of further reduction in the total amount of compensation. To my mind, the interest theory is impracticable and unrealistic and will not be a proper yardstick for determining the correct amount of compensation.

22. After eliminating the interest theory from our consideration, we are left with the following options :

(1) After determining the basic figure relating to the annual dependency of the claimants, the same should be multiplied by the number of years by which the life expectancy of the victim has been cut short without making any deduction whatsoever;

(2) Some deduction should be made in the above amount in lieu of lump sum payment to the claimants; and

(3) The basic figure of annual dependency should be multiplied by a suitable multiplier which will take into consideration the life expectancy of the deceased as well as the average life of the dependants amongst other relevant factors.

23. In view of the judgments of the English Courts, and the Supreme Court, as discussed in the earlier part of this judgment, the most 'just and reasonable' view appears to be that the total amount of damages should be arrived at by multiplying the annual dependency by a suitable multiplier. The sole basis of awarding compensation to the dependents of the deceased is that on account of culpable negligence or default of the offender, a valuable life who was the source of livelihood to the claimants is cut short. Before the termination of life, the deceased was making some earning either through salary in Government service or any business, enterprise or in any other manner, or was getting earning through his own business or cultivation of land. A part of the same he was spending for his own maintenance and some part, if not the whole, was being utilised for up-keep and maintenance of the dependants who may be his widow, parents or his children. There can be cases where after spending the earnings on all the members of the family, still surplus may be left and may have been utilised for bringing into existence an estate or property. Thus, abrupt termination of life results in loss to the dependents or to the estate. The basic figure of annual dependency has, thus, to be determined after excluding the amount which the deceased was spending on himself or which he was investing in some capital investment or formation of the estate.

24. The second stage is as to how to convert the same into the total amount of compensation. For this purpose, the relevant factors are obviously the number of years by which the unfortunate life has been cut short. In order to determine the same, the average life expectancy has to be worked out. Along with this, the ages of the dependents have also to be kept in view. The total amount of compensation due to old parents who may be expected to live for about five or ten years more cannot be the same as in the case of children and the widow who may have a long life still to go though the victim who has met the tragic and may be young. Besides this, the other relevant considerations are the uncertainties of life such as the victim may have died a natural death on account of any disease or ailment earlier even if the accident had not taken place. The widow may remarry and thus may not be dependent on the earnings of the husband. The children after getting education may get employed and may become self-employed. Trade and business of the victim may not flourish and may be the victim of recession and other uncertain factors. According to the Supreme Court, the determination of the amount of compensation is basically a net balance of the loss and gain to the survivors or the dependents. In this calculation, in the very nature of things, it is not possible to visualise and measure in exact terms all the uncertainties, hazards and the windfalls of life. According to their Lordships of the Supreme Court, there is bound to be some sort of general estimate, but mere speculations or wild guess work has to be avoided. In order to do justice between the parties, the method of multiplying the annual dependency by the number of years by which the life has been cut short without any further reduction is unreasonable and unrealistic. The amount of damages or compensation should not serve as windfall to the dependents. This amount would have been available to them if the accident had not taken place only from month to month and from year to year. That is why, in some cases, the method of making some percentage of deduction from the lump sum so arrived at, was adopted, but the same is too arbitrary and vague to serve the purpose of award of just compensation. The principle of working out the suitable multiplier with which annual dependency be multiplied and capital amount arrived at appears to be the only just and reasonable method because the same takes into consideration not only the age of the victim, but also the ages of the dependents and all uncertainties of life, both in the realm of enhancement in the income as well as factors justifying reduction in the amount of compensation. For the purpose of determining this multiplier, no exact and mathematical calculation can be provided. The English Courts have held in some cases that 16 times multiplier was quite sound and reasonable. The Supreme Court have gone further

and in one case even 20 times was considered to be a suitable multiplier.

25. In Taylor v. O'Connor (1970) 1 All ER 365, Lord Reid while dealing with this aspect of the matter held, —

"Damages to make good the loss of dependency over a period of years must be awarded as a lump sum, and that sum is generally calculated by applying a multiplier to the amount of one year's dependency. That is a perfectly good method in the ordinary case, but it conceals the fact that there are two quite separate matters involved — the present value of the series of future payments, and the discounting of that present value to allow for the fact that, for one reason or another, the person receiving the damages might never have enjoyed the whole of the benefit of the dependency. It is quite unnecessary in the ordinary case to deal with these matters separately. Judges and counsel have a wealth of experience which is an adequate guide to the selection of the multiplier and any expert evidence is rightly discouraged."

In the opinion of Lord Guest, the multiplier was intended to provide in a rough measure adequate compensation for the loss sustained. No precise method can be expected. It is well hallowed in practice, and depends in some measure on the expertise of Judges accustomed to try these cases. Thus, out of all the alternatives, methods which have been adopted so far for determining the just amount of compensation, multiplier method appears to be realistic and reasonable and ensures better justice between the parties.

26. In Smt. Naresh Kanta's case (AIR 1977 Punj & Har 214) (FB) (supra), however, a different principle of law appears to have been laid down. Therein, it was held (at pp. 218, 219), —

"The guiding star, according to the above mentioned judgments for the assessment of damages is that the annual earnings of the deceased, taking into consideration also the prospective benefits in the form of increments or promotions, should be ascertained after making deductions of the benefits which may accrue to the dependents as a result of the death and also the amount which the deceased was expected to have spent on his own person. This estimated income should be multiplied by the number of years by which the life of the deceased is estimated to be cut short. The result would be the fair capitalised amount of compensation to which the dependants may be entitled."

The judgment in the above Full Bench case was written by me. As I look back, and it is also manifest from a close perusal of the judgment, the main contention in the said case centred round the applicability of the interest principle. No arguments were addressed and the mind was not specifically applied to the question regarding the determination of damages from all angles including the multiplier principle. On re-consideration and in view of the discussion of the various judgments of the English Courts, and the Supreme Court, as held above, I am of the considered opinion, that the above view needs modification. The multiplier principle appears to be more sound and equitable. The statement of law to the same effect has been enunciated by their Lordships of the Supreme Court.

27. It is manifest from a perusal of the various judgments of this Court that the multiplier method has not been applied and compensation in cases under the Act, and the Motor Vehicles Act, has been assessed on erroneous basis. Keeping in view the decisions in the Supreme Court cases and some English cases, noticed above, we hold that the following principles be observed and followed while assessing the compensation;

(1) The compensation to be assessed is the pecuniary loss caused to the dependents by the death of the person concerned, and no compensation is to be assessed on any extraneous consideration like love, affection, mental agony or any such similar consideration. Solatium is alien to the concept of compensation;

(2) For the purpose of calculating the just compensation, annual dependency of the dependents should be determined in terms of the annual loss accruing to them due to the abrupt termination of life. For this purpose, annual earning of the deceased at the time of the accident and the amount out of the same which he was spending for the maintenance of the dependents will be the determining factor. This basic figure will then be multiplied by a suitable multiplier;

(3) The suitable multiplier; as referred to in 2 above, shall be determined as held in Sudhakar's case (AIR 1977 SC 1189) (supra), decided by the Supreme Court as well as in Mallet's case (1969

Acc CJ 312) (HL) (supra), by taking into consideration the number of years of the dependency of the various dependents, the number of years by which the life of the deceased was cut short and the various imponderable factors such like early natural death of the deceased, his becoming incapable of supporting the dependents due to illness or any other natural handicap or calamity, the prospects of the remarriage of the widow, the coming up of age of the dependents and their developing their independent sources of income as well as the pecuniary benefits which might accrue to the dependents on account of the death of the person concerned. Such benefits, however, should not include the amount of the insurance policy of the deceased to which the dependents may become entitled on account of its maturity as a result of the death.

(4) The method adopted in certain decisions of this Court of multiplying the amount of the annual loss to the dependents with the number of years by which the life has been cut short without anything else cannot be sustained and all those decisions in which this view has been taken are hereby overruled;

(5) The compensation cannot be assessed on the basis of the so-called interest theory as the same provides the dependents with the capital as well as the amount of annual loss earned by way of interest and it also suffers from a number of other defects, as have been discussed in this judgment; and

(6) Considerations of ever growing inflation and the decrease in the money value are also not relevant for the purpose of assessment of compensation.

28. Now, adverting to the facts of the present case, according to the finding of the trial Court, one Karnail Singh, aged 23 years, was murdered by the appellants on Sept. 30, 1960. Suit for damages was filed by the parents, widow, two minor sons and two minor daughters of the deceased. A total compensation to the tune of Rs. 57,200/- was claimed. In reply, not only the commission of the murder was denied, but the appellants also disputed the amount of damages as claimed in the alternative. After scrutinising the evidence, the trial Court came to the positive conclusion that the murder of Karnail Singh had been committed by the appellants and that they were liable to pay damages to the claimants. At the time of his death, Karnail Singh was found to be 23 years of age. It was further held that at the time of his death, he was possessed of a healthy and stout physique. Regarding the earning of the deceased, the evidence on behalf of the claimants was to the effect that his annual income was between Rs. 2,000/- to Rs. 2,500/-. According to the conclusion of the trial Court, the same was in exaggerated figure. However, it was held that the deceased was a stout young man and that he was cultivating the land of other persons at the relevant time. It was held that the deceased could be expected to earn Rs. 3/- per day as agricultural labour. In view of this estimate, his annual income was calculated at Rupees 1,080/-. In the opinion of the trial Court, Rs. 480/- were likely to be spent by Karnail Singh on himself and thus Rs. 600/- annually were incurred for the maintenance of his family. This amount was thus the annual dependency of the claimants.

29. Regarding life expectancy of the deceased, it was held that in view of the normal expectancy of life at 60 years, life of Karnail Singh had been cut short as a result of murder by 37 years. Multiplying the annual dependency by 37, a total amount of Rs. 22,200/- was allowed as compensation to the claimants. This calculation has been challenged by the appellants in the present appeal. The finding regarding the commission of murder by the appellants and the award of Rs. 300/- on account of funeral expenses by the trial Court, however, has not been disputed.

30. As the deceased was a stout young man possessing good health at the time of the fatal accident and was working as a cultivator on others' lands, the finding of the trial Court to the effect that the deceased was expected to earn Rs. 3/- per day as agricultural labour appears to be rather on the low side. In our opinion, his daily earning cannot be estimated at less than Rs. 4/-. Thus, his annual income can be justly estimated to be Rs. 1,440/- at this rate. He was supporting his family consisting of his wife and the four children, and the old parents. If he spent one-third of the income on himself, the annual dependency of the claimant will be Rs. 960/-.

31. According to the trial Court, the normal expectancy of life in case of Karnail Singh, deceased, was 60 years. Thus, his life was cut short by 37 years. Keeping in view all the circumstances of

the case as well as the hazards and uncertainties of the life in the villages, in our opinion, 16 will be a suitable multiplier. Thus, the respondents are entitled to a total amount of Rs. 15,360/- as compensation and not more. In view of this finding, the amount of Rs. 22,200/- as awarded by the trial Court has to be reduced to this extent. Adding the undisputed amount of Rs. 300/- awarded in lieu of the funeral expenses, the respondents are held entitled to a total compensation of Rs. 15,660/-. The decree of the trial Court for Rs. 22,500/- is modified and the decretal amount is reduced to Rs. 15,660/-.

With this modification, this appeal is dismissed with no order as to costs.

S. S. SANDHAWALIA, C. J.:—I agree.

S. C. MITAL, J.: — I agree.

D. B. LAL, J.: — I agree.

S. P. GOYAL, J.: — I agree.

Appeal dismissed and decree modified.

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FULL BENCH

S. S. SANDHAWALIA, C. J., P. C. JAIN AND S. C. MITAL, JJ.

Gurcharan Singh, Petitioner v. State of Haryana and others, Respondents.

Civil Writ No. 2207 of 1977, D/- 17-7-1978.*

Punjab Co-operative Societies Act (25 of 1961) (as applicable in Haryana), Sections 27 (1) and (1A) — Suspending a member or a Committee pending supersession proceedings — Giving of prior notice or opportunity of being heard is not necessary. C. W. P. No. 8358 of 1976, D/- 29-1-1977 (Punj & Har) and 1978 Punj LJ 15, Overruled.

An opportunity to show cause is not imperative before suspending a member or a Committee of a Co-operative Society during the course of the proceedings for supersession under S. 27 of the Punjab Co-operative Societies Act, 1961 (as applicable in Haryana). (Para 5)

The legislature in its wisdom has in express terms provided for the giving of an opportunity to show cause as regards the supersession of the Managing Committee or removal of a member thereof under sub-sec. (1) of S. 27 of the Act. However, when sub-sec. (1A) was inserted in the section by way of amendment vide Haryana Act 22 of 1972, the framers of the statute had designedly not used the earlier phraseology of reasonable opportunity to show cause being given in the context of the suspension of the Managing Committee or a member. Therefore as regards suspension the provision of a show cause notice is conspicuous by its absence. (Para 5)

In the larger perspective also it is manifest that the suspension of the Managing Committee during the course of the proceedings of supersession appears to be an emergent or urgent matters which may well be necessitated upon the authority being satisfied that the same is necessary in the interest of the Co-operative Society. If in the context of such an urgent or emergent action, the relatively tardy requirements of principles of natural justice requiring the necessity to issue a show cause notice, affording time for the filing of a reply, the consideration of the same and perhaps to afford the opportunity to lead evidence and thereafter to decide the same were to be imported it may well in effect lead to defeating the very purpose of an emergent provision of this nature. C. W. P. No. 8358 of 1976, D/- 29-1-1977 (Punj & Har) and 1978 Punj LJ 15, Overruled. (Paras 6, 11)

Cases Referred: Chronological Paras

1978 Pun LJ 15	3, 5, 8, 11
(1977) CWP No. 8358 of 1976, D/- 29-1-1977 (Punj & Har), Shadipur Co-operative Credit Society v. State of Haryana	3, 5, 8, 11
AIR 1975 Punj & Har 36 : 76 Pun LR 789	10
AIR 1972 Bom 108	8
1971 Pun LJ 417	10
(1965) 67 Pun LR 529	10
(1963) 65 Pun LR 1085	10

G. S. Sandhu, for Petitioner; A. S. Nehra, Addl. Advocate General, Haryana, for Respondents.

S. S. SANDHAWALIA, C. J.:— Whether an opportunity to show cause is imperative before suspending a member or a Committee of a Co-operative Society during the course of the proceedings for supersession under S. 27 of the Punjab Co-operative Societies Act, 1961 (as applicable in Haryana) is the significant question which falls for determination in this reference to the Full Bench.

*(Decided by Full Bench on order of reference made by D. S. Tewatia and Bhopinder Singh Dhillon, JJ. D/- 13-9-1977.)

2. The facts are not in serious dispute and a passing reference to them suffices. Gurcharan Singh, petitioner, is one of the five members of the Managing Committee of the Hansala Co-operative Agriculture Service Society Ltd., Hansala. The Deputy Registrar, Co-operative Societies, Kurukshetra exercising the powers of the Registrar initiated proceedings for the supersession of the aforesaid Committee. The notice, annexure P. 1 dated the 19th of July, 1977 was issued to the said Committee to show cause as to why the same be not superseded or removed and therein a number of irregularities and illegalities committed by the Managing Committee were listed seriatim. The members of the Committee were invited to show cause and given an opportunity to clear their position regarding the charges specified in the notice annexure P. 1 within a fortnight of the receipt thereof as required under S. 27 of the Act. However, the authority further took the view that in view of the charges levelled against the Managing Committee it should not be allowed to function during the pendency of the proceedings for supersession and removal and acting under S. 27 (1A) of the Act the authority suspended the Managing Committee and appointed Shri Kuldip Rai Vaid, Development Officer of the Kurukshetra Central Co-operative Bank Ltd., as its Administrator meanwhile. The aforesaid suspension alone is the subject-matter of challenge in this writ petition.

3. When the matter first came up for hearing before a Division Bench, the primary and indeed the sole ground raised on behalf of the petitioner was that the impugned action of suspension had been taken against him without giving any notice and opportunity of being heard. Reliance for this contention was wholly based on two Division Bench judgments. In C. W. P. No. 8358 of 1976, Shadipur Co-operative Credit Society v. State of Haryana, decided on the 29th of Jan. 1977, the Division Bench in a short order at the stage of motion hearing observed that the vested rights of the Managing Committee to look after the affairs of the Society could not be nullified unless an enquiry in accordance with the principles of natural justice had been conducted. Consequently the Bench proceeded forthwith to quash the impugned order of suspension leaving it open to the authorities concerned to pass a fresh order in accordance with law. The same Division Bench reiterated their earlier view, even though its correctness was challenged before them again at the motion stage only in the judgment reported in Angrej Singh v. State of Haryana, 1978 Pun LJ 15.

4. By the order of reference the learned Judges of the Division Bench seriously doubted the view expounded in the aforesaid two decisions and therefore referred the matter for decision by a larger Bench. That is how the matter is before us.

5. It is evident that the real and indeed the only question here is the correctness of the observations made in the Shadipur Co-operative Credit and Service Society (C. W. P. No. 8358 of 1976, D/- 29-1-1977 (Punj & Har)) and Angrej Singh's cases (1978 Pun LJ 15) (supra). However, before resorting to a critical analysis of the aforesaid judgments, one must inevitably have a close look at the relevant provisions of the statute around which the controversy must necessarily revolve. Section 27 (1) and (1A) of the Punjab Co-operative Societies Act as applicable in Haryana read as follows:

"27. Supersession of Committee. (1) If in the opinion of the Registrar a committee or any member thereof persistently makes default or is negligent in the performance of the duties imposed on it or him by this Act or the rules or the bye-laws or commits any act which is prejudicial to the interests of the society or its members, the Registrar may after giving the committee or member as the case may be, an opportunity to state its or his objections, if any, by order in writing —

(a) remove the committee, and —

(i) order fresh election to the committee, or

(ii) appoint one or more administrators who need not be members of the society, to manage the "affairs of the society for a period not exceeding one year specified in the order which period may, at the discretion of the Registrar be extended from time to time, so, however, that the aggregate period does not exceed five years;

(b) remove the member and get the vacancy filled up for the remaining period of the outgoing member, according to the provisions of this Act, the rules and the bye-laws.

(1A) where the Registrar while proceeding to take action under sub-sec. (1), is of the opinion that suspension of the Committee or member during the period

of proceedings is necessary in the interest of the Co-operative society, he may suspend the committee or member, as the case may be, and where the committee is suspended, make such arrangement as he thinks proper for the management of the affairs of the society till the proceedings are completed:

Provided, that if the committee or member so suspended is not removed, it or he shall be reinstated and the period of suspension shall count towards its or his term."

Even a bare look at the plain language of the aforequoted provisions at once brings to mind the significant fact that the legislature in its wisdom has in express terms provided for the giving of an opportunity to show cause as regards the supersession of the Managing Committee or removal of a member thereof under sub-sec. (1) of S. 27 of the Act. However, when sub-section (1A) was inserted in the section by way of amendment vide Haryana Act 22 of 1972, the framers of the statute had designedly not used the earlier phraseology of reasonable opportunity to show cause being given in the context of the suspension of the Managing Committee or a member. Therefore as regards suspension the provision of a show cause notice is conspicuous by its absence. It appears to me as a settled canon of construction that when the legislature uses different language and particularly in contiguous provisions it must be presumed to have done so designedly. It seems hardly possible to hold that whilst in S. 27 (1) an opportunity to show cause is expressly provided for, yet in sub-sec. (1A) where it is designedly excluded the end-result should still be the same. In fact the only inference from this difference in terminology appears to be plain, namely, that in the context of suspension under subsection (1A), the legislature has by necessary implication excluded any opportunity to show cause. I am, therefore, of the view that the provisions of sub-section (1A) when viewed particularly in juxtaposition to sub-sec. (1) lead to a clear pointer that whilst resort to the principles of natural justice is expressly provided in the more material case of supersession and removal of the Managing Committee or its members the same is excluded in a relatively minor and interlocutory stage of the suspension of the Managing Committee or any one of its members. It deserves highlighting that suspension is only one of the intermediatary steps in the course of the proceedings taken under S. 27 (1) for the supersession or removal of the Managing Committee or any one of its members.

6. In the larger perspective also it is manifest that the suspension of the Managing Committee during the course of the proceedings of supersession appears to be an emergent or urgent matter which may well be necessitated upon the authority being satisfied that the same is necessary in the interest of the Co-operative Society. This indeed is provided by the statute itself in sub-section (1A) of the Act. Apparently to prevent any further misappropriation of the Society's funds or irreparable injury to its property and its working, the Registrar is clothed with the power to suspend the Managing Committee and make immediate alternative arrangements for the management of its affairs, if necessary. If in the context of such an urgent or emergent action, the relatively tardy requirements of principles of natural justice requiring the necessity to issue a show cause notice, affording time for the filing of a reply, the consideration of the same and perhaps to afford the opportunity to lead evidence and thereafter to decide the same were to be imported it may well in effect lead to defeating the very purpose of an emergent provision of this nature. If that be so, it is equally well-settled that a construction which would tend to defeat rather than advance the intent of the legislature has inevitably to be avoided.

7. Mr. A. S. Nehra, learned Additional Advocate General of the State of Haryana, also forcefully argued on the analogy of service cases in this context. It is rightly pointed out that in the whole gamut of service law the suspension of a public servant does not attract the principles of natural justice to require that even a show cause notice be given prior to the emergent act of suspension. Counsel rightly contended that the suspension of a member of a Managing Committee though not identical, is on a similar footing. It was further pointed out that the legislature has made identical provisions of supersession and suspension with regard to the Managing Committee as a body as also of an individual member. On this premises it was forcefully submitted that the provisions of a notice and an elaborate opportunity to show cause is rather incongruous in the context of the emergent and urgent nature of

action visualised at the stage of suspension by the legislature.

8. Coming now to the two judgments, the correctness of which is under consideration, it is significant to notice that these are obviously on first impression, and as has already been noticed, recorded at the motion stage only. An analysis thereof leaves no manner of doubt that the issue was very far from being seriously agitated before the Bench. In particular the observations in Shadipur Co-operative Credit and Service Society's case (C. W. P. No. 8358 of 1976, D/- 29-1-1977, (Punj & Har) (supra) are apparently wholly brief and it appears that even the material provisions were not pointedly brought to the notice of their Lordships. In Angrej Singh's case (1978 Pun LJ 15) the same Bench had only chosen to follow its earlier observations and herein again the matter does not seem to have been forcefully presented in all its aspects on behalf of the respondents. In particular, the significant difference in the terminology used in sub-section (1) in contradistinction to sub-section (1A) has not at all been noticed. The emergent or in any case the urgent nature of the provision regarding the suspension and the fact that the same is nothing but a step in the larger context of the supersession and removal of the Managing Committee in which ultimately the parties are entitled to show cause, has also not been mentioned. Reliance in Angrej Singh's case (supra) was placed, in passing on Little Gibbs Co-op. Housing Society Ltd. Bombay v. State of Maharashtra, AIR 1972 Bom 108. It deserves recalling that that case was one of supersession and not of suspension and significantly Section 78 of the relevant statute therein in terms provided for an opportunity to show cause. The observations in the said judgment, therefore, are of no aid to the view expounded with regard to the suspension in the two cases.

9. The Division Bench had then attempted to distinguish the settled law in this Court under Section 102 of the Gram Panchayat Act on the ground that a Sarpanch had no monetary stakes, whereas a member of the Co-operative Society or its Managing Committee had a financial interest in the management of the business of the Society. With respect, I am of the view that that consideration would not be pre-eminently relevant in the matter of the construction of a statute wherein the language, if not in pari materia, is at least analogous.

10. Apart from principle and rationale, there appears also to be a plethora of authority within this Court on an analogous provision. Section 102(1) of the Punjab Gram Panchayat Act similarly vests a power of suspension of a Panch, in the Deputy Commissioner during the course of an enquiry instituted against him for his removal. That the provisions are of a similar nature appears to be manifest. In interpreting the said provisions a Division Bench of this Court in Rajinder Singh v. Director of Panchayats Punjab, (1963) 65 Pun LR 1085 had occasion to observe that the said Section did not talk of giving any notice before passing the order of suspension and did not choose to read any principle of natural justice therein. Similar observations were made by Shamsher Bahadur J. in Ratti Ram v. Deputy Commr. Patiala, (1965) 67 Pun LR 529. Koshal J., (as the learned Chief Justice then was) in Gurdial Singh v. State of Punjab, 1971 Pun LJ 417 similarly had an occasion to construe Section 102(1) of the Gram Panchayat Act and held that no notice or opportunity before passing an order of suspension against a Panch was required by the statute. Lastly in this context is the Division Bench judgment in Hari Singh v. Director of Panchayats, Punjab, 76 Pun LR 789 : (AIR 1975 Punj & Har 36) wherein it was observed (at p. 39 of (AIR) :—

"* * * * The order for the suspension of the petitioner was passed during the pendency of the enquiry which had been ordered by the Director of Panchayats under Section 102(2) of the Act by means of his letter dated November 30, 1971. It was not necessary for the Deputy Commissioner to issue notice to the petitioner before passing the order of suspension to show cause against the proposed order."

11. It is, therefore, plain that the view expressed in both Shadipur Co-operative Credit Society (C. W. P. No. 8358 of 1976, D/- 29-1-1976 Punj) and Angrej Singh's cases (1978 Pun LJ 15) (supra) is not sustainable on a close analysis of the relevant provisions, on an examination on principle, and on the weight of authority within this Court. We are, therefore, constrained to overrule both the judgments as not laying down the law correctly.

12. The only contention raised on behalf of the petitioners having been

negatived, there is no merit in this writ petition which is consequently dismissed. However, we would leave the parties to bear their own costs.

Petition dismissed.

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FULL BENCH

S. S. SANDHAWALIA, C. J.,
S. C. MITAL, D. S. TEWATIA,
K. S. TIWANA AND S. P. GOYAL, JJ.

Ram Sarup and another, Appellants v. Sher Singh and others, Respondents.

Ex. Second Appeal No. 1306 of 1971, D/- 25-9-1978.*

Civil P. C. (5 of 1908), S. 48 (prior to its repeal — S. 48, if controlled by Art. 182 of Limitation Act. AIR 1975 Punj & Har 246 (FB), Overruled. (Limitation Act (9 of 1908), Art. 182).

Per Majority: S. 48 of the Code (prior to its repeal by S. 28 of Limitation Act, 1963.) merely prescribed a period of limitation and not an insuperable or a final bar. The subsequent history of the legislation is again a pointer to the same effect. Partially the place of S. 48 of the Code has now been taken by Art. 136 of the Schedule to the Limitation Act, 1963. This change, therefore, must be construed as declaratory of the law and once it is held that S. 48 of the Code also prescribed a period of limitation, it would well follow that the same would be controlled by the provisions of the Limitation Act, 1908. (Para 6)

If a party has a right to get the decree amended and has been successfully able to do so then he cannot be denied the fruits of his success by the mere fact that more than twelve years have passed from the date of the original decree and the same on that ground should become unexecutable. To deny him the execution of the decree merely because the tardy court processes had been stretched beyond a period of twelve years would be uncalled for unless the statute in mandatory terms were to lay down otherwise. (Para 7)

Thus, S. 48 of the Code was controlled by Art. 182 of the Limitation Act of 1908. AIR 1975 Punj & Har 246 (FB), Overruled. AIR 1971 SC 974, Rel. on. (Para 8)

Anno: AIR Comm. Lim. Act (3rd Edn.), Art. 182, N. 2.

Cases Referred: Chronological	Paras
AIR 1975 Punj & Har 246 (FB)	2, 5, 8
AIR 1971 SC 974	5, 8
AIR 1957 Trav-Co 293	5
AIR 1955 Cal 269	8
AIR 1954 Bom 104	5
AIR 1953 Orissa 13	8
AIR 1952 Mad 186 (FB)	8
AIR 1946 Pat 392	5
AIR 1944 Nag 155	8
AIR 1943 Bom 164	8
AIR 1940 Mad 127 (FB)	5
AIR 1939 All 403: 1939 All LJ 522: ILR (1939) All 647 (FB)	8
AIR 1939 Pat 607	5
AIR 1935 Lah 292	5
AIR 1932 All 351: 1932 All LJ 471	5

S. C. Kapur, for Appellants; S. P. Jain, for Respondents.

S. S. SANDHAWALIA, C. J.:— Whether S. 48 of the Code of Civil Procedure, 1908 (now repealed with effect from the 1st of Jan. 1964, by S. 28 of the Indian Limitation Act, 1963) was controlled by Art. 182 of the First Sch. of the Indian Limitation Act, 1908, is the significant question which falls for determination by this Full Bench.

2. This reference to the larger Bench has been necessitated by a forceful challenge to the correctness of the judgment reported as Amar Nath v. Mul Raj, AIR 1975 Punj & Har 246 (FB), wherein it has been held that S. 48 aforesaid laid down a bar which was final and which could not be extended by the amendment of the decree, whether that amendment was made before or after the expiry of the said period of twelve years, and that the date of the decree within the meaning of S. 48 of the Code is always the date of the original decree and not the date of the amended decree.

3. The case in hand is a glaring example of the occasional tardiness of judicial procedure. In the suit originally filed by the decree-holder for partition of the joint property, the preliminary decree was passed by the trial Court more than four decades earlier on the 27th of March, 1938. For the purposes of this reference, it is unnecessary to follow in detail the chequered history of the case thereafter. It suffices to mention that in the tortuous

* (From order of P. L. Sanghi, Sr. Sub-J. with enhanced Appellate Powers Rohtak, D/- 17-5-1971.)

course of proceedings that ensued, the decree aforesaid was allowed to be amended on the material date of the 16th of July, 1966. The crucial question that now arises is whether the terminus for the execution of the decree is the date of its amendment (16th of July, 1966) as provided for in cl. (4) in col. 3 of Art. 182 of the First Schedule of the Limitation Act 1908 or the date of the original decree, namely, the 27th of March, 1938.

4. As the controversy must inevitably revolve around the provisions of the now repealed S. 48 and Art. 182 of the First Schedule, Indian Limitation Act 1908, these may first be set down for facility of reference :—

"48 (1) Where an application to execute a decree not being a decree granting an injunction has been made no order for the execution of the same decree shall be made upon any fresh application presented after the expiration of twelve years from —

(a) the date of the decree sought to be executed, or,

(b) where the decree or any subsequent order directs any payment of money or the delivery of any property to be made at a certain date or at recurring periods, the date of the default in making the payment or delivery in respect of which the applicant seeks to execute the decree.

(2) Nothing in this section shall be deemed —

(a) to preclude the Court from ordering the execution of a decree upon an application presented after the expiration of the said term of twelve years, where the judgment-debtor has, by fraud or force, prevented the execution of the decree at some time within twelve years immediately before the date of the application; or

(Contd. on Col. 2)

(b) to limit or otherwise affect the operation of Art. 183 of the First Schedule to the Indian Limitation Act, 1908." and Art. 182

(See Art. 182 below)

5. On the vexed question whether S. 48 of the Code of Civil Procedure, 1908, laid down an absolute bar of twelve years for the execution of a decree or whether it was controlled or overridden by the provisions of the Limitation Act, there has been a wide ranging conflict of judicial opinion in the various High Courts for nearly half a century. I do not, however, propose to further contribute to the volume of this judicial literature because it appears to me that the matter has now been finally set at rest by the binding precedent of the final Court. It suffices to mention that the learned Judges in Amar Nath's case (AIR 1975 Punj & Har 246) (FB) (supra) rested their view on a string of precedents including Fakir Chand v. Kundan Singh, AIR 1932 All 351, Ganesh Das v. Vishan Das, AIR 1935 Lah 292, Mt. Dulhin v. Harihar Gir, AIR 1939 Pat 607; Ramachandra Rao v. Parasuramayya, AIR 1940 Mad 127 (FB); Shyam Sunder Prasad v. Ramdas Singh, AIR 1946 Pat 392; Ganeshmal Pasmal v. Nandlal Tulsiram, AIR 1954 Bom 104 and Krishna Pillai Narayana Pillai v. Neelakanta Pillai Velayudhan Pillai, AIR 1957 Trav-Co 293. However, it now appears manifest that the aforesaid view and the authorities mentioned above can no longer be held as good law in view of the categoric observations made by their Lordships in Lalji Raja and Sons v. Firm Hansraj Nathuram, AIR 1971 SC 974.

6. Since I take the view that the matter is concluded by a binding precedent it is wasteful to launch on an examination of the issue on principle. It suffices to mention that the argument that S. 48 of the Code of Civil Procedure was a self-

"Article 182—

For the execution of a decree or order of any Civil Court not provided for by Article 183 or by Section 48 of the Code of Civil Procedure, 1908.	Three years, or where a certified copy of the decree or order has been registered, six years.	1. The date of the decree or order, or 2. (Where there has been an appeal) the date of the final decree or order of the Appellate Court, or the withdrawal of the appeal, or 3. (Where there has been a review of judgment) the date of the decision passed on the review, or 4. (Where the decree has been amended) the date of amendment, or 5. * * * 6. * * * 7. * * *"

contained Code in which the period prescribed laid down was an absolute bar has been negatived in no uncertain terms by their Lordships and it has been consequently held that S. 48 in effect also merely prescribed a period of limitation and not an insuperable or a final bar. The subsequent history of the legislation is again a pointer to the same effect. This is manifest in the fact that S. 48, as already noticed, has now been repealed by the provisions of S. 28 of the Indian Limitation Act, 1963. Partially its place has now been taken by Art. 136 of the Schedule to the Limitation Act, 1963. This change, therefore, must be construed as declaratory of the law and once it is held that S. 48 of the Code also prescribed a period of limitation, it would well follow that the same would be controlled by the provisions of the Limitation Act, 1908.

7. On principle also the aforesaid view commends itself for acceptance. If a party has a right to get the decree amended and has been successfully able to do so then he cannot be denied the fruits of his success by the mere fact that more than twelve years have passed from the date of the original decree and the same on that ground should become unexecutable. The present case is an apt example of such a situation. The decree-holder secured his original decree on the 27th of March, 1938, and in a long drawn out legal battle, amendment of the decree was secured nearly 28 years thereafter on the 16th of July, 1966. To deny him the execution of the decree merely because the tardy Court processes had been stretched beyond a period of twelve years would in my opinion be uncalled for unless the statute in mandatory terms were to lay down otherwise.

8. As I said earlier, apart from principle, it appears to me that despite the earlier conflict the controversy now fortunately seems to have been set at rest by the following categoric observations of their Lordships in Lalji Raja's case (AIR 1971 SC 974) (supra) (at pp. 980, 981):—

"25. The argument advanced on behalf of the judgment-debtors is that S. 48 is a self-contained Code and the period prescribed therein is a bar and not a period of limitation and hence the decree-holders cannot take the benefit of S. 14 (2). In support of this argument reliance is placed on sub-sec. (2) (a) of S. 48 of 'the Code'. That sub-section undoubtedly lends some support to the contention of the judgment-debtors. It indicates as to when the period prescribed under S. 48 (1) can be extended. By implication it can be urged that the period prescribed under S. 48 (1) of the Code can only be extended under the circumstances mentioned in that clause and not otherwise. But in assessing the correctness of that contention we have to take into consideration cl. (b) of sub-sec. (2) of S. 48 of the Code as well as Arts. 181 and 182 of the Limitation Act, 1908. These provisions clearly go to indicate that the period prescribed under S. 48 (1) of the Code is a period of limitation. This conclusion of ours is strengthened by the subsequent history of the legislation. By the Limitation Act 1963, S. 48 of the Code is deleted. Its place has now been taken by Art. 136 of the Limitation Act of 1963.

26. At one stage, there was considerable conflict of judicial opinion as to whether S. 48 is controlled by the provisions of the Limitation Act 1908. But the High Courts which had earlier taken the view that S. 48 prescribes a bar and not limitation have now revised their opinion. The opinion amongst the High Courts is now unanimous that S. 48 of the Code is controlled by the provisions of the Limitation Act, 1908 — see Kandaswami Pillai v. Kannappa Chetty, AIR 1952 Mad 186 (FB); Durg v. Pancham, ILR (1939) All 647 : (AIR 1939 All 403 (FB); Sitaram v. Chunnilalsa, AIR 1944 Nag 155; Amarendra v. Manindra, AIR 1955 Cal 269; Krishna Chandra v. Siva Paravatamma, AIR 1953 Orissa 13 and Ramgopal v. Sidram, AIR 1943 Bom 164.

27. We are of the opinion that the ratio of the above decisions correctly lay down the law. That apart, it would not be appropriate to unsettle the settled position in law."

In the light of the aforesaid enunciation, I would return an answer in the affirmative to the question formulated at the very outset. As a necessary consequence it has to be held that the observations in Amar Nath's case (AIR 1975 Punj & Har 246) (FB) (supra) on this point are no longer good law and are hereby overruled.

9. The case shall now go back to the learned Single Judge for determination in accordance with the answer to the referred question.

S. C. MITAL, J.:— I agree.

D. S. TEWATIA, J.:— I agree.

K. S. TIWANA, J.:— I agree.

S. P. GOYAL, J.:— I agree.

Answer in affirmative.

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A. S. BAINS, J.

Jarnail Singh, Appellant v. Shakuntla Devi, Respondent.

F. A. F. O. No. 84-M of 1977, D/- 27-9-1978.*

Hindu Marriage Act (25 of 1955), Section 13 (1) (i-a) and (i-b) — Divorce — Husband's petition — Allegation of cruelty and desertion by wife not substantiated — Couple having five children — Two daughters of marriageable age — Relation between two spouses strained on the husband developing illicit relation with another woman — Wife willing to live with husband without any pre-conditions but husband not ready to keep her — Held that the family could not be disrupted at that stage on non-existent grounds. (Para 10)

Anno: AIR Manual (3rd Edn.), Hindu Marriage Act, S. 13, N. 8.

R. S. Bindra, for Appellant; Laxmi Grover and H. S. Sahney, for Respondent.

JUDGMENT :— Appellant Jarnail Singh has filed this appeal against the judgment of the learned Additional District Judge, Hoshiarpur vide which his application under S. 13 (1) (i-a) and (i-b) of the Hindu Marriage Act (hereinafter called as the Act) was dismissed. The facts giving rise to this appeal are as under :—

The parties were married in the year 1957. Out of the wedlock five children were born, three daughters and two sons. The parties lived cordially up to the year 1973, but later on the relations became strained and the present appellant and the respondent did not live together. Consequently the appellant filed an application under S. 13 (1) (i-a) and (i-b) of the Act for divorce on the basis of cruelty and desertion. It was alleged in the application that she left the house of the appellant on the pretext that she wanted to attend the Akhand Path Bhog ceremony at the house of her father in village Kukowal and after that she never came back in spite of the attempts made by the appellant. The main ground given in the application was that she wanted a share in the property of Dhanpat who is the uncle of the appellant which he refused and on this account she had deserted him. This application was resisted by the respondent-wife and the allegations in the application were denied. It was alleged that she was turned out of the house along with her daughters after giving beatings to her. She also denied the incident of May 22, 1973 which is mentioned in the application of the appellant. It was further alleged in her written statement that as the appellant had illicit relations with one Varinder Kumari a J. B. T. teacher, he started maltreating her and ultimately turned her out and that he also filed a defamation application under S. 500 of the I. P. C. against her with a view to put pressure on her to get divorce. She filed maintenance application on her own behalf and on behalf of her children which was allowed by the Court of January 19, 1976. The parties contested on the following issues :—

1. Whether the respondent has treated the petitioner with deliberate cruelty so as to cause reasonable apprehension in his mind that it will be injurious for him to live with the respondent ? OPA

2. Whether the respondent has deserted the petitioner for continuous period of two years immediately preceding the presentation of this petition ? OPA.

3. Relief.

2-3. The learned Additional District Judge after perusing the evidence dismissed the application of the appellant.

4. I have gone through the evidence and the relevant record. The appellant in order to prove his case produced one Rattan Lal, P. W. 1 clerk who brought the file from the Court of Judicial Magistrate First Class, Hoshiarpur, Balwant Rai, P. W. 2, Clerk of the District Education Office dealing with transfers, Ripudaman Singh, P. W. 3 head teacher of Government Primary School, Jahanpur, Head Constable Puran Chand, P. W. 4, Dhanpat P. W. 5, who is the uncle of the appellant, Kartar Singh P. W. 6, who is an Assistant in the Office of Director Public Instruction, Chandigarh and the appellant himself appeared as his own witness as P.W. 7, Rattan Lal, P.W. 1, Balwant Rai, P. W. 2, Ripudaman Singh P. W. 3 and Kartar Singh, P. W. 6 are the witnesses regarding transfer of the appellant from Government High School Dhada Kalan to some other school. hence they are not very material on the actual allegations made by the appellant in his application.

5. P. W. 4 is Head Constable Puran Chand who says that there was a compromise between the appellant and his

*(From order of Daljit Singh Dhaliwal, Addl. Dist. J., Hoshiarpur, D/- 28-9-1977).

father-in-law. P. W. 5 Dhanpat is the uncle of the appellant who has executed a will in favour of the appellant of his property. Jarnail Singh appellant deposed as his own witness and supported the allegations which he made in the application. His main contention is that after his uncle Dhanpat, P. W. 5 executed the will in his favour for the immovable property, the relations with the respondent became strained as she wanted to get that property in her name. He further deposed that his father-in-law and brother-in-law waylaid him on May 3, 1973, when he was returning from the school in the evening and that there was a compromise regarding that incident on May 28, 1973. I have perused the evidence of these witnesses.

The relations between the appellant and the respondent were cordial for about 15-16 years and on no occasion they ever quarrelled with each other or lived separately from each other.

6. The only ground urged by the appellant is that the relations became strained after his uncle Dhanpat, P. W. 5 executed the will in his favour of his property and the respondent wanted the transfer of that property in her name. I am not at all convinced with this allegation of the appellant. No wife in the villages would disrupt married life after 16 years on such a ground and when the property belongs to uncle. Moreover, she has three daughters and two sons and even if the uncle had executed the will in her husband's favour that cannot be any cause of annoyance because ultimately the property would devolve on her children. Moreover, till then, according to the showing of the appellant himself, there has been no untoward incident between them. Five children are born out of their wedlock. Two daughters are of marriageable age. This could hardly be any ground for the wife to break and disrupt the family after such a long time. It is to be highlighted that the will is not produced by the husband (appellant) or his uncle. Hence it is also doubtful whether actually any will is executed by the uncle in favour of the appellant. The evidence produced by the respondent shows that the relations became strained because the appellant developed friendship with one Varinder Kumari who was a teacher in the same school where the appellant was employed. This allegation is supported by her in her own version.

7. The allegation of relationship with Varinder Kumari is corroborated by the testimony of Sikander Kaur, R. W. 1, who is the daughter of the appellant. No daughter will depose against her father falsely. Moreover, there was no occasion for the respondent also to make any such false allegation if there was none because earlier the relations between the parties were cordial and five children were born out of the wedlock. Their statements are further corroborated by Didar Singh, R. W. 2 who is resident of the village of the appellant, Bachint Singh, R. W. 4 who is the father-in-law of the appellant and Gurdial Singh, R. W. 3 who is the Sarpanch of village Kukowal. All these witnesses namely Sikander Kaur, Didar Singh and Shakuntla Devi say that Varinder Kumari was living in the Haweli of the appellant and that they were seen together going on a motorcycle from this village to the school and Sikander Kaur, R. W. 1 has even alleged that they were seen in a compromising position in the room of the Haweli. All these facts show that the relations became strained only when the appellant developed relation with Varinder Kumari who started living in the house of the appellant.

8. The learned Additional District Judge has given cogent reasons and has minutely discussed the evidence produced by the parties. Moreover, if this fact was wrong then the father or the mother of the appellant could come forward and depose that Varinder Kumari never lived in their Haweli, but for the reasons best known to the appellant neither his father nor his mother has come in the witness box. None of his sons living with him has also come forward to deny these allegations.

9. Today the parties are present in the Court in person. Respondent was willing to live with the appellant as his wife. But when I asked the appellant whether he is willing to keep her, he flatly refused that under no circumstance he is ready to keep her. The respondent Shakuntla Devi in all fairness without any pre-conditions offered to go and live with him as his wife, but the appellant did not agree. This also shows that the appellant is not willing to keep her.

10. The parties were married in the year 1957. Twenty one years have passed. Five children are born out of the wedlock — three daughters and two sons. Two daughters are of marriageable age, the eldest being 21 years of age and the other 19 years of age. At this stage the family cannot be allowed to disrupt and

divorce allowed to the appellant on the grounds which are not at all proved by the evidence produced by the appellant. Accordingly, the finding of the learned trial Court on both the issues is affirmed.

11. No other point is urged.

12. For the reasons recorded above, this appeal fails and is dismissed with costs.

Appeal dismissed.

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S. C. MITAL, J.

Jagir Singh and others, Appellants v. Atma Singh and others, Respondents.

Second Appeal No. 1122 of 1978, D/- 30-9-1978.*

T. P. Act (4 of 1882), S. 60 — Partial redemption — Principle does not apply when mortgage has already been disintegrated by consent.

Where the mortgagees had already disintegrated the mortgage by agreeing to the redemption of three-fourths of the land and it was so redeemed, the principle that partial redemption cannot be made will not apply at the time when the mortgagors ask for redemption of the whole of the remaining one-fourth of land. The redemption of the surviving mortgage to the extent of one-fourth of the land cannot be said to be partial. AIR 1942 PC 50, Distinguished. (Para 2)

Anno: AIR Manual (3rd Edn.), T. P. Act, S. 60, Notes 38, 39.

Cases Referred: Chronological Paras

AIR 1942 PC 50 : 1942 All LJ 463 2

ILR (1886) 12 Cal 414 : 12 Ind App 171 (PC) 2

Balraj Bahl, for Appellants; R. N. Aggarwal (for Nos. 1 to 3), for Respondents.

JUDGMENT:— In this appeal, the mortgagees-defendants have raised the question of partial redemption. The trial Court decreed the suit, filed by the mortgagors, for redeeming one-fourth of the mortgaged land. Its decision has been upheld by the lower appellate Court. The concurrent finding of the two Courts below that the remaining three-fourths of the mortgaged land has already been redeemed by the mortgagors, is unassailable. The end-result is that only one-fourth of the mortgaged land, which is the subject-matter of the suit, remains. In this situation, the question of partial redemption obviously does not arise because the mortgage subsists as to the one-fourth of the suit land. If instead of one-fourth, say one-eighth share was sought to be redeemed, the objection on the ground of partial redemption might have been sustained. All the same, learned counsel for the mortgagees pressed into service the following proviso to S. 60 of the T. P. Act:—

"Nothing in this section shall entitle a person interested in a share only of the mortgaged property to redeem his own share only, on payment of a proportionate part of the amount remaining due on the mortgage, except only where a mortgagee, or if there are more mortgagees than one, all such mortgagees, has or have acquired, in whole or in part, the share of a mortgagor."

2. It is true that disintegration of the mortgage security results in great injustice to a mortgagee. The Judicial Committee in Nilkant v. Suresh Chunder, ILR (1886) 12 Cal 414 : 12 Ind App 171 (PC) observed: —

"It would put him (the mortgagee) to a separate suit against each purchaser of a fragment of the equity of redemption though purchasing without his consent, and he would have separate suits against each of them, and suits in which no one of the parties would be bound by anything which took place in a suit against another. Different proportions of value might be struck in the different suits, and the utmost confusion and embarrassment would be created."

This well-settled law does not apply to the present case, inasmuch as the mortgagees have already disintegrated the mortgage to the extent of three-fourths of the land by agreeing to its redemption. Thus the redemption of the surviving mortgage to the extent of one-fourth of the land cannot be said to be partial. Shah Ram Chand v. Parbhu Dayal, AIR 1942 PC 50 cited by the learned counsel for the mortgagees is distinguishable on facts.

3. In the result, I do not find any merit in the appeal and the same is hereby dismissed. No order as to costs.

Appeal dismissed.

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*(From decree of A. L. Bahri, Dist. J., Ferozepore, D/- 3-5-1978).

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SURINDER SINGH, J.

Mohinder Kaur, Appellant v. Bhag Ram, Respondent.

F. A. O. Nos. 65-M and 66-M of 1976, D/- 6-9-1978.*

Hindu Marriage Act (25 of 1955), Ss. 9 and 10 — Cruelty as a defence to proceedings for restitution of conjugal rights or judicial separation — False allegation by husband against wife about her second marriage and her living in adultery — Amounts to mental cruelty entitling her to judicial separation.

Where a husband's petition for restitution of conjugal rights under S. 9 and a wife's counter-petition for judicial separation under S. 10 are tried together and the trial court has recorded a clear finding that the allegations of second marriage of the wife with any other person made by the husband are not proved that itself is sufficient proof of mental cruelty on the part of the husband entitling her to a decree for judicial separation especially when the wife had taken a specific ground in her petition that the husband had made false allegations in his petition under S. 9 that she was living in adultery with one B after having contracted a second marriage with him. There is ample authority on the point that the very act of levelling such like allegations tantamounts to perpetrating mental cruelty on the other party. AIR 1967 Punj 397, AIR 1963 Punj 242 and AIR 1960 Punj 422, Foll. (Para 4)

Anno: AIR Manual (3rd Edn.), Hindu Marriage Act, S. 9, N. 2; S. 10, N. 2.

Cases Referred: Chronological	Paras
AIR 1967 Punj 397	4
AIR 1963 Punj 242	4
AIR 1960 Punj 422	4

M. S. Liberhan, for Appellant; Roshan Lal Sharma, for Respondent.

JUDGMENT:— This judgment will dispose of F. A. Os. Nos. 65/M and 66/M of 1976 which are both inter-connected, there being a common order of the trial Court disposing of two connected petitions between the parties who are husband and wife. Bhag Ram (husband) filed a petition under S. 9 of the Hindu Marriage Act (hereinafter referred to as the Act) against the appellant Mohinder Kaur for the grant of a decree for restitution of conjugal rights with the allegation that the parties were married about sixteen years ago and lived together up-till Oct., 1972. A female child was born to them who was about four years old (at the time of the filing of the petitions). It was alleged by the husband that in Oct. 1972 the appellant went to see her parents along with the daughter with a promise to return within a month or so, but she did not come back. The respondent made some attempts to bring her back but she failed to oblige him. A specific allegation was also made in the plaint that on July 29, 1973, the appellant contracted a second marriage with one Bakshi of Village Kalewal and since then she had been living in adultery with the said Bakshi. These allegations were refuted by the appellant and she emphatically denied her alleged second marriage with Bakshi aforesaid. On the other hand, she pleaded that as she was not good looking and had not brought dowry according to the satisfaction of the respondent, the latter had been beating her and had driven her out of the house which had necessitated her living with her father since April 1971. The appellant further alleged that her father took a Panchayat to the respondent to prevail upon him to take her back but he refused point-blank.

2. The trial Court framed the necessary issues in the petition under S. 9 of the Act to cover the controversial points and after consideration thereof, granted a decree for restitution of conjugal rights in favour of the husband. However, it is noteworthy that after a detailed consideration of the evidence on the question of the alleged second marriage said to have been contracted by the appellant, the trial Court recorded a very clear finding that the allegation of second marriage was wrong. The only ground on which a decree for restitution of conjugal rights was granted in favour of the husband is that the wife had not been able to show sufficient cause for keeping away from the society of the husband.

3. In the connected petition out of which F. A. O. No. 66/M of 1976 arises, the wife had filed an application under S. 10 of the Act for judicial separation in which she had levelled allegations of cruelty, desertion etc. against the husband. A specific ground which was taken by her in the said petition was that the husband had made false allegations in his petition under S. 9 of the Act (referred to above) that she was living in adultery with one Bakshi of village Kalewal after

*(From decree of Niranjan Singh, 1st Class, Sub. J., Rupar, D/- 2-4-1976).

having contracted a second marriage with him. She asserted that such allegations of marriage or adultery which were false, frivolous and scandalous had created a reasonable apprehension in her mind that it would be harmful or injurious for her to live with her husband. She also contended that these allegations had resulted in mental cruelty to her mind. This petition filed by the wife was contested by the husband. Both the matters were, however, consolidated and as a result thereof a common judgment was passed by the trial Court in which, as already noticed a decree for restitution of conjugal rights was granted in favour of the husband and the petition under S. 10 of the Act filed by the wife for judicial separation was dismissed.

4. The main and, in fact, the only ground which has been urged by the learned counsel for Mohinder Kaur (wife) is that the moment the trial Court recorded a clear and specific finding that the allegations of second marriage by the wife with Bakshi were not proved, these allegations per se should have been considered sufficient proof of mental cruelty on the part of the husband, entitling the wife to keep away from the society of such a person. There is substance in the contention of the learned counsel and strangely enough the trial Court has not focussed its attention on this aspect of the matter at all. All that has been considered by the trial Court is that she had not been able to substantiate that she had been mal-treated and as a result thereof a decree for restitution of conjugal rights was passed against her. This is not a correct approach to the matter. The learned counsel for the husband is unable to point out any lacuna in the finding of the trial Court in regard to the alleged second marriage and the resultant allegation of living in adultery with Bakshi which were found to be wrong. There is ample authority on the point that the very act of levelling such like allegations tantamounts to perpetrating mental cruelty on the other party. Reference may in this behalf be made to Madan Mohan Kohli v. Smt. Sarla Kohli, AIR 1967 Punj 397 which is a case directly on the point. The learned Single Judge also placed reliance on two earlier decisions of this Court in Iqbal Kaur v. Pritam Singh, AIR 1963 Punj 242 and Gurcharan Singh v. Waryam Kaur, AIR 1960 Punj 422. No authority to the contrary has been cited before me.

5. The net result is that the decision of the trial Court in its consolidated judgment recorded in the two petitions filed by both the parties is not sustainable. Both the F. A. Os. Nos. 65/M and 66-M of 1976 are allowed and the judgment of the trial Court is reversed. In consequence thereof the petition filed by Bhag Ram respondent under S. 9 of the Act stands dismissed, while the petition filed by the appellant Mohinder Kaur under S. 10 of the Act for judicial separation is decreed. In the circumstances of the case, the parties are left to bear their own costs in both the appeals.

Order accordingly.

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S. S. SANDHAWALIA, C. J. AND S. S. DEWAN, J.

M/s. Kwality Restaurant, Amritsar, Petitioner v. Satinder Khanna, Amritsar, Respondent.

Civil Revn No. 358 of 1978, D/- 26-7-1978.*

Civil P. C. (5 of 1908), O. 18, R. 3-A — Obtaining permission of Court to examine himself as witness after examination of other witnesses — Stage for. AIR 1978 Orissa 1, Dissented from.

The intention of the legislature is that the normal rule prescribed by the legislature is that a party appearing as his own witness should do so before any one of his own witnesses. However, the rule is not inflexible and may be deviated from with the permission of the Court. No specific stage is prescribed or fixed by the statute for securing such permission. A party may perhaps as a matter of abundant caution apply at the stage of commencing his evidence and get the necessary permission and equally, if sufficient ground is made out he may secure such permission at a later stage. AIR 1978 Orissa 1, Dissented from. (Para 7)

Cases Referred:	Chronological Paras
AIR 1978 Orissa 1	2, 8, 9
AIR 1962 Punj 180	8

M. K. Mahajan, for Petitioner; Bhagirath Dass with S. K. Heeraji, for Respondent.

S. S. SANDHAWALIA, C. J.:— Whether R. 3-A of O. 18 of the Civil P. C.

*(To revise order of S. Dalip Singh, Sub. J., Amritsar, D/- 23-1-1978).

envisages that permission of the Court for a party to appear as his own witness subsequent to his other witnesses must necessarily be obtained at the very commencement of the evidence and not later, is the rather significant question which falls for determination in this civil revision admitted to a hearing by the Division Bench.

2. It is unnecessary to advert to the facts in any great detail. It suffices to mention that the trial Court for adequate reasons accorded permission (despite objection raised on behalf of the defendant) to the plaintiff for appearing as his own witness on an application made by him apparently after he had already examined evidence in support of his case. This order is sought to be challenged primarily on the basis of the judgment reported as Jagannath Nayak v. Laxminarayan Thakur, AIR 1978 Orissa 1, which undoubtedly supports the case of the petitioner.

3. As the controversy must necessarily revolve around the provisions of the statute, it is reproduced for facility of reference:—

"R. 3-A. Party to appear before other witnesses. Where a party himself wishes to appear as a witness, he shall so appear before any other witness on his behalf has been examined, unless the Court, for reasons to be recorded, permits him to appear as his own witness at a later stage."

4. Now a bare reference to the language of the aforesaid provision would make it manifest that the legislature has laid down the rule that a party appearing as his own witness must so appear before any other witness on his behalf has been examined. This rule is couched in terms mandatory. However, in equally express terms one exception to the said rule has also been provided by the legislature. This is that with the permission of the Court such a party for sufficient cause may be allowed to appear even at a stage subsequent to the examination of one or all of his witnesses. What is significant to note herein is that the language of the statute does not prescribe the precise time at which such permission is to be secured. It does not say that this must necessarily be in the very first instance before any witness has been examined on behalf of the party. One may say that the statute is, therefore, silent as to the stage at which this permission is to be secured. Nor can it be said that by necessary intendment the said permission must be sought at the very inception of the evidence and not later.

5. In construing a provision of the aforesaid nature it must necessarily be kept in the forefront that in essence it lays down a rule of procedure. As has been oft repeated, procedure is ultimately the handmaid of justice meant to advance its cause and not to obstruct the same. A procedural rule, therefore, has to be liberally construed and care must be taken that so strict an interpretation be not placed thereon whereby technicality may tend to triumph over justice. It has to be kept in mind that an overly strict construction may result in the stifling of material evidence if for one reason or another the party concerned fails to secure the permission at the very first instance. That cannot easily be ascribed to be the intent of the legislature in a matter essentially procedural.

6. With the aforesaid canon of construction in the background one may proceed to examine the argument raised on behalf of the respondent. Relying particularly on the last lines of the rule, i. e. "for reasons to be recorded, permits him to appear as his own witness at a later stage", it was contended by Mr. Bhagirath Dass that the words "at a later stage" may go well with the permission to be obtained as also with the sequence of the stage of the appearance of the party. It was in fact contended that the language of the statute if at all is plainly open to the construction that both the permission and the stage of appearance by the party may be later to the examination of some or all of his evidence. Without more it may be observed that this argument is again not devoid of plausibility. It may well be imagined that a plaintiff or a defendant at the very earliest stage may not even think it necessary to step into the witness-box in support of his case. However, the trend of evidence either his own or that of the opposite party may necessitate his own examination or he may feel compelled to do so even at a later stage. But denying him that right merely on the ground that he did not at the very first instance anticipate such necessity and thus secure the permission of the Court before examining any one of his witnesses would perhaps be too harsh a construction to place on the rule in the absence of any express or implied intendment to that effect.

7. Broadly construed, therefore, the intention of the legislature appears to be

that the normal rule prescribed by the legislature now is that a party appearing as his own witness should do so before any one of his own witnesses. However, the rule is not inflexible and may be deviated from with the permission of the Court. No specific stage is prescribed or fixed by the statute for securing its permission. A party may perhaps as a matter of abundant caution apply at the stage of commencing his evidence and get the necessary permission and equally, if sufficient ground is made out, he may secure such permission at a later stage.

8. Coming now to the judgment primarily relied upon in Jagannath Nayak's case (AIR 1978 Orissa 1) (supra), it is evident that heavy reliance has been placed on the legislative history and in particular the report of the Law Commission. It is perhaps instructive to quote the relevant part of the 54th Law Commission Report on the point:—

"18. 2. We shall first refer to an important point regarding examination of the parties. The matter was considered in the earlier report, but, as we take a different view, we propose to discuss it again.

18. 3. The Fourteenth Report had recommended that ordinarily, a party who wishes to be examined as a witness should offer himself first, before the other witnesses are examined. The Commission, in its Report on the Code, however, considered it unnecessary to make any such statutory provision. It noted that this should be the ordinary rule, but thought that a rigid provision on the subject would not be desirable.

18. 4. We think that the amendment recommended in the 14th Report should be carried out. Since the proposed rule will be confined to ordinary cases, the hardships arising from special features of the case, should not present a problem. Having regard to the persistent and notorious malpractice indulged in by litigants in this respect — malpractice which borders on dishonesty — we think that the time has come to insert a statutory provision."

A reference to Smt. Gurdial Kaur v. Pyara Singh, AIR 1962 Punj 180, would indicate that apart from the statutory provisions, precedent had earlier ruled that the plaintiff must first come in the witness-box to depose to his case and be followed by corroborative evidence. However, it was equally noticed that practice sometimes ran contrary to this desirable rule and in the absence of a statutory provision the same could not be held as illegal. The legislative history and the above quoted comments of the Law Commission would indicate that they plainly took notice of this situation and the 27th Report of the Law Commission observed that though this should be the ordinary rule yet a rigid provision on the subject would not be desirable. The 54th Report, however, thought that the time had come when a statutory provision might be made, but did not necessarily say that it should be couched in absolute rigidity. Instead the observation would indicate that this rule would be confined to ordinary cases and the hardship, if any, arising therefrom was sought to be ameliorated by making an exception to this rule by way of seeking permission of the Court for appearance by the party as his own witness at a later stage. The relevant portion of the Report does not in any way indicate that the stage at which the permission was to be secured was either fixed or inflexible by necessary intendment. Indeed this seems to have been left entirely open. With great respect to Ray, J., in the Orissa case, we are unable to find anything in the legislative history and the reports of the Law Commission which would indicate that any inflexible rule with regard to the stage of seeking permission was sought to be laid down.

9. The learned Single Judge in Jagannath Nayak's case (supra) had then sought support for his view on the ground that the rule was mandatory and not directory. Assuming it to be so, it is clear that the mandate laid therein rearding the party appearing before his other witnesses has been itself provided with an exception where permission can be accorded by the Court for adequate reasons. When the provision itself provides both the mandate and an exception to the rule, the one cannot be divorced from the other. The significant thing to highlight here is that the question at issue is not with regard to the ordinary rule that a party shall appear before any witness on his behalf but pertains to the stage at which permission to appear at a later stage is to be secured. Whilst the ordinary rule with the exception may be deemed as mandatory, there is nothing inflexible in R. 3-A with regard to the stage of the permission. For the reasons aforesaid, with great respect we are compelled to record our dissent from the view expressed in Jagannath Nayak's case (supra).

10. We are inclined to hold that a too narrow view of a procedural provision would not tend to subserve to the interest of justice. The stage at which the requisite permission under the statute is to be sought is not so vital a matter which should debar the litigant later from seeking the permission or inexorably stifle his evidence if he once misses the opportunity of securing such permission at the very time when he is to commence leading his evidence.

11. We are, therefore, of the view that such permission may be sought at any stage and if the Court finds merit in the same it would not be debarred from acceding to such a prayer.

12. No other point has been urged.

13. Finding no merit in this revision petition we hereby dismiss the same but leave the parties to bear their own costs.

Revision dismissed.

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S. S. DEWAN, J.

Tara Singh, Appellant v. Nathu Ram, Respondent.

Ex. Second Appeal No. 1845 of 1975, D/- 21-9-1978.*

Civil P. C. (5 of 1908), S. 11 — Constructive res judicata — Applicability of, to execution proceedings.

Where the judgment-debtor failed to plead in the suit or raise in the execution proceedings the objection that the amount due to him could not be recovered from him due to the bar of S. 3 of Punjab Registration of Money Lenders' Act, the same must be considered to be barred by the principles of constructive res judicata. AIR 1962 Pat 72 (FB) and AIR 1970 SC 1525, Rel. on; 1966 Cur LJ 921 (Punj) and AIR 1972 Punj 390, Disting. (Para 3)

Anno: AIR Comm. C.P.C. (9th Edn.), S. 11 N. 39.

Cases Referred: Chronological	Paras
AIR 1972 Punj 390: 1972 Pun LJ 264	4
AIR 1970 SC 1525	3
1966 Cur LJ 921 (Punj)	4
AIR 1962 Pat 72 (FB)	3

Khem Chand Jain, for Appellant; Achhra Singh, for Respondent.

*(From order of Jai Singh Sekhon, Dist. J., Patiala, D/- 11-11-1975.)

JUDGMENT:— This execution second appeal has been filed against the judgment of District Judge, Patiala, dated November 11, 1975, who accepted the appeal of the decree-holder against the judgment of the executing Court and dismissed the objections of the judgment-debtor.

2. The sole point for determination in the present appeal is whether the objection of the appellant judgment-debtor is barred by the principles of constructive res judicata. The material facts of the case bearing on the decision of the above question are as follows:—

The consent decree was passed by the Subordinate Judge, Bassi, on 22-12-1962, decreeing the money suit of Nathu Ram (respondent decree-holder) against Tara Singh (appellant judgment-debtor) to the tune of Rs. 3,400 and the said amount was to be paid in two instalments. The judgment-debtor failed to pay any of the stipulated instalments of the decretal amount. The decree-holder commenced execution proceedings against the judgment-debtor on 18-7-1972. That application was resisted by the judgment-debtor on the ground that he had already paid half of the decretal amount through a valid receipt, which was misplaced by him and that he may be allowed to pay the decretal amount in six monthly instalments. The parties led evidence. The Subordinate Judge accepted the execution application on 20-7-1973 and directed that warrants of attachment be issued. The judgment-debtor challenged that order in appeal, but the same was dismissed by the District Judge, Patiala, vide his order dated October 15, 1973. Thereafter, the judgment-debtor filed an objection application dated November 14, 1973 under Section 11-B of the Punjab Debtors Protection Act No. II of 1936. That application was resisted by the decree-holder, on the ground that it was barred by the principles of constructive res judicata as no such objection was taken earlier by the judgment-debtor. That objection petition was dismissed by the Subordinate Judge on February 25, 1974. Thereafter, the judgment-debtor filed another objection application dated April 10, 1974, alleging therein that under Section 3 of the Punjab Registration of Money Lenders' Act, 1938, the decree-holder was not entitled to realise the decretal amount as he was a professional money lender. This application was also contested by the decree-holder on the ground that it was barred

by the principles of constructive res judicata. The learned Subordinate Judge came to the conclusion that the judgment-debtor was not barred by the principles of constructive res judicata to raise the point whether the decree-holder was a professional money lender, in the execution proceedings and that finding was reversed on appeal filed by the decree-holder. Feeling aggrieved, the judgment-debtor has filed this execution second appeal.

3. The only contention of the learned counsel for the appellant is that under Section 3 of the Punjab Registration of Money Lenders' Act, the decree-holder was not entitled to realise the decretal amount as he was a professional money lender. I find no merit in this contention. At the outset, it may be mentioned here that there is not a tittle of evidence on the record that the decree-holder was a professional money-lender during the relevant period. In order to attract the provisions of Section 3 of the said Act, the judgment-debtor has to allege and prove that the decree-holder is a money lender. The judgment-debtor has failed to plead or raise this objection in the suit or in the execution proceedings arising from the consent decree and as such his subsequent objection that the decree-holder was not entitled to realise the decretal amount as he was a professional money lender, must be held to be barred on the principles of res judicata. The point whether the principles of constructive res judicata apply in execution cases has been settled in Full Bench decision in the case of Baijnath Prasad Sah v. Ramphal Sahni, AIR 1962 Pat 72. In that case also objection had been raised by one of the judgment-debtors about the provisions of Section 49-M of the Bihar Tenancy Act as amended by the Bihar Tenancy (Amendment) Act 1955. That objection regarding the non-saleability of the land had been taken by him after the confirmation of the sale. It was held, according to the majority decision, that the judgment-debtor was barred by the principles of res judicata from raising the objection on the ground of non-saleability of the kasht lands. Similar view was taken in case—Prem Lata Agarwal v. Lakshman Prasad Gupta, AIR 1970 SC 1525.

4. The learned counsel appearing for the judgment-debtor in the course of his arguments, referred to the decisions in case of Pt. Vishnu Datt v. Jai Narain, 1966 Cur LJ 921 (Punj) and the case of Rabi Ram v. Dalip Singh, 1972 Punj LJ 264: (AIR 1972 Punj 390). In my opinion, these two cases referred to by the learned counsel are absolutely of no assistance to him, because the question whether principle of constructive res judicata would apply in execution proceedings was not the subject-matter of decision in these two cases.

5. For the reasons stated above, I hold that the learned District Judge has taken a very correct view of the law, and, therefore, finding no merit in this appeal, I dismiss the same with costs. The executing Court is however, directed to proceed further in accordance with law.

Appeal dismissed.

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PREM CHAND JAIN AND J. M. TANDON, JJ.

Smt. Harvinder Kaur and another, Petitioners v. Godha Ram and another, Respondents.

Civil Revn. No. 1198 of 1977, D/- 24-8-1978.*

Civil P. C. (5 of 1908), S. 115 Expln. and O. 26, R. 9 — 'Case decided' — Meaning of — Order refusing to appoint Local Commissioner under O. 26, R. 9 is not a case decided within explanation to S. 115 — Order not revisable. 1975 Cur LJ 744 (Punj), Overruled.

The intention of adding the explanation to S. 115 by the 1976 Amendment was only to define the words 'case decided', i.e., that a revision would lie against an order passed during the course of a suit or other proceeding. But the explanation cannot be given this meaning that every order made in the course of a suit or other proceeding would be revisable. (Para 6)

The meaning that can be given to the explanation is that an order made in the course of a suit or proceeding would be revisable only when it determines or adjudicates some right or obligation of the parties in controversy. Thus, a revision would lie against an interlocutory

*(Against order of Subhash Chander, Sub. J. 2nd Class, Kaithal, D/- 8-8-1977.)

order only if it determines or adjudicates some right or obligation of the parties in controversy. However, even after the satisfaction of the aforesaid test the power of revision would be exercisable by the High Court subject to the limitations put under sub-sec. (1) and the proviso to Section 115 of the Code of Civil Procedure. (Para 8)

Where the trial Court has only rejected the application for the issuance of a commission on the ground that issue No. 3 could be proved by producing the relevant record and that demarcation was not necessary, it is clear that the Court did not decide any issue nor did it adjudicate for the purposes of the suit some right or obligation of the parties in controversy. As such it is not a case decided within the meaning of the explanation and the order is not revisable. 1976 Rev LR 654 (Punj & Har) and (1976) 78 Pun LR 280, Approved; 1975 Cur LJ 744 (Punj), Overruled. (Para 9)

Anno: AIR Comm. Civil P. C. (9th 1976 Edn.), S. 115 Notes 5 and 5A; O. 26 R. 9 N. 10.

Cases Referred: Chronological	Paras
(1976) 78 Pun LR 280	2, 12
1976 Rev LR 654 (Punj & Har)	2, 12
AIR 1975 Punj and Har 174 (FB)	10, 11
1975 Cur LJ 744 (Punj)	2, 3, 10, 11
(1971) 73 Pun LR 531	12
AIR 1970 SC 406	7, 11
AIR 1964 SC 497	5, 7, 10, 11

H. L. Sarin, for Petitioners; C. B. Goel, for Respondents.

PREM CHAND JAIN, J.:— On the reference that has been made by the learned single Judge vide his order dated May 3, 1978, the question of law that requires determination may be formulated thus:—

"Whether revision lies against an order passed under O. 26, R. 9 of the Civil P. C. refusing to appoint a Local Commissioner?"

2. The reference has been made as in the opinion of the learned Judge there appeared to be a conflict of opinion on this aspect of the matter. In Dalmir Singh alias Dalmira v. Sant Parkash, Civil Revision No. 1459 of 1975, decided on Sept. 21, 1976,* R. S. Narula, C. J. (as he then was), on the basis of the judgment of Pattar J., in Mohinder Kumar Rajinder Parkash v. Basheshar Nath, (1976) 78 Pun LR 280, held that no revision lay against such an order. On the contrary, S. C. Mital J., in M/s. Goverdhan Das Gopi Nath v. Smt. Amolak Raj, 1975 Cur LJ 744 (Punj), has held that an order refusing to issue a commission is revisable under S. 115 of the Civil P. C.

3. Mr. Sarin, learned counsel for the petitioners, contended that a revision lay against an order refusing to appoint a local Commissioner and that the view taken in M/s. Goverdhan Das Gopi Nath's case was the correct view and deserved to be upheld. Besides relying on the reasoning given in M/s. Goverdhan Dass Gopi Nath's case, the learned counsel relied on the explanation added to Section 115 of the Civil P. C., which is in the following terms:—

"In this section, the expression 'any case which has been decided' includes any order made, or any order deciding an issue, in the course of a suit or other proceeding."

On the strength of the aforesaid explanation, it was contended by Mr. Sarin that the order declining to appoint a commission was passed in the course of a suit and such an order fell within the expression 'case decided'.

4. After hearing the learned counsel for the parties, we find ourselves unable to agree with the contention of the learned counsel.

5. S. 115 consists of two parts, the first prescribes the conditions in which jurisdiction of the High Court arises, i.e., there is a case decided by a Subordinate Court in which no appeal lies to the High Court; the second, sets out the circumstances in which the jurisdiction may be exercised. But the power of the High Court is exercisable in respect of "any case which has been decided". The expression 'case decided' was not defined in the Code, with the result that there was a conflict of judicial decisions on the question whether the expression 'case decided' included interlocutory orders or not. Though this conflict was resolved by the Supreme Court in S. S. Khanna v. F. J. Dhillon, AIR 1964 SC 497, yet in order to clear all doubts about the maintainability of a revision against an interlocutory order, the explanation has been added by the Amendment Act in the year 1976. However, in the instant case, the explanation by itself is of no help as it has still to be decided whether in view of the provi-

*Reported in 1976 Rev LR 654 (Punj and Har)

sions of the explanation an order declining to appoint a commission would be revisable or not? In our view, in the circumstances of this case, the answer has to be in the negative.

6. Before the amendment of S. 115 in the year 1976, the power of revision was exercisable subject to the restriction imposed in cls. (a), (b) and (c) of sub-sec. (1). As earlier observed, the words 'case decided' had not been defined and for that reason, a conflict of judicial decisions in respect of interpretation of these words had crept in. The intention of adding the explanation was only to define the words 'case decided', i.e., that a revision would lie against an order passed during the course of a suit or other proceeding. But the explanation cannot be given this meaning that every order made in the course of a suit or other proceeding would be revisable. Even, Mr. Sarin, learned counsel, during the course of arguments, did not go to that extent that every order passed in the course of a suit or other proceeding would be revisable under S. 115 of the Code.

7. In this situation, it has now to be found out as to which type of interlocutory orders would be revisable by this Court in exercise of its powers under S. 115 of the Civil P. C.? To this question, the answer is available from the judgment of their Lordships of the Supreme Court in Baldevdas Shivlal v. Filmistan Distributors (India) Pvt. Ltd., AIR 1970 SC 406, wherein after considering S. S. Khanna's case (AIR 1964 SC 497) it was observed thus (at p. 410):—

"But it was not decided in S. S. Khanna's case, (1964) 4 SCR 409: (AIR 1964 SC 497) that every order of the Court in the course of a suit amounts to a case decided. A case may be said to be decided, if the Court adjudicates for the purposes of the suit some right or obligation of the parties in controversy; every order in the suit cannot be regarded as a case decided within the meaning of S. 115 of the Civil P. C."

8. In the light of the aforesaid observation, without dilating any more on this subject, the meaning that can be given to the explanation is that an order made in the course of a suit or proceeding would be revisable only when it determines or adjudicates some right or obligation of the parties in controversy. Thus, a revision would lie against an interlocutory order only if it determines or adjudicates some right or obligation of the parties in controversy. However, even after the satisfaction of the aforesaid test the power of revision would be exercisable by this Court subject to the limitations put under sub-sec. (1) and the proviso to S. 115 of the Civil P. C.

9. Adverting to the facts of the present case, we find that the trial Court has only rejected the application for the issuance of a commission on the ground that issue No. 3 could be proved by producing the relevant record and that demarcation was not necessary. From these observations, it is clear that the learned Subordinate Judge did not decide any issue nor did he adjudicate for the purposes of the suit some right or obligation of the parties in controversy.

10. Adverting to the case law, reference may be made to M/s. Goverdhan Das Gopi Nath's case (1975 Cur LJ 744) (Punj) the only judgment on which reliance had been placed by Mr. Sarin and which decision necessitated the reference to the larger Bench. In view of our aforesaid discussion, we are, with utmost respect, unable to agree with the view taken in that decision. The learned Judge, on the basis of the judgment of the Supreme Court in S. S. Khanna's case (AIR 1964 SC 497) and a Full Bench judgment of this Court in M/s. Sadhu Ram Bali Ram v. M/s. Ghansham Dass Madan Lal, AIR 1975 Punj & Har 174, arrived at the conclusion that the order rejecting the application of the defendant for examining two witnesses residing in Bombay on commission falls within the expression 'case decided'.

11. As has already been observed in the earlier part of the judgment, S. S. Khanna's case stands explained by their Lordships of the Supreme Court in Baldevdas Shivlal's case (AIR 1970 SC 406) and in view of the test laid down therein, the order of the Court should result into adjudication of some right or obligation of the parties in controversy during the course of a suit or other proceeding. The order declining to issue a commission of the type mentioned in M/s. Goverdhan Das Gopi Nath's case does not saitsfy that test. It may further be observed that the facts of M/s. Sadhu Ram Bali Ram's case were different as in that case the onus of an issue had been wrongly placed and while deciding that question it was held that such an order would be revisable.

12. In view of the aforesaid discussion, we hold that no revision would lie against an order passed under O. 26, R. 9 and the view taken in M/s. Mohinder Kumar Rajinder Parkash ((1976) 78 Pun LR 280); Dalmir Singh alias Dalmira 1976 Rev LR 654 (Punj & Har) and Mangal Singh v. Piara Lal, (1971) 73 Pun LR 531 cases lays down the correct law.

13. Before parting with the judgment, it may, however, be made clear that it cannot as a general rule be laid down that in no case a revision would lie against an interlocutory order passed under any other provision of O. 26, and that it would be on the facts of each case that it will have to be found out whether the interlocutory order, against which a revision is sought to be filed, has adjudicated for the purposes of the suit some right or obligation of the parties in controversy or not.

14. For the reasons recorded above, this revision petition fails and is dismissed, but in the circumstances of the case, we make no order as to costs. The parties, through their learned counsel, have been directed to appear before the trial Court on Nov. 7, 1978.

Revision dismissed.

AIR 1979 PUNJAB & HARYANA 79

B. S. DHILLON AND
S. S. DEWAN, JJ.

The Commissioner of Income-tax, Patiala, Applicant v. M/s. Krishna Copper and Steel Rolling Mills, Jagadhri, Respondent.

I. T. Reference No. 60 of 1974, D/-3-10-1978.

Income-tax Act (43 of 1961), S. 33 (1) (b) (B) (i), Sch. 5 Item 1 — Assessee manufacturing iron rods and girders out of scrap metal — Entitled to development rebate at 35%.

Rebate at 35% will be available to the assessee, who manufactures, produces or constructs iron and steel (Metal) either from the original ore or from the scraps. In this view, where the assessee is producing iron bars and girders from the scraps, he will be entitled to the rebate at 35%. (Para 4)

Anno : AIR Man. (3rd Edn.) I. T. Act, S. 33, N. 1.

D. N. Awasthy, Sr. Adv. with B. K. Jhingan, Adv., for Applicant; B. S. Gupta, Adv. with Jagdev Sharma, Adv., for Respondent.

B. S. DHILLON, J.:— The following question of law has been referred to us by the Income Tax Appellate Tribunal, Chandigarh Bench at the instance of Commissioner of Income-tax, Patiala:—

"Whether on the facts and in the circumstances of the case, the Appellate Tribunal was right in law in holding that the assessee was entitled to development rebate at the rate of 35% under S. 33 (1) (b) (B) (i) read with item No. 1 of the fifth Schedule to the Income-tax Act, 1961?"

2. It is not disputed that the assessee is manufacturing iron rods and girders out of the scrap metal. The only question which falls for determination with a view to answer this question is the interpretation of the provisions of Section 33 (1) (b) (B) (i), which are as follows :—

"..... ....

(B) in the case of machinery or plant—

(i) where the machinery or plant is installed for the purposes of business of construction, manufacture or production of any one or more of the articles or things specified in the list in the Fifth Schedule,—

(a) thirty-five per cent of the actual cost of the machinery or plant to the assessee, where it is installed before the 1st day of April, 1970,

"..... ...."

Reference may also be made to the provisions of Fifth Schedule attached with the Act:

"List of Articles and things—

(1) Iron and steel (metal), ferro-alloys and special steels.

(2) Aluminium, copper, lead and zinc (metals).

...."

From the bare reading of this provision, it is obvious that if an assessee is engaged in construction, manufacture or production of any of the items mentioned in Fifth Schedule, he is entitled to the rebate at the rate of 35 per cent. The Central Board of Direct Taxes was required to interpret the provisions of Cl. (2) of Schedule Fifth in response to a letter addressed by the Secretary, Bharat Chamber of Commerce, Calcutta. A copy of the said letter has been made available to us and the decision of the Board, which was communicated in this regard, is in the following terms : —

"Section 33 (1) (iii) of the Income-tax Act, 1961, as amended by Finance Act,

1965, provides for enhanced development rebate at the special rate of 35% in respect of plant and machinery installed after 31-3-1965 for the purpose of the business of construction, manufacture or production of any one or more of the articles and things specified in the list in the Fifth Schedule. Item (2) of the said list refers to "Aluminium, Copper, Lead and Zinc (metals)." A question has been raised whether for the purpose of the allowance of the higher rate of development rebate, Aluminium (metals) should necessarily be manufactured from Aluminium Ore, namely Bauxite, or it may be manufactured even from Aluminium scrap. The matter has been examined by the Board and it has been decided that for the purpose of allowing the higher rate of development rebate at 35%, item (2) of the Fifth Schedule would include the manufacture of Aluminium (metal) both from Bauxite as well as from Aluminium scrap."

3. From what has been stated in the reply by the Board, it is quite clear that the Board itself was of the opinion that for the purposes of allowing the higher rate of development rebate at 35 per cent, item (2) of the Fifth Schedule would include the manufacture of Aluminium (metal) both from Bauxite as well as from Aluminium scrap. It is pertinent to note that in the letter of the Secretary, Bharat Chamber of Commerce, Calcutta, it has been pointed out that over 20 per cent of such metals are made out of Aluminium just as a significant proportion of steel is made out of scraps.

4. In view of the interpretation given by the Board regarding item (2) of the Fifth Schedule, we are left with no option but to give the same interpretation as the Board itself gave to item (2) while interpreting item (1) of the Fifth Schedule. It would thus be seen that rebate at 35 per cent will be available to the assessee, who manufactures, produces or constructs iron and steel (metal) either from the original ore or from the scraps. In view of the fact that the assessee is producing iron bars and girders from the scraps, therefore, he will be entitled to the rebate at 35 per cent. The question is thus answered in favour of the assessee. There will be no order as to costs.

S. S. DEWAN, J.:— I agree.

Answered accordingly.

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S. C. MITAL, J.

Raj Kumar, Petitioner v. The State of Punjab, Respondents.

Criminal Misc. No. 5771-M of 1978, D/- 7-11-1978.*

Criminal P. C. (2 of 1974), S. 167 (2) Proviso (a) — Period of remand — Calculation of 60 days — Not day of arrest but day of production before Magistrate is to be included.

Petitioner arrested on 17-6-1978 and produced before the Magistrate on 18-6-1978 — Chalan filed on 16-8-1978 — Held that it could not be said that chalan was filed on 61st day of arrest. — Inclusion of 17-6-1978 was not within the purview of the Proviso, as it was on 18-6-1978 that the Magistrate authorised the detention of the petitioner. (Para 2)

Anno : AIR Comm. Cr. P. C. (7th Edition), S. 167, N. 7.

S. K. Sharma, Advocate, for Petitioner; D. S. Boparai, A. A. G. (Punjab), for Respondents.

ORDER :— Raj Kumar and another have been chalaned under Sec. 302 read with S. 34, Indian Penal Code, for committing the murder of Smt. Taro in furtherance of their common intention. This petition for bail for Raj Kumar has been pressed solely on the ground that the police failed to file the chalan within 60 days of the arrest of Raj Kumar petitioner, which took place on 17th June 1978. Learned counsel for the State has pointed out that the petitioner was produced before the Illaqa Magistrate on 18th June, 1978 and the chalan was filed on 16th Aug., 1978. Learned counsel for the parties are agreed that if 17th June, 1978, is included, then the chalan was filed on sixty-first day of the arrest of the petitioner.

2. The question for determination is, whether in the facts of this case, 17th June, 1978, has to be included or not. Proviso (a) to sub-s. (2) of S. 167 of the Code of Criminal Procedure lays down that "no Magistrate shall authorise the detention of the accused person in custody under this section for a total period exceeding sixty days and on the expiry of the said period of sixty days, the accused person shall be released on bail if he is prepared to furnish bail." It is

*(Against order of K. S. Bhalla S. J. Amritsar, D/- 18-9-1978).

no gainsaying that it was on 18th June, 1978, that the Magistrate authorised the detention of the petitioner. Accordingly, the inclusion of 17th June, 1978, does not appear to be within the purview of the proviso. This petition, therefore, fails and the same is hereby dismissed.

Petition dismissed.

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FULL BENCH

R. S. NARULA, C. J., M. S. GUJRAL AND R. N. MITTAL, JJ. and Final Order by S. S SANDHAWALIA, C. J. AND S. C. MITAL, J.

Duli Chand, Petitioner v. State of Haryana and others, Respondents.

Civil Writ Petns. Nos. 1232 and 4776 of 1974, D/- 5-9-1975 and final order D/- 4-10-1978.*

(A) Punjab Gram Panchayat Act (4 of 1953), Ss. 95, 102 — Whether State Government can delegate its powers exercisable under S. 102 (2) to Deputy Commissioners.

The language of S. 95 is plain and does not admit of any exception to the power of delegation thereby conferred on the appropriate authorities. It is significant that wherever the Legislature desired the power of delegation to be circumscribed within certain limits or the power to delegate any particular function by any particular authority named in the Act being excluded from the operation of S. 95, it has been specifically so provided. The authority conferred on the Government under sub-sec. (1) of S. 95 to delegate any of its powers under the Act has been conferred by the Legislature subject to only one exception, namely the power to make rules, and to no other exception. There is intrinsic evidence of legislative policy for delegation of the Government's function under S. 102 (2) to lower authorities in the section itself. Whereas Cls. (a) to (c) of sub-sec. (2) relate to the Government's powers to remove any Panch on the objective tests laid down in those clauses being satisfied, the power to remove under Cls. (d) and (e) of sub-sec. (2) is based on the opinion of the Government. In those clauses i. e. in Cls. (d) and (e) it has been specifically stated that a Panch who in the opinion of the Government or of the officer to whom Government has delegated its powers of removal has been guilty of misconduct in the discharge of his duties or whose continuance in office is in the opinion of the Government or of the officer to whom Government has delegated its powers of removal undesirable in the interest of public may be removed by the Government. If the legislative intent was that the power under sub-sec. (2) of S. 102 to remove a Panch is not expected to be delegated, no reference could at all have been made to the officer to whom the Government has delegated its power of removal in Cls. (d) and (e) of that very section itself. Hence the State Government in exercise of the powers conferred by sub-sec. (1) of S. 95 of the Punjab Gram Panchayat Act, 1953 (4 of 1953) can delegate its powers exercisable under sub-sec. (2) of S. 102, to the Deputy Commissioners in respect of Gram Panchayats within their jurisdiction. Case law discussed. (1968) 70 Pun LR 341 and AIR 1970 Punj & Har 193 (FB), Dist. (Paras 4, 13)

(B) Interpretation of Statutes — Reference to Legislative assembly debates.

Legislative Assembly Debates can be cited before the Court at least for the purpose of finding out the historical background and the environmental circumstances in which the law was made. (Para 10)

Cases Referred: Chronological Paras

AIR 1972 SC 2452 : 1972 Lab IC 1619	12
1972 Serv LR 299 (Delhi) (FB)	11
AIR 1972 Goa 1	14
AIR 1970 SC 140	14
AIR 1970 Punj 193 : ILR (1969) 1 Punj and Har 59 (FB)	7, 8
(1968) 70 Pun LR 341	6, 7
ILR (1966) 2 Punj 20	13
(1966) 68 Punj LR 633	9
AIR 1966 Raj 125 : 1966 Cri LJ 584	14
AIR 1963 SC 1503	5
AIR 1961 Punj 24	5
AIR 1959 Andh Pra 413 (FB)	9
(1956) 3 All ER 939 : (1957) 2 WLR 106, Vinc v. National Dock Labour Board	14

Gopi Chand, for Petitioner; H. N. Mehtani, Dy. Advocate General, Haryana, for Respondents.

R. S. NARULA, C. J.:— The question referred to this Full Bench is:—

"Whether the State Government in exercise of the powers conferred by sub-

*(Decided by Full Bench on order of reference made by R. N. Mittal and M. S. Gujral, JJ. on 22-11-1974).

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sec. (1) of S. 95 of the Punjab Gram Panchayat Act, 1952, can delegate its powers exercisable under sub-sec. (2) of S. 102 of the said Act, to the Deputy Commissioners in respect of Gram Panchayats within their jurisdiction."

It appears to be unnecessary to go into the facts and circumstances giving rise to the above-quoted question as the pure legal question referred to us arises in a large number of writ petitions and our answer is expected to govern all those cases.

2. Section 102 of the Punjab Gram Panchayat Act, 1952, as applicable to the State of Haryana and as amended up to date (hereinafter called the Act) reads as follows:—

"(1) The Deputy Commissioner may during the course of an enquiry, suspend a Panch for any of the reasons for which he can be removed, and debar him from taking part in any act or proceedings of the said body during that period and order him to hand over the records, money or any property of the said body to the person authorised in this behalf.

(2) Government may, after such enquiry as it may deem fit, remove any Panch—

(a) on any of the grounds mentioned in sub-sec. (5) of S. 5;

(b) who refuses to act, or becomes incapable of acting, or is adjudged an insolvent;

(c) who, without reasonable cause, absents himself for more than two consecutive months from the meetings of the Gram Panchayat or the Adalti Panchayat as the case may be;

(d) who in the opinion of Government or of the officer to whom Government has delegated its power of removal, has been guilty of misconduct in the discharge of his duties during his past or present tenure;

(e) whose continuance in office is, in the opinion of Government or of the officer to whom Government has delegated its powers of removal, undesirable in the interests of the public.

Explanation.— The expression 'misconduct' in Cl. (d) includes the failure of the Sarpanch without sufficient cause—

(i) to submit the judicial file of a case within two weeks of the receipt of the order of any Court to do so;

(ii) to supply a copy of the order of the Gram Panchayat in an administrative or judicial case decided by it, within two weeks from the receipt of a valid application therefor.

(3) A person who has been removed under Cl. (a) or (c) of sub-sec. (2) may be disqualified for re-election for such period not exceeding five years as Government may fix.

(4) A person who has been removed under Cl. (b), (d) or (e) of sub-sec. (2) shall stand disqualified for re-election for a period of five years from the date of his removal; and a person who was removed under any of the said clauses on or after the 1st day of Sep., 1965, shall stand disqualified for re-election during such period after the commencement of the Punjab Gram Panchayat (Haryana Amendment) Act, 1971, which falls within a period of five years from the date of his removal."

Section 95 of the Act which contains the authority for delegation of powers conferred by the Act is in the following terms:—

"(1) Government may, by notification delegate all or any of its powers under this Act other than the power to make rules, to a Deputy Commissioner or the Sub-Divisional Officer as the case may be or the Director.

(2) The Director may with the previous permission of Government delegate any of his powers other than those delegated to him to an officer not below the rank of District Panchayat Officer.

(3) The Chief Judicial Magistrate may delegate any of his powers to a Judicial Magistrate of the first class.

(4) The District Judge may delegate any of his powers to a Subordinate Judge of the first class.

(5) The Collector may delegate any of his powers to an Assistant Collector of the first grade.

(6) The Deputy Commissioner or the Sub-Divisional Officer, as the case may be, may delegate any of his powers of control to an officer not below the rank of an Extra Assistant Commissioner or to a District Panchayat Officer:

Provided that the power specified in S. 102 shall not be delegated by the Deputy Commissioner."

In exercise of the powers conferred on the Government by sub-sec. (1) of S. 95 of the Act, the powers of the Government to remove any Panch under sub-sec. (2) of S. 102 and to disqualify such person under sub-sec. (3) of that section have been dalegated to the Deputy Commissioners in respect of the Gram Panchayats within their jurisdiction by the Haryana Government notification No. HP-

14-69/4464, dated March, 19, 1969 (Annexure P/6 to the writ petition.

3. The argument of the learned counsel for the petitioner is that S. 95 (1) is liable to be struck down as being invalid and inoperative because:—

(i) its provisions go against the policy of the Act; and

(ii) the power of removal of a Panch being quasi-judicial in nature is a personal power conferred by the Legislature on the Government and such power cannot be lawfully delegated, and the provision authorising such delegation should itself be declared to be bad.

4. The language of S. 95 is plain and does not in our opinion admit of any exception to the power of delegation thereby conferred on the appropriate authorities. It is significant that wherever the Legislature desired the power of delegation to be circumscribed within certain limits or the power to delegate any particular function by any particular authority named in the Act being excluded from the operation of S. 95, it has been specifically so provided. For example, sub-section (5) of S. 95 authorises the Deputy Commissioner to delegate any of his powers of control to an officer not below the rank of an Extra Assistant Commissioner or to a District Panchayat Officer. (Sub-sec. (1) of S. 102 authorises the Deputy Commissioner to suspend a Panch during the course of an inquiry.) The proviso to sub-sec. (5) restricts the Deputy Commissioner's power of delegation so as to exclude from its scope the authority to delegate his powers under S. 102 of the Act, i. e., to suspend a Panch or to remove one in exercise of his delegated authority. The authority conferred on the Government under sub-section (1) of S. 95 to delegate any of its powers under the Act has been conferred by the Legislature subject to only one exception, namely the power to make rules, and to no other exception.

5. The other provisions in the Act conferring any powers on the Government are contained in Ss. 95-A, 99 (2), 99-A, 100, 103 and 105 of the Act. Section 95-A refers to the power of the Government to hold general election, etc. of Panches of Gram Panchayats according to the procedure contained in that section. Section 99 provides that if a Gram Panchayat makes default in the performance of any duty other than a judicial function imposed upon it by or under the Act, or under any other law, the Deputy Commissioner may fix a period for the performance thereof, and in case of default may appoint any person to perform it. Sub-section (2) of that section states that if in the opinion of the Government a Gram Panchayat has failed or is otherwise incompetent to administer its property, the Government shall appoint a person to administer such property for and on behalf of the Gram Panchayat, and the Government may terminate such arrangement at any time. Section 99-A authorises the Government to take over by notification the management of any land of the Gram Panchayat for a period not exceeding twenty years if in the opinion of the Government it is necessary to do so in public interest or to secure proper management of such land held or managed by the Panchayat. Section 100 authorises the Government to call for and examine the record of proceedings of any Gram Panchayat for the purposes of satisfying itself as to the legality or propriety of any executive order passed therein, and further empowers the Government to confirm, modify or rescind any such order. Section 101 of the Act empowers the Government to make rules consistent with the Act. It is this power which has been specifically excluded from the operation of sub-sec. (1) of S. 95. The provisions of S. 102 have already been referred to in the opening part of this judgment. Section 103 authorises the Government to suspend or supersede a Gram Panchayat if in the opinion of the Government a Panchayat is incompetent to perform or persistently makes default in the performance of the duties imposed on it by or under the Act or any other Act, or exceeds or abuses its powers or fails to maintain proper sanitation, etc. Section 105 relates to the liability of members for the loss, waste or misapplication of any money or property belonging to the Panchayat. Sub-sec. (3-A) of that section provides that the Government may, either on its own motion at any time, or on an application received in that behalf within the prescribed period, call for the record of any proceedings in which the Deputy Director of Panchayats has passed an order under sub-sec. (3) for the purpose of satisfying itself as to the legality or propriety of such order and to pass such order in relation thereto as the Government thinks fit. It is settled law that whenever a power vested in the Government by a statute is delegated by it in exercise of statutory authority to do so, the delegate

functions as the Government and any action taken by him, or order passed by him in exercise of such delegated authority is deemed to be the order of the Government itself. The authoritative pronouncement of the Supreme Court on this point in Roop Chand v. State of Punjab, AIR 1963 SC 1503, is conclusive on the subject. It is also well settled that there is a presumption in favour of the legality and validity of a statutory provision and burden to rebut that presumption lies on the person who challenges the provision as being invalid or bad or unconstitutional (vide Braham Dutt v. Peoples' Co-operative Transport Society Ltd., New Delhi, AIR 1961 Punj 24).

6. The bases on which Mr. Gopi Chand has submitted that S. 96 (1) of the Act is contrary to the policy of the Act and contrary to the legislative intent are certain observations in the judgment of a Division Bench of this Court (Mehar Singh, C. J., as he then was, and myself) in Ram Ditta Singh v. The Deputy Commissioner, Ferozepore, (1968) 70 Pun LR 341, and certain speeches made in the Punjab Legislature at the time of consideration of the clause in the Bill of the Principal Act at the time it was passed in 1952 by the then Legislature of the united Punjab. The question that arose before Mehar Singh, C. J. and myself in Ram Ditta Singh's case (supra) was whether a Panch could or could not be suspended by the Deputy Commissioner under sub-sec. (1) of S. 102 without an inquiry having first been ordered by the Government under sub-sec. (2) of that section. The inquiry in that case had been ordered by the Sub-Divisional Officer and was held by the Block Development and Panchayat Officer. It was on the report of that inquiry that an explanation of the Sarpanch was obtained and the same not having been found to be satisfactory the Sarpanch was suspended by the order of the Deputy Commissioner. The order of suspension was impugned in the writ petition which was dismissed by the learned Single Judge on the ground that the Sarpanch still had an opportunity to show cause against the allegation made against him, but was allowed in appeal on the short ground that the initial inquiry against the Sarpanch had not been started under the orders of the Government, and inasmuch as sub-secs. (1) and (2) of S. 102 must be read together, it is only during the course of an inquiry ordered by the Government that the Deputy Commissioner has the power to suspend a Panch or a Sarpanch under sub-sec. (1). It was held that if no inquiry is ordered by the Government under sub-sec. (2), the power of the Deputy Commissioner to suspend under sub-sec. (1) does not become operative, as the provisions of that section do not envisage any inquiry against a Panch independent of that referred to in sub-sec. (2) during the course of which a Deputy Commissioner can order suspension of a Panch. It was in that context that after laying down the law to the above effect in clear terms, Mehar Singh, C. J. proceeded to observe as below:—

"The two sub-sections, as I have already said, have to be read together, and the obvious consequence is that it is only when the Government has ordered or started an enquiry under sub-sec. (2) against a Panch, that the Deputy Commissioner concerned has the power under sub-sec. (1) to suspend that Panch. He cannot suspend him in consequence of an enquiry not ordered or started by the Government under sub-sec. (2). The Legislature has designedly framed the two sub-sections in the manner in which the same are, leaving the power to order or start an enquiry against a Panch with the Government alone. The reason is obvious, for a Panch is member of an elected local body and a representative of his constituency so far as that elected body is concerned, and the Legislature did not intend to leave interference with such elected bodies in the hands of local officers by way of starting enquiries against the elected member of such local bodies. The power of suspension was previously with the Director of Panchayats and it is only the recent amendment that has given the same to a Deputy Commissioner, but that is only after the Government has taken the more serious decision of interfering with the tenure of an elected member of a Panchayat for irregularities or breaches referred to in sub-sec. (2) of S. 102. The initial step that has to be taken to order or to start an enquiry has been confined by the Legislature only to the Government at the highest level, and this has been done as a matter of sound policy so as to obviate interference with such elected institutions in the State at the lower levels. There may be some preliminary enquiry or looking into the affairs of a Panchayat by the Government for the purpose of making up its mind to order or start an enquiry under sub-sec. (2), and it is only

when it thus makes up its mind to act under that sub-section that an order by the Deputy Commissioner under sub-section (1) may follow, but such a preliminary enquiry does not give power to a Deputy Commissioner to act under sub-sec. (1) without there being an order by the Government for an enquiry under sub-sec. (2)."

7. It may be straightway noticed that the question which we are called upon to answer neither arose in Ram, Ditta Singh's case (supra) nor was the same posed, argued or discussed before the Bench which decided that case of which I happened to be a member. The observation in the above-quoted passage from the said judgment about the initial step regarding the decision to start an inquiry having been confined by the Legislature only to the Government at its highest level related to the law as it then stood and appears to have been made in order to lay emphasis on the fact that the order for suspension in consequence of and during an inquiry ordered by the Government was somewhat insignificant when compared with the initial decision to be taken by the Government. That the said provision had been enacted as a matter of sound policy does not, in my opinion, amount to saying that if the power had been vested in some authority lower than the State Government itself, it would be contrary to any policy to be found anywhere in the Act. The observation about interference with the elected institutions in the State at the lower level is mere obiter and was neither necessary nor relevant to the decision of the point that was before the Division Bench. What is stated in the last lines of the above-quoted passage from Ram Ditta Singh's case that the Deputy Commissioner having no power to suspend a Panch under sub-sec. (1) without there being an order "by the Government" for an inquiry under sub-sec. (2) relates to the provision of S. 102 itself without taking notice of S.95 of the Act. In fact the question of the validity and extent of the legal delegation of the Government's power under S. 102 did not arise in Ram Ditta Singh's case. Nothing stated in that judgment can, therefore, really give any light to us for answering the question which has been quoted in the opening sentence of this judgment. It is also significant that Mehar Singh, C. J. (who was the author of the judgment of the Division Bench in Ram Ditta Singh's case) himself made it clear that the power of the Government could be delegated to the Deputy Commissioner while presiding over the subsequent Full Bench of this Court in Ujagar Singh v. State of Punjab, ILR (1969) 1 Punj and Har 59 : (AIR 1970 Punj & Har 193). The judgment in that case was also written by the learned Chief Justice. In the course of that judgment Mehar Singh, C. J. observed as below (at p. 195 of AIR) :—

"According to S. 95 of the Act, the Government can delegate its powers under the Act to a Deputy Commissioner of a District, apart from the Director of Panchayats. So the Government can, having regard to this provision, delegate its powers under sub-sec. (2) of S. 102 of the Act to a Deputy Commissioner, though actually it has delegated its powers not to any Deputy Commissioner of any district in the State but to the Director of Panchayats, an officer at the centre who heads the Department of Panchayats."

Reference is then made in the judgment to the amendment of sub-sec. (1) of S. 102 whereby the power to suspend (which originally vested in the Director of Panchayats) was vested in the Deputy Commissioner. That amendment was justified by the Full Bench as having been effected in the wake of the number of cases and the volume of work involved in that respect. It was only after laying down categorically that the Government could delegate its power under sub-section (2) of Section 102 to a Deputy Commissioner under Section 95 that the following observations were made by Mehar Singh C. J. in Ujagar Singh's case (supra) (at p. 195 of AIR) :—

"In spite of the power under S. 95 to delegate its powers under the Act to the Deputy Commissioner, the Government has not chosen to do so in so far as its power under sub-sec. (2) of S. 102 is concerned. It has delegated that power to the Director of Panchayats only, an official of top rank in the Department. So, while such a delegation to a Deputy Commissioner is possible, the action of the Government itself supports the inference that it has paid attention to the policy of the Legislature that such powers are not to be delegated to district officials so that they may not interfere with the working of local bodies as Panchayats."

It is the reference to the "policy of the Legislature" in the above-quoted observations of the Full Bench that has led to

that sophisticated argument that has been addressed before us by Mr. Gopi Chand. It is of great importance that while referring to the so-called policy of the Legislature the learned Chief Justice again laid emphasis on the fact that "while such a delegation to a Deputy Commissioner is possible", what is now sought to be argued before us that such a delegation by the Government of its powers under S. 102 (2) of the Act to a Deputy Commissioner is not possible and would be void. To argue this is to argue directly contrary to what has been held by the Full Bench of this Court in Ujagar Singh's case. From a perusal of the judgment in Ujagar Singh's case it appears that no argument about the policy of the Legislature had in fact been advanced by anyone, and that the reference to the same in the judgment is to the normal ordinary general policy of the Legislature to avoid delegation of important governmental functions to officers at district level or below. There is, however, no such general policy. Such policy is bound to vary from legislation to legislation keeping in view the nature of the power, the extent of delegation, the position of the delegate in the official hierarchy the number of cases and the volume of work involved, and so many other things. Keeping in view the number of cases and the volume of work involved in the matter of inquiries against Sarpanches and Panches throughout the State, it would be impossible for the State Government itself to appropriately apply its mind to the question of ordering an inquiry into the conduct of a Panch or a Sarpanch, and it appears to us to have been only fair that the said power has been delegated to the Chief executive officer of the district who is ordinarily bound to know better about his district administration and the functioning of the elected bodies within his jurisdiction. After carefully considering the Division Bench judgment in Ram Ditta Singh's case and the Full Bench judgment in Ujagar Singh's case, we are firmly of the opinion that it has not been held in any of the two cases that the power of the Government under S. 102 (2) of the Act cannot be delegated under S. 95, (1) of the Act to the Deputy Commissioner.

8. The expression of this view of ours during the hearing of the case led Mr. Gopi Chand to an argument of frustration derived from the reference to legislative policy in the observations of Mehar Singh, C. J. in Ujagar Singh's case (AIR 1970 Punj 193) (FB). He referred to the following questions raised by Sardar Achhar Singh Chhina, M. L. A., and the answers thereto given by the Minister for Local Government in the Punjab Legislative Assembly session held on November 21, 1952:—

"SARDAR ACHHAR SINGH CHHINA:

... ...

Further, it has been provided in this Bill that the Panchayat Officer will have power to remove the Panches elected by the people. In other words, it means that these Panchayat Officers will remove those Panches whom they do not like. I want to ask the Government what is the sense under the circumstances in the election of Panches by the Gram Sabha?

MINISTER FOR LOCAL GOVERNMENT: I submit that with the exception of the Government no one shall be competent to remove the Panches of a Panchayat. Only the Government will have this power. The Hon'ble Member is under some wrong impression.

SARDAR ACHHAR SINGH CHHINA: I want to enquire from the Hon'ble Minister whether the Panchayat Officers are not representatives of the Government what does he mean by the Government?

MINISTER FOR LOCAL GOVERNMENT: I repeat that the Government alone shall be competent to remove them. The Panchayat Officers will not be authorised to do so.

SARDAR ACHHAR SINGH CHHINA: The Hon'ble Minister should realise that in this case the Director or the Assistant Director will mean Government as they will be entrusted with this power.

... ...

... ...

SARDAR ACHHAR SINGH CHHINA: This means that the Panches will begin to look for favour to the person who is invested with this power. It would be the same thing as the Members of this House trying to win favour of the person who may have the authority to remove them from membership despite the fact that they had been elected by the public. Similarly, these Panches will care more for the Government's wishes. Therefore, Sir, I want to submit that they should not delude themselves by the notion that by passing this Bill they shall be able to establish Ram Rajya. They should also not have the misunderstanding that through this Bill they will be successful in checking the people from

becoming communists. On the other hand, all of them will become communists.

MINISTER FOR LOCAL GOVERNMENT: Mr. Speaker, I want to point out that the Hon'ble Member who was just in possession of the House is mistaken. In the absence of some authority to remove a Panch who does not work diligently that Panchayat will become quite useless. To that reason, the Government must have the power to remove him.

SARDAR ACHHAR SINGH CHHINA: Mr. Speaker, I too do not wish that a Panch who does not work well should not be removed. In my opinion such a Panch must be removed. The power to remove a Panch should not vest with the Government but it should lie with the electorate which elects him. The Panchayats shall not be able to work well if the Government holds this power. Further, in that case the Panchayat Officers shall be in a position to create a split among the people and the whole purpose with which this institution is being started, shall be destroyed. The Government should not be empowered with the authority of being able to dissolve a Panchayat which has been elected by the people. The people must hold the power to remove those Panches, who in their opinion do not work well, as they have been authorised to elect them."

9. It will be noticed from the above discussion in the Assembly that there were two view-points; one of Sardar Achhar Singh Chhina and the other of the Minister for Local Government. The view of Mr. Chhina was that though the Bill must provide for power to remove a Panch who does not work well, but that power should not vest with the Government. It appears that the original suggestion was to make a provision in the Bill for the removal of elected Panches by the Panchayat Officers. The initial objection was to that clause. When the Minister for Local Government repeatedly reiterated that power to remove a Panch was going to be vested with the Government, Mr. Chhina still insisted in his objection as the basic difficulty felt by him was that the power for the removal of an elected Panch should lie with the electorate which had elected him, and he thought that the Panches would not be able to work well if the Government held the power to remove a Panch. Great emphasis is laid towards the end of the last speech of Mr. Chhina on the subject wherein he stated unequivocally that the Government should not be empowered with the authority of being able to dissolve a Panchayat which has been elected by the people, and the people alone must hold the power to remove those Panches who in their opinion do not work well as they have been authorised to elect them. It is clear that the distinction if any between the various levels of the Government machinery which was being drawn during the course of the above-mentioned discussion was between a Panchayat Officer and the Government. It was even indicated at one stage that the Government may mean the Director or Assistant Director. There is nothing at all in the above-mentioned discussion about an objection having been raised to the power of the Government to delegate its functions under Section 102 to a Deputy Commissioner. The Deputy Commissioner is not a local officer. According to Cl. (14) of S. 2 of the Punjab General Clauses Act, the Deputy Commissioner means the Chief Officer in charge of the general administration of a district. He is as responsible an officer as a Deputy Secretary in the State Government Secretariat whose orders are treated to be the orders of the Government according to the rules of business. In fact the posts of the Deputy Commissioners of districts and the Deputy Secretaries in the State Government Secretariat are inter-changeable and it is a matter of common knowledge that inter se transfers between the two offices take place amongst the members of the Indian Administrative Service. It has been observed in Shri Sarwan Singh v. The Additional Deputy Commr., Patiala, (1966) 68 Pun LR 633 (at p. 635), that the general administration of a district may be carried out by several officers in a particular district, but one and only one of them can be the chief officer in charge of the general administration, and that the very word "chief" denotes head, principal, highest, first or outstanding. The Panchayats work at village level. Various villages and towns make one sub-division. All the sub-divisions in a district are under the Deputy Commissioner. The Deputy Commissioner of a district is, therefore, not an insignificant officer or authority. He is in fact quite high in the hierarchy of executive officers in a State Government. The real administration of the State is divided into the hands of the various Deputy Commissioners. They are responsible

officers and it cannot be argued that the Government has acted without any sense of responsibility in delegating its functions u/s. 102 (2) of the Act to some small fry. In B. Veeraswamy v. State of Andhra Pradesh, AIR 1959 Andh Pra 413 (FB), the question posed before the Full Bench was whether the State Government could authorise the Regional Transport Officer to exercise the powers and to discharge the functions of the State Transport Authority under Ss. 48-A, 51-A and 56-A of the Motor Vehicles Act, 1939. While answering that question the Full Bench observed that the State Government could authorise the Regional Transport Officer to exercise the powers and discharge the functions of the State Transport Authority as there was a presumption that the Government will discharge its duties honestly and in accordance with the rules of law and it cannot be argued that where the powers of delegation are vested in the Government, the same would be abused.

10. Similarly arguments were advanced before us on the question whether it is open to the Court to allow reference being made to the Legislative Assembly Debates for the purpose of finding out the intention of the Legislature which enacted the relevant law. It appears to me to be absolutely unnecessary to refer to those arguments as it is now settled law that Legislative Assembly Debates can be cited before the Court at least for the purpose of finding out the historical back-ground and the environmental circumstances in which the law was made. We have not been able to discern any legislative intent in the Legislative Assembly Debates referred to before us which might indicate that the Legislature never intended that the Government may delegate its functions under sub-sec. (2) of S. 102 of the Act to a Deputy Commissioner in exercise of the express power of delegation conferred on the Government under sub-sec. (1) of S. 95. The second argument of Mr. Gopi Chand also, therefore, fails.

11. The last submission of the learned counsel for the petitioner was that the power of removal of a Panch is a judicial or quasi-judicial power of a personal nature, and no law can ever be made authorising the delegation of such a power. In other words it was argued that if a power is vested in a particular authority, its delegation would amount to the delegation of the rank of that authority and no law permits the Deputy Commissioner to be made the Government. Counsel relied in this connection on certain observations made in a Full Bench judgment of the Delhi High Court in the Management of Delhi Transport Undertaking (of the Municipal Corporation) New Delhi v. B. B. L. Hajelay, 1972 Serv LR 299. The question which arose before the Delhi High Court in that case was that whereas S. 96 (1) of Delhi Municipal Corporation Act provided that every municipal officer or every municipal employee would be liable to have his increment or promotion withheld or to be censured, reduced in rank, etc. for any breach of departmental regulations or misconduct, etc., the said power having been vested in the Commissioner could not be delegated by him in exercise of his authority under S. 491 of the said Act which provides as below:—

"The Commissioner may by order direct that any power conferred or any duty imposed on him by or under this Act shall, in such circumstances and under such conditions, if any, as may be specified in the order, be exercised and performed also by any municipal officer or other municipal employee specified in the order."

The proviso to S. 96 (1) categorically prohibits any officer or other employee of the Corporation being reduced in rank, compulsorily retired, removed or dismissed by any authority subordinate to that by which he was appointed. The question whether the Commissioner who had appointed the respondents in that case could delegate his power of reducing the respondents in rank to some subordinate authority in exercise of his power under S. 491 of the Delhi Act was answered in the negative. Nothing stated in that judgment can in our opinion be of any advantage to the petitioner as there is no prohibition in S. 95 (1) of the Act which may partake of the nature of the prohibitive proviso to S. 95 (1) of the Delhi Act.

12. The above-mentioned judgment of the Delhi High Court was upheld by their Lordships of the Supreme Court while dismissing the appeal of the Management of Delhi Transport Undertaking (Civil Appeal 1518 of 1971) on September 6, 1972: (reported in AIR 1972 SC 2452). It is on the following passage of the judgment of the Supreme Court that Mr. Gopi Chand has sought to place reliance (at p. 2455):—

"It is, therefore, clear that a protection which is given to an employee by the

statute cannot be nullified by rules and regulations authorised by the statute itself. In other words, any regulation made by the Corporation which would have authorised the Assistant General Manager to remove respondent No. 2 from service would have been inoperative qua respondent No. 2 as his appointing authority was the General Manager (Transport). The question now is whether, if the Corporation itself by any regulation could not have destroyed the above protection given by the statute to respondent No. 2, it would be appropriate to say that the General Manager by an order delegating his functions to the Assistant General Manager under S. 491 read with S. 504 of the Corporation Act could destroy the protection. Since the General Manager (Transport) is an officer of the Corporation and subordinate to the Corporation, it will amount to saying that what the Corporation could not do by a regulation could be done by an officer of the Corporation by merely delegating his functions to the Assistant General Manager. The position would look ridiculous. The true position in law is that while Ss. 491 and 504 read together authorised the General Manager (Transport) to delegate his powers and functions to a subordinate, they did not authorise delegation of his rank. What is involved in matters of appointment and removal is the status and rank of the employee and the status and rank of the authority taking action. When the proviso to sub-sec. (1) of S. 95 says that an officer and an employee shall not be dismissed by an authority subordinate to that by which he was appointed the subordination is of rank and not of functions. The proviso places an embargo on any subordinate of the appointing authority from removing or dismissing an employee from service and, therefore, the High Court was right in holding in the present case that the removal of respondent No. 2 by the Assistant General Manager (Transport) was illegal.

Mr. Chagla then contended that by reason of the delegation, the Assistant General Manager had become an agent of the General Manager and the act of the Assistant General Manager must be deemed to be the act of the General Manager himself. We are not concerned here with the law of agency. It is implicit in the statutory prohibition debarring removal by a lesser authority, that the appointing authority has to personally apply its mind to the question of removal and cannot delegate such a function. Since the authority which can remove an employee is the appointing authority or its superior in office, the protection thus provided cannot be destroyed by importing concepts of agency." The objection to delegation in the above-quoted passage is again based on the proviso to S. 95 (1) which contains an absolute prohibition against the delegation of power vested in the Commissioner under the purview of sub-sec. (1) of Section 95 to anyone in respect of an employee who was appointed by him. The reference to the necessity of the authority to personally apply its mind to the question of removal, and, therefore, to the undesirability of delegation of any such function is again directly connected in the same sentence to the statutory prohibition debarring removal by the lesser authority. There is no such debarring provision in S. 95 of the Act.

13. In fact it appears to us that there is intrinsic evidence of legislative policy for delegation of the Government's function under S. 102 (2) to lower authorities in the section itself. The section has already been quoted in an earlier part of the judgment. Whereas clauses (a) to (c) of sub-sec. (2) relate to the Government's powers to remove any Panch on the objective tests laid down in those clauses being satisfied, the power to remove under Clauses (d) and (e) of sub-sec. (2) is based on the opinion of the Government. In those clauses, i. e. in clauses (d) and (e) it has been specifically stated that a Panch who in the opinion of the Government "or of the officer to whom Government has delegated its powers of removal" has been guilty of misconduct in the discharge of his duties or whose continuance in office is "in the opinion of the Government or of the officer to whom Government has delegated its powers of removal" undesirable in the interest of public. If the legislative intent was that the power under sub-section (2) of S. 102 to remove a Panch is not expected to be delegated, no reference could at all have been made to the officer to whom the Government has delegated its power of removal in clauses (d) and (e) of that very section itself. This we think is the crucial turning point which completely dispels the illusory argument advanced on behalf of the petitioner. The provisions of S. 102 (2) have already been held to be intra vires and valid by a Division Bench of this

Court in Piyara Lal v. Deputy Commr., Hoshiarpur, ILR (1966) 2 Punj 20, nor has the vires of that provision or the reference to delegation in the sub-section itself been attacked before us.

14. Before parting with the case we may also notice that the counsel for the petitioner referred to the judgment of the Judicial Commissioner of Goa, Daman and Diu in Village Panchayat of Curchorem v. Lt. Governor of Goa, Daman and Diu, AIR 1972 Goa, 1, to argue that the power of the Government under section 102 (2) of the Act is personal power like the power of the Lieutenant Governor to be exercised in his own discretion, and cannot, therefore, be delegated. This argument hardly deserves any serious notice as the Government is not a person like a Lieutenant Governor, and the provisions of the Act itself indicate that the Legislature intended the power of the Government under S. 102 (2) to be delegated to some lower officer Same applies to the reference made by the learned counsel to the judgment of the Rajasthan High Court in Ramdutt v. State of Rajasthan, AIR 1966 Raj 125, on the basis of which it was argued that a Panchayat is a local Government and the Government cannot be authorised to remove a local Government. There are a large number of fallacies in this argument. Even if the Panchayat is treated to be a local Government, each Panch or Sarpanch of the Panchayat cannot be said to be a local Government. Moreover, in the Rajasthan case the question was of legislative policy. The policy of the Punjab Legislature in the Act before us is clear and unambiguous. The judgment of the Supreme Court in Sub-Divisional Officer, Sadar, Faizabad v. Shambhoo Narain Singh, AIR 1970 SC 140, and of the House of Lords in Vine v. National Dock Labour Board, (1956) 3 All ER 939, having been cited in the same connection do not require being dealt with at any length.

15. Mr. Bhup Singh who is the counsel for the petitioner in the connected writ petition (C. W. P. 4776 of 1974, Chiranji Lal v. State of Haryana) which is one of the cases heard by us along with this petition, adopted all the arguments of Mr. Gopi Chand, and further submitted that if delegation of Government's power under S. 102 (2) to the Deputy Commissioner is held to be legal, it would further have to be held on account of the express provision of sub-sec. (1) of S. 95 of the Act that the said power may even be delegated by the Government to the Sub-Divisional Officer, and it would really be anomalous that whereas the main power to order an inquiry may be vested in the Sub-Divisional Officer, the less important routine power of suspending a Panch in the course of such an inquiry be left to the Deputy Commissioner by sub-sec. (1) of S. 102 of the Act, the further delegation of which is prohibited by the proviso to sub-sec. (5) of S. 95 of the Act. No such thing has happened, and we are not called upon to answer academic questions which have not arisen. Nor has the vexed question posed by Mr. Bhup Singh any relevance to the precise question which has been referred to this Bench.

16-18. For the foregoing reasons we answer the question referred to us in the affirmative. The case will now go back to the Bench which originally heard it (and referred it to us) for being decided in accordance with law.

R. N. MITTAL, J.:— I agree.

M. S. GUJRAL, J.:— I agree.

Final order by the Division Bench (consisting of S. S. Sandhawalia, C. J. and S. C. Mital, J.) was passed on 4-10-1978.

S. S. SANDHAWALIA, C. J.:— 19. Duli Chand had brought this writ petition for quashing the initiation of an enquiry against him by the Deputy Commissioner, Jind, and the interim order of suspension passed in the said proceedings on the 14th of March, 1974. In the course of hearing it became necessary to refer the following question for decision by the Full Bench—

"Whether the State Government in exercise of the powers conferred by sub-section (1) of S. 95 of the Punjab Gram Panchayat Act, 1952, can delegate its powers exercisable under sub-sec. (2) of S. 102 of the said Act, to the Deputy Commissioners in respect of Gram Panchayats within their jurisdiction."

In its elaborate judgment, the learned Judges of the Full Bench have returned the answer in the affirmative to the question aforesaid.

20. However, when the matter has now come up before us, learned counsel for the parties are both agreed that the proceedings have been rendered infructuous by the recent holding of the fresh elections to the Gram Panchayat of village Butani and in fact all over the State. Accordingly we dismiss the writ petition

on the aforesaid ground whilst leaving the parties to bear their own costs.

Order accordingly.

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BHOPINDER SINGH DHILLON AND S. S. DEWAN, JJ.

Bachan Dass and another, Appellants v. Shiromani Gurdwara Parbandhak Committee, Amritsar, Respondent.

F. A. O. Nos. 224 of 1966 and 14 of 1967, D/- 19-10-1978.*

(A) Sikh Gurdwaras Act (8 of 1925), Section 7 — Punjab Land Revenue Act (17 of 1887), Sec. 45 — Wrong entry in favour of Sikh Gurudwara in respect of certain properties in revenue record — Presumption thereunder is subject to rebuttal.

It is well known that the wrong entry in the revenue record does not extinguish the rights of the owners in the land nor does it confer any title on the notified Sikh Gurdwara. It is true that the entry when made is entitled to a presumption of correctness unless rebutted, but the mere making of an entry does not in any way create a title. The entries in the revenue record, though adverse to the owners, do not at all extinguish their right in the land in dispute. S. 45 entitles any persons aggrieved by an entry in the record of rights to seek relief under Section 42, Specific Relief Act. (Para 7)

Where the title holders of the land continued to be in possession thereof even after mutation thereof in favour of a Sikh Gurudwara and the wrong entry as to mutation was made without any opportunity to the title holders and the order effecting mutation in favour of the Gurdwara did not appear to have been issued to give effect to Farman-e-Shahi, the entire proceedings leading to the mutation in favour of the Gurdwara were illegal. Civil Appeal No. 446 of 1962, D/- 9-11-1964 (SC), Distinguished. (Paras 5, 8)

(B) Sikh Gurdwaras Act (8 of 1925), Section 7 — Building exclusively not residential house of the owner — Guru Granth Sahib ceremoniously opened every day and read therein by Mahants and travellers are fed — Building alluded to as Dera is a Gurdwara. Civil Appeal No. 446 of 1962, D/- 9-11-1964 (SC), Foll. (Para 10)

Cases Referred: Chronological Paras

(1964) Civil Appeal No. 446 of 1962, D/- 9-11-1964 (SC), Banta Singh v. Gurdwara Sahib Dasmi Padshahi 4, 8, 10

T. S. Mangat, for Appellants; Narinder Singh, for Respondent.

S. S. DEWAN, J.:— This judgment will dispose of F. A. O. No. 224 of 1966 and F. A. O. No. 14 of 1967, as both are directed against one and the same judgment dated August 1, 1966, of the Sikh Gurdwaras Tribunal (Punjab) Chandigarh, (hereinafter called the Tribunal).

2. Briefly stated the facts giving rise to these appeals are that 58 Sikh worshippers filed a petition under sub-section (1) of S. 7 of the Sikh Gurdwaras Act, 1925 (hereinafter referred to as the Act) and the said petition was published under sub-sec. (3) of S. 7 of the Act, regarding the claim in respect of Gurdwara Siri Guru Granth Sahib situate in the revenue estate of village Lapran, Tehsil Sirhind, District Patiala. Thereupon, Bachan Dass son of Daulat Ram and Bishan Dass son of Khushi Ram filed an objection petition before the State Government under S. 8 of the Act, alleging therein that the land and the house in question had been donated by Bijay Singh of Bhadaur to their forefathers in the year 1860 BK and the same descended to them (petitioners) from them; that they acquired perpetual rights in the properties in question being in possession for the last 161 years and that there never came in existence Gurdwara Sri Guru Granth Sahib in village Lapran nor had it anything to do with the property in question. The Government treated the objection petition to be one under Ss. 8 and 10 of the Act and forwarded it to the Tribunal for disposal under sub-sec. (1) of S. 14 of the Act. The Shiromani Gurdwara Prabandhak Committee (hereinafter called as the Committee) contested the petition and filed written statement. It was averred that the properties in question belonged to a Sikh Gurdwara and that the case fell under the purview of S. 16 (2) (iv) or S. 16 (2) (iii) of the Act. During the proceedings before the Tribunal, it was found that no notification under S. 9 of the Act had been issued by the Government and that the objection petition had been wrongly forwarded to the Tribunal as composite petition under Ss. 8 and 10 of the Act.

*(From order of Sikh Gurdwaras Tribunal Punjab at Chandigarh, D/- 1-8-1966).

Shri Tehal Singh Mangat, counsel for the petitioners admitted that the petition was under S. 10 of the Act. The petition under S. 8 was dismissed by the Tribunal and the petition under S. 10 was allowed to proceed. The counsel for the Committee filed fresh written statement and it was averred that the land in dispute belonged to the Gurdwara and was granted to the petitioners by the Sardar of Bhadaur for the maintenance of the Gurdwara and it had descended from office-holder to office-holder on more than two occasions. Regarding the house in dispute, it was alleged that it was of the notified Sikh Gurdwara. The pleadings of the parties gave rise to the following issues :—

1. What right, title or interest, if any, has the petitioners in the property in dispute ?

2. What right, title or interest, if any, has the notified Sikh Gurdwara in the property in dispute ?

3. Both these issues were decided by the majority judgment of the Tribunal and it was held that the petitioners were entitled to declaration that the land in dispute belonged to them and the house belonged to the notified Sikh Gurdwara. However, Shri Sarup Singh, one of the members of the Tribunal recorded a dissenting judgment and he was of the view that the land in dispute was proved to be belonging to the Gurdwara Siri Guru Granth Sahib and that the petitioners had no right, title or interest in the land in dispute. The Committee has come up in appeal (F. A. O. No. 14 of 1967) claiming that the land in dispute is the property of the scheduled Gurdwara and that the majority view is not correct whereas the petitioners have also challenged the finding of the Tribunal on issue No. 2 through F. A. O. No. 224 of 1966.

4. Both the parties produced oral as well as documentary evidence in support of their respective claims. After going through the oral as well as the documentary evidence, we are inclined to agree with the view taken by the majority decision of the Tribunal. Exhibit P-3 is the certified copy of the pedigree table of Khandan No. 20 pertaining to Faqir Udasis of Lapran for the years 1961-62 Svt. It starts from Chaina who was succeeded by Madho Ram. Balak Ram succeeded Madho Ram, who in turn was followed by Sarmukh Dass. Sham Dass followed Sarmukh Dass who had two sons, Nanak Dass and Daulat Ram. Daulat Ram died and his two sons Khushi Ram and Bachan Dass succeeded him. This pedigree table shows that the succession was from father to son. Nanak Dass died and the land standing in his name in Exhibit P-1 Jamabandi for the years 1961-62 B. K. was mutated in the names of his two nephews Khushi Ram and Bachan Dass sons of Daulat Ram vide mutation No. 29 dated 28 Katak 1964 Svt. (Exhibit P-4). This entry was again repeated in the Jamabandi for the years 1982-83 Svt. (Exhibit P-8). It is not disputed by the learned counsel for the Committee that the land in dispute throughout remained in possession of the petitioners up to the date of the notification. (Copy of mutation No. 319 (Exs. P-5 and R-2)), however, indicates that the land in dispute standing in the names of Khushi Ram and Bachan Dass sons of Daulat Ram stands mutated in the name of Siri Guru Granth Sahib Ji, in village Lapran and they are shown as its Mohtmims. This mutation was challenged before the Tribunal by the learned counsel for the petitioners with the contentions that Deohri Maulla had no authority to issue direction for substituting the name of Siri Guru Granth Sahib instead of Bachan Dass and Khushi Ram and that the entry in the record of rights could be changed only if covered by one of the clauses contained in S. 37 of the Punjab Land Revenue Act, 1887. It was also alleged that the entry was changed without giving any notice to the petitioners and as such it was illegal and that the mutation could neither confer nor take away title. On the other hand, the case of the Committee was that the entry in the record of rights was brought about under the orders of the Deohri Maulla to give effect to Farman-e-Sahi; that the entry incorporated in the Jamabandi was changed as back as in the year 1986/87 Svt. (Exh. R-3); that the same entry was repeated in the subsequent Jamabandis and that the petitioners had acquiesced in this entry and as such they could not be permitted to turn round and say that the notified Sikh Gurdwara was not the owner of the disputed land. Primarily, reliance in this respect was placed on a decision given by the Supreme Court in Civil Appeal No. 446 of 1962, Banta Singh v. Gurdwara Sahib Dasmi Padshahi, decided on 9-11-1964. The contentions of the Committee were considered seriatim and rejected on merits. These very contentions have been repeated before us. Mr. Narainder

Singh has been unable to cogently assail the view expressed by the Tribunal on these points and we see no reason whatsoever to opine to the contrary.

5. Mutation No. 319 (Exhibits P-5 and R-2) shows that the land in dispute standing in the names of Khushi Ram and Bachan Dass sons of Daulat Ram stands mutated in name of the Gurdwara Sri Guru Granth Sahib Ji in village Lapran and they are shown as Mohtmims. This document further shows that this entry was made in the absence of Khushi Ram and Bachan Dass. The order for variation in the mutation was issued by Sardar Sahib Deohri Maulla (Col. Amrit Singh) but it is of no consequence because Col. Amrik Singh had no authority to pass such order. In this view of the matter, the Tribunal has rightly found that the entire proceedings beginning from the Patwari's report to the final order made by the Revenue Officer on the mutation, were illegal. On perusal of the mutation (Ex. P-5) we find that it is nowhere described that Sardar Sahib Deohri Maulla was issuing the order to give effect to Farman-e-Shahi. The words 'Farman-e-Shahi' in fact do not find mention in the order. The first part of the order reads that recommendations made in the petition are accepted and direction should be issued that in fact no land or Muafi should be entered in the name of a Mahant before his appointment is formally sanctioned by the Ijlas-e-Khas in the manner given therein and the second part of the order runs like this :—

"This should also be recorded that the lands that pertain to Deras should not be deemed to belong to the Mahants nor should they be entered as the property of the Mahants in the Government papers. On the other hand such lands should be shown under the management of the Mahants and the Mahants shall have no right to sell or mortgage the lands belonging to the Deras. This should be brought to the notice of the revenue authorities and this order should be published in the Gazette."

6. The second part of the order shows that it is only those lands which pertain to Deras and entered as property of the Mahants that have to be shown in Government papers as property of the Dera under the management of their respective Mahants. A bare reading of the said order envisages a sort of enquiry by the revenue authorities in order to satisfy that the lands sought to be entered in the name of the Deras were attached to them. It is candidly admitted by Mr. Narinder Singh, learned counsel for the Committee that no such enquiry was conducted either by Sardar Sahib Deohri Maulla or the Revenue Officer before the mutation substituting the name of Shri Guru Granth Sahib Ji in place of Khushi Ram and Bachan Dass sons of Daulat Ram was ordered and sanctioned. What to speak of enquiry the petitioners were not given any notice and it was only on the order of Sardar Sahib Deohri Maulla that the Patwari entered the ownership of the land in the name of Shri Guru Granth Sahib, ignoring the previous entry which was in the names of the petitioners. One more circumstance that militates against the Committee is that if the land was given to the religious institution, there was no cogent reason by the committee as to why the names of Khushi Ram and Bachan Dass should not have been shown as Managers or Karkuns in the possessory column of record of rights. The entry of a title in the revenue records as the result of mutation proceedings is merely the recognition by revenue officers of a title which they believe to exist. It is true that the entry when made is entitled to a presumption of correctness unless rebutted, but the mere making of an entry does not in any way create a title.

7. The entries in the revenue record, though adverse to the petitioners, do not at all extinguish their right in the land in dispute. Section 45 of the Punjab Land Revenue Act entitles any persons aggrieved by an entry in the record of rights to seek relief under S. 42, Specific Relief Act. A suit for declaration in respect of any entry in the record of rights is governed by S. 120 of the Limitation Act. The case of the petitioners is that they felt aggrieved with the adverse entry appearing in the record of rights only on the publication of the notification, and the period of limitation commenced running from the date of notification i. e. 5-7-1963. They had near about three years more at their disposal for instituting a suit under S. 42, Specific Relief Act for getting the entry corrected. It is well known that the wrong entry does not extinguish the rights of the petitioners in the suit land nor does it confer any title on the notified Sikh Gurdwara. Even after the mutation, Khushi Ram and Bachan Dass continued

to remain in possession of the land in question.

8. The ratio of the decision in Banta Singh's case (C. A. No. 446 of 1962, D/-D/- 9-11-1964) (SC) (supra) is not applicable to the facts and circumstances of the present case. In that case Banta Singh was afforded sufficient opportunity, but he had failed to produce any evidence to substantiate his claim. The Tehsildar's order sanctioning mutation was issued in accordance with the orders of his Highness whose orders were the law. All this material is lacking in the case in hand. In the present case neither there is any reference to the orders of his Highness nor the petitioners have been given any opportunity to produce evidence in support of their claim.

9. Keeping in view the evidence adduced on behalf of the petitioners, we are inclined to agree with the view taken by the Tribunal that there is no manner or doubt left that the petitioners are entitled to the land in dispute in their personal capacity.

10. So far as the house in question is concerned, the case of the petitioners is that it belonged to Nanak Dass who was the real brother of their grandfather and had descended to them after his death. The record shows that Nanak Dass appeared as a witness in Muafi file No. 78 instituted on 24th Har, 1965 BK and decided on 14th Asoj, 1965 BK. In his statement (Ex. R-5) recorded on 7th Chet 1962 BK, Nanak Dass describes the house in question as Dera. He has stated that Guru Granth is opened every day; that he is a Pathi and that the wayfarers are fed every day. Ex. R-6 is the certified copy of the joint statement of three Lambardars of village Lapran, namely, Aroor Singh Bhagwan Singh and Dasondhi, which was recorded in the same file (No. 78). They have called the institution as a Dera. They further add that Guru Granth is opened regularly and Khushi Ram reads it; that the travellers are fed and that the building of the Dharamsala is of Pacca masonry. The Committee examined four witnesses. Though they belong to villages other than Lapran, but their evidence fits in with the statements of Nanak Dass and the three Lamberdars. They have stated that people use this institution for the worship of Holy Granth; that Bachan Dass and Bishan Dass are the Mahants of this Gurdwara and they perform the Parkash of Guru Granth Sahib and render service to the travellers. From the evidence adduced on behalf of the Committee, it is thus quite clear that the building is not exclusively the residential house of the petitioners, but a building in which Guru Granth Sahib is ceremoniously opened every day and read by the Mahants and the travellers are fed. In Banta Singh's case (C. A. No. 446 of 1962, D/- 9-11-1964) (SC) (supra) Dera was held to be a Gurdwara.

11. We are inclined to agree with the findings of the Tribunal as it is found from the documentary as well as the oral evidence that the house in dispute is under the ownership of Gurdwara.

12. For the reasons recorded above, there is no merit in these appeals and the same are hereby dismissed. However, there will be no order as to costs.

BHOPINDER SINGH DHILLON, J.:— I agree.

Appeals dismissed.

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RAJENDRA NATH MITTAL, J.

Bawa Singh and others, Appellants v. Babu Singh and others, Respondents.

Civil Misc. No. 1443/C of 1978 in Second Appeal No. 1009 of 1968,* D/- 10-10-1978.

Civil P. C. (5 of 1908), S. 152 — Application for rectifying clerical or arithmetical mistakes in judgments and decrees — No limitation. (Limitation Act (36 of 1963), S. 29 (2).)

Words used in S. 152 are 'at any time', which show that the power of the Court to rectify clerical or arithmetical mistakes in the judgments or decree-sheets is not controlled by time factor. No doubt, it is true, that Art. 137 of Limitation Act prescribes a period of three years for making application under any enactment but period of limitation prescribed by it will not apply to the applications under S. 152 of the Code. AIR 1962 Pat 116, Rel. on. AIR 1977 SC 282 and AIR 1978 Delhi 167 (FB), Disting. (Para 3)

From S. 29 (2) of the Limitation Act it is evident that where any special law prescribes limitation that will be deemed to be substituted in the Schedule to the Limitation Act. If S. 152 is read along with S. 29 (2) of the Limitation Act, it would be clear that the words 'at any time' in S. 152 would be deemed to have

*(Reported in 1978 Rev LR 534).

AW/AW/A141/78/SNV

been substituted in place of the period prescribed in the Article. Therefore, an application can be filed for rectifying any clerical or arithmetical mistakes in judgments and decrees at any time. (Para 3)

Anno: AIR Comm., C. P. C. (9th Edn.), S. 152, N. 7; AIR Comm., Limitation Act (5th Edn.), S. 29, N. 4.

Cases Referred: Chronological Paras

AIR 1978 Delhi 167 : 80 Pun LR (D) 190 : 1978 Tax LR 2000 (FB) 4
AIR 1977 SC 282 4
AIR 1962 Pat 116 3

B. S. Jawande, for Applicants; Puran Chand, for Respondents.

ORDER:— This application has been filed under S. 152 of the Civil P. C. stating that in the decree-sheet dated May 3, 1968, prepared by the Additional District Judge, Patiala, in Cl. 'm' words Killa No. 3 Min 6-4 and Rectangle No. 27 have not been incorporated through oversight. The applicant has, therefore, prayed that the decree-sheet be corrected accordingly so that it agrees with the judgment of the Court. The application has been opposed by the respondents on the ground that it is not within limitation.

2. It is contended by the learned counsel for the petitioners that in Cl. 'm' in the heading of the decree-sheet after the words Mustateel No. 26, the words 'Killa 3 Min. 6-4 and Mustateel No. 27' have not been mentioned through an oversight. He submits that under S. 152 of the Civil P. C., this Court has inherent powers to rectify clerical mistakes at any time. He requests that the mistake be ordered to be rectified. On the other hand, the learned counsel for the respondents, has vehemently argued that Art. 137 of the Limitation Act which prescribes a period of three years, is applicable to the present case. He further submits that as the application for amendment has been filed after three years consequently it is barred by limitation.

3. I have heard the learned counsel for the parties at a considerable length and find force in the contention of the learned counsel for the petitioners. It cannot be disputed that preparation of the decree is the duty of the Court. Section 152 of the Code prescribes that clerical or arithmetical mistakes in judgments, decrees or orders or errors arising therein from any accidental slip or omission may at any time be corrected by the Court either of its own motion or on the application of any of the parties. Words used in this section are 'at any time', which show that the power of the Court to rectify clerical or arithmetical mistakes in the judgments or decree-sheets is not controlled by time factor. No doubt, it is true, that Art. 137 prescribes a period of three years for making application under any enactment but period of limitation prescribed by it will not apply to the applications under Section 152 of the Code. Section 29 (2) of the Limitation Act says that where any special or local law prescribes for any suit, appeal or application a period of limitation different from the period prescribed by the Schedule, the provisions of S. 3 shall apply as if such period were the period prescribed by the Schedule and for the purpose of determining any period of limitation prescribed for any suit, appeal or application by any special or local law, the provisions contained in Ss. 4 to 24 (inclusive) shall apply only in so far as, and to the extent to which, they are not expressly excluded by such special or local law. From the aforesaid section, it is evident that where any special law prescribes limitation that will be deemed to be substituted in the Schedule to the Limitation Act. If S. 152 of the Code is read along with S. 29 (2) of the Limitation Act, it would be clear that the words 'at any time' would be deemed to have been substituted in place of the period prescribed in the Article. Therefore, in my view, an application can be filed for rectifying any clerical or arithmetical mistakes in judgments and decrees at any time. In the aforesaid view, I am fortified by the observations of Shyamal Bihari v. Girish Narain, AIR 1962 Pat 116 wherein it has been observed that S. 152 permits clerical or arithmetical mistakes in judgments, decrees or orders to be corrected at any time. The phrase 'at any time' used in S. 152 indicates that the power of the Court to amend its decree under this section is uncontrolled by any time factor, but only by the scope of the section within which it functions. It is further held that there is no limitation for an application to amend the decree. The decree may be amended under this section at any time although the time for appealing from the decree has expired.

4. Mr. Puran Chand, learned counsel for the respondents, has referred to Kerala State Electricity Board, Trivandrum v. T. P. Kunhalumma, AIR 1977

SC 282 and R. C. Abrol & Co. (Pvt.) Ltd. v. A. R. Chadha & Co., 80 Pun LR (D) 190 : (AIR 1978 Delhi 167) (FB). It may be sufficient to observe that the facts of the aforesaid cases are different and the observations made therein shall not be applicable to the present case.

5. For the aforesaid reasons, I accept the petition and direct that the amendment may be made in the decree-sheet. No order as to costs.

Order accordingly.

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M. R. SHARMA, J.

Nasib Singh, Petitioner v. Om Prakash and another, Respondents.

Civil Revn. No. 1464 of 1975, D/- 23-10-1978.*

East Punjab Urban Rent Restriction Act (3 of 1949), S. 13 (2) (i) — Proviso — Deposit of rent by tenant at the rate claimed by landlord — No bar to dispute quantum of rent — Mention of the words 'under protest' at the time of deposit — Not necessary.

The Rent Control Legislation has been brought on the statute book with the avowed object of ameliorating the lot of tenants by affording them remedies against undue raises in rents demanded by the landlords. Almost all the Rent Control Statutes lay down that the tenants should not be forced to pay anything beyond what is commonly known as the standard rent. Courts of law while interpreting such statutes have to adopt an interpretation which advances their object instead of frustrating it. (Para 5)

The proviso to S. 13 (2) (i) of the Act nowhere mentions that a tenant while making a tender of the rent should do so under protest. All that is required is that the tenant should pay the arrears of rent, interest and costs etc. on the first hearing of the application. This implies that even when there is a genuine dispute about the quantum of rent it is open to the tenant to make tender at the rate claimed by the landlord; but that tender does not debar him from claiming a trial of the issue relating to the quantum of rent. Had it not been so an unscrupulous landlord would claim rent at a rate higher than at which it had been fixed, pocket the same when tendered on the first date of hearing, and then leave the tenant helpless. 1970 Ren CJ 671 (Delhi), Distinguished; (1967) 69 Pun LR 248, Rel. on. (Para 4)

Cases Referred: Chronological Paras

1970 Ren CJ 671 (Delhi) 1, 6
(1967) 69 Pun LR 248 8

Sarwan Singh, for Petitioner; M. K. Mahajan, for Respondents.

ORDER:— The respondent No. 1 filed a petition for the ejectment of the petitioner on the grounds inter alia of non-payment of rent. He claimed that the rent of the premises in dispute had been fixed at Rs. 40/- per month. The petitioner submitted a written statement in which he asserted that the premises in dispute carried a monthly rent of Rs. 22/- per month. However, in order to save his interest, the petitioner tendered rent along with costs and interest etc. at the rate of Rs. 40/- per month. Thereafter the respondent made a petition before the learned Rent Controller, wherein he submitted that the issue regarding the quantum of rent be struck off because he had already received the arrears of rent. The learned Rent Controller acceded to this prayer and struck off the relevant issue. While doing so he purported to rely upon a Single Bench decision of Delhi High Court in case Behari Lal v. Ajudhia Dass, 1970 Ren CJ 671.

2. In this petition it has been argued on behalf of the petitioner that the petitioner had asserted that the rent fixed was at the rate of Rs. 22/- per month and he could not have been forced to pay rent at the rate of Rs. 40/- per month without its being determined at that figure. On behalf of the respondent, it has been argued that since the petitioner did not tender rent at the rate of Rs. 40/- per month under protest, it was not open to him to claim a decision on the issue relating to the quantum of rent.

3. The proviso to S. 13 (2) (i) of the East Punjab Urban Rent Restriction Act reads as under:—

"Provided that if the tenant on the first hearing of the application for ejectment after due service pays or tenders the arrears of rent and interest at six per cent per annum on such arrears together with the cost of application assessed by the Controller, the tenant shall be deemed to have duly paid or tendered the rent

*(To revise order of R. S. Sharma, PCS, Chief Judl. Magistrate, Jullundur, D/- 2-9-1975.

within the time aforesaid."

4. This proviso nowhere mentions that a tenant while making a tender of the rent should do so under protest. All that is required is that the tenant should pay the arrears of rent, interest and costs etc. on the first hearing of the application. This implies that even when there is a genuine dispute about the quantum of rent it is open to the tenant to make tender at the rate claimed by the landlord; but that tender does not debar him from claiming a trial of the issue relating to the quantum of rent. Had it not been so an unscrupulous landlord would claim rent at a rate higher than at which it had been fixed, pocket the same when tendered on the first date of hearing, and then leave the tenant helpless.

5. The Rent Control Legislation has been brought on the statute book with the avowed object of ameliorating the lot of tenants by affording them remedies against undue raises in rents demanded by the landlords. Almost all the Rent Control Statutes lay down that the tenants should not be forced to pay anything beyond what is commonly known as the standard rent. Courts of law while interpreting such statutes have to adopt an interpretation which advances their object instead of frustrating it. Any interpretation of the aforementioned proviso contrary to the one suggested by me would lead to the same result.

6. Behari Lal's case (1970 Ren CJ 671) (Delhi) (supra) relied upon by the learned Appellate Authority does lay down that it is not open to the Rent Controller to hold an enquiry after the rent claimed by the landlord is tendered on the first date of hearing. The learned Judge who decided that case observed as under:—

"In such a situation after the Rent Controller had found as to what the arrears were, has the Rent Controller now to force the landlord to accept the additional amount and has the tenant now to be non-suited on the ground that he has not paid the rent due. Faced with this situation, the learned counsel for the petitioner had to admit that in such a situation the tenant could not be non-suited because he could be only ejected if the amount paid by him turned out to be less than the rent due as demanded by the landlord. He, however, submitted that in the instant case the payment by the tenant was conditional and so it was the duty of the Rent Controller to go into the question as to what amount of rent was due from the tenant, irrespective of the fact that the landlord accepted the payment unconditionally and gave up this ground for ejectment. I asked him that supposing the Rent Controller, on holding an enquiry, came to the conclusion that rent paid by the tenant was not in excess of the amount demanded by the landlord, would the Rent Controller be justified in non-suiting the tenant and ordering his ejectment. I also asked him if the Rent Controller came to the conclusion that, in fact, excess amount has been paid, would he be justified in directing the landlord to pay back the excessive amount. The learned counsel for the landlord-petitioner had to admit that in the former case the Rent Controller could not order the ejectment of the tenant while in the latter case he could order the repayment to the tenant but the case would not be affected. Holding an enquiry in such circumstances would be a sheer waste of time."

7. It appears that in that case ejectment was sought only on the ground of non-payment of rent and the landlord accepted the payment unconditionally and gave up his ground of ejectment. That case is, therefore, clearly distinguishable.

8. In Dial Chand v. Mahant Kapoor Chand, (1967) 69 Pun LR 248, a learned Judge of this Court has laid down that proviso to Cl. (i) sub-sec. (2) of S. 13 of the East Punjab Urban Rent Restriction Act was for the benefit of the tenant, who could adopt any of the three courses namely, (i) he could under protest make tender of the arrears of the rent, (ii) if the rate is subsequently found to be less he can hope for the adjustment of the excess payment, and (iii) he can enter into a dispute with the landlord and insist upon his lower rate of rent and then take the consequences if he has not been able to prove that the rent agreed upon between the parties was at the figure mentioned by him. The learned Judge while deciding this case did not lay down as a matter of law that before the tenant tenders rent at the higher rate he must under all circumstances make a statement that he was making tender of the rent at the higher rate under protest. In any event, whether the rent was being tendered under protest or not can be determined by the

learned Rent Controller by taking into consideration the facts and circumstances of each case and if the tenant claims that the rent had been fixed at lower rate by raising the necessary plea in the written statement it should be presumed that he was making a tender of the rent at the higher rate under protest or only provisionally so that if the decision of the issue regarding the quantum of rent ultimately goes against him he may not be deprived of the benefit of the proviso (i) to sub-sec. (2) to S. 13 of the East Punjab Urban Rent Restriction Act. This precautionary measure adopted by him does not debar him from insisting upon the determinations by the Rent Controller of the rate of rent fixed by the parties by mutual consent.

9. By striking off the issue relating to the quantum of rent which had earlier been framed by the learned Rent Controller he has denied the petitioner of a very valuable right and in so doing he has acted with material irregularity in exercise of his jurisdiction. I, therefore, allow this petition, set aside the impugned order and direct the learned Rent Controller to decide the issue regarding the quantum of rent and then to proceed in accordance with law. The parties through their counsel are directed to appear before the Rent Controller on November 9, 1978.

Revision allowed.

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A. S. BAINS, J.

Gurcharan Singh, Appellant v. Sukhdev Kaur, Respondent.

F. A. F. O. No. 71-M of 1978, D/- 3-10-1978.*

Hindu Marriage Act (25 of 1955), Section 13 (1) (ia) (as added by Marriage Laws Amendment Act (68 of 1976)) — Cruelty — What amounts to.

Where the wife not only left the husband's house but also left at his house a two months old child and went to her parents' place and, when approached, not only refused to return to husband's house to live with him but also refused to keep the child and the child as a result died, the attitude of the wife amounted to cruelty. Consequently, the husband, in the circumstances was entitled to a decree of divorce on ground of cruelty.

(Para 8)

J. R. Mittal, for Appellant.

JUDGMENT :— This appeal is directed against the judgment of the Additional District Judge, Bhatinda, dated 31st Jan., 1978.

2. The facts giving rise to this appeal are as under :—

The appellant filed a petition under S. 13 of the Hindu Marriage Act (hereinafter called the Act) for dissolution of his marriage by a decree of divorce. The marriage between the parties took place 6 years before the filing of the petition. For some time, the parties lived together as husband and wife. Two children were born out of the wedlock, but both of them died. The respondent-wife deserted the petitioner without any reasonable excuse and against his will. It is alleged that the respondent had given birth to a male child 5 months before she deserted and she left 2 months old infant child with his father. The petitioner, along with his brother Hakam Singh and Sher Singh, went to the village of respondent's parents and requested her to return, to which she did not agree and also she did not agree to keep the infant child. As a result, the child died.

3. The respondent was served before the trial Court, but she did not appear. Hence, ex parte proceedings were taken out.

4. The appellant produced two witnesses: Bikram Singh (P. W. 1) and he himself entered the witness box as P. W. 2. He supported his version as given in the application. His statement was corroborated by Bikram Singh. However, the learned District Judge dismissed his petition, on the ground that the allegations made therein do not amount to cruelty. Dissatisfied by the judgment of the learned District Judge, the petitioner-husband has come to this Court.

5. The respondent-wife has not appeared in spite of service.

6. I have heard the learned counsel for the petitioner-appellant and gone through the record of the case with his help.

7. The appellant, as stated earlier, has reiterated the allegations made in his petition. His statement is corroborated by his witness Bikram Singh (P. W. 1). The respondent had not appeared in spite of service either before the trial Court,

*(Against decree of Joginder Singh Sidhu, Addl. Dist. J., Bhatinda, D/- 31-1-1978).

nor has she put in appearance in this Court.

8. The learned Additional District Judge, to my mind, has erred in holding that such a conduct of the respondent-wife does not amount to cruelty to the petitioner-husband. It has come in evidence that the respondent-wife left at the appellant's house a two months old child; that the appellant went to her parents' village and requested her to accompany, but she refused to do so, as also to keep the child. As a result of this, the child died. Death of such an infant child does amount to agony to the father. Nothing is more tragic than the death of a child before the parents. Although the mother is more concerned with an infant child than the father. Generally mothers are more devotional and affectionate towards the infant children and can sacrifice anything for the sake of their children. In the instant case, the attitude of the mother seems to be devoid of all human feeling. Even if it may be assumed that for some reasons, she did not have cordial relations with the appellant, she could have taken a two months old infant child with her. But she chose to leave the infant behind with the appellant. Not only she refused to accompany her husband for living with him as his wife, but she also refused to keep the child. Nothing can be more cruel than this attitude of the wife. The child died when he was only two months old. It does amount to nothing short of cruelty. I have no reason to disbelieve the statement of the appellant-husband and Bikram Singh (PW 1) who knew the parties and who had accompanied the appellant to respondent's parents' house for bringing her back. Cruelty has been added as a ground for divorce only in the amended Act (The Marriage Laws (Amendment) Act, 1976). Cruelty was not a ground for divorce under the old Act, but was a ground for judicial separation. Now the marriage law has been liberalised after the aforesaid amendment. Earlier the grounds for divorce were inter alia: adultery, conversion of religion, unsoundness of mind, venereal disease in a communicable form, renunciation of the world, not being heard of as alive for a period of seven years, non-resumption of cohabitation as between the parties to the marriage for a period of two years or upwards after the passing of a decree for judicial separation in a proceeding to which they were parties; no restitution of conjugal rights as between the parties to the marriage for a period of two years or upwards after the passing of a decree for restitution of conjugal rights in a proceeding to which they were parties. A wife could also present a petition for dissolution of her marriage by the husband and the husband being guilty of rape, sodomy or bestiality. But after the amendment, the law has been liberalised. The intention of the Legislature seems to be that where the parties cannot live together, it is of no use to keep them together if any of the parties to the marriage wants to seek divorce and for that purpose some new grounds have been added. Now the parties can have even a consent decree for divorce which was not available before the aforesaid amendment.

9. For the foregoing reasons, I hold that the respondent's conduct in the present case amounts to cruelty to the appellant. Accordingly, the finding of the trial Court is reversed.

10. Consequently, this appeal is allowed and the judgment of the learned Additional District Judge is set aside and the appellant is granted a decree of divorce on the ground of cruelty. There would be no order as to costs.

Appeal allowed.

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B. S. DHILLON AND
S. S. DEWAN, JJ.

Narain Dass, Petitioner v. Union of India and others, Respondents.

Civil Writ Petns. Nos. 3670, 82 to 84 and 1238 of 1975, D/- 12-10-1978.

(A) Displaced Persons (Compensation and Rehabilitation) Act (44 of 1954), Sections 19 (4), (5), 34 (1) — Evacuee property in possession of unauthorised occupants — Notification by State of Haryana fixing rent and damages of suburban agricultural land at 6 times land revenue — Validity — (Constitution of India, Arts. 14; 19 (1) (f)).

In exercise of the delegated powers under S. 34 (1) of the Act and in pursuance to the guidelines prescribed by the Central Government under sub-sections (4) and (5) of S. 19, the State of Haryana fixed the rent and damages at the rate of 6 times land revenue in res-

pect of the suburban agricultural lands which were evacuee property and were in possession of unauthorised occupants. The assessment of rent and damages at 6 times land revenue by the Managing Officer could not be challenged as ultra vires sub-sections (4) and (5) of Sec. 19. In view of a large number of persons in unauthorised occupation of evacuee property, it could not be insisted that the Managing Officer should in each case assess the actual damage or rent and only then proceed to recover the damages or rent. The guidelines are prescribed by the Central Government in a reasonable manner and have nexus with the objects to be achieved. Therefore, the notification could not be challenged as contravening Art. 14 or 19 (1) (f) of the Constitution. ILR (1967) 1 Punj 678, Foll. (Para 4)

Anno: AIR Comm. Constn. of India (2nd Edn.), Art. 14 N. 42 (O), Art. 19, N. 68; AIR Manual (3rd Edn.), Displaced Persons (C. & R) Act, S. 19 N. 1.

(B) Displaced Persons (Compensation and Rehabilitation) Act (44 of 1954), Section 19 (4) and (5) — Evacuee property in possession of unauthorised occupants — Rent and damages — Assessment — Opportunity of hearing must be given to unauthorised occupants. (Para 5)

Anno: AIR Manual (3rd Edn.), Displaced Persons (C. & R.) Act, S. 19 N. 1.

Cases Referred : Chronological Paras

ILR (1967) 1 Punj 678 4

J. S. Chawla and B. S. Wasu, for Petitioner; Kuldip Singh (for No. 1), S. C. Mohunta, Advocate General (No. 2), (for Nos. 2 to 4), for Respondents.

B. S. DHILLON, J.:— This judgment will dispose of Civil Writ Petitions Nos. 82, 83, 84, 1238 and 3670 of 1975. Since common question of law has been raised in these petitions, therefore they are being disposed of by this common judgment.

2. The petitioner in all the abovementioned writ petitions are in possession of the evacuee property as unauthorised occupants. Under the provisions of sub-sections (4) and (5) of Section 19 of the Displaced Persons (Compensation and Rehabilitation) Act, 1954 (hereinafter referred to as the Act), the Central Government has the power to lay down principles of assessment of rent and damages on which the Managing Officer may assess the rent or damages, as the case may be, in respect of evacuee property in occupation of the persons from whom the said rent or damages, as the case may be, have to be recovered. Sub-section (4) of Sec. 19 of the Act deals with cases where the person concerned is in possession by way of allotment or of lease of the evacuee property to which he is subsequently not found to be entitled; whereas sub-section (5) of this section deals with the cases where the evacuee property is in unauthorised possession of the person concerned. However, before passing an order either under sub-sec. (4) or sub-section (5) of this section, the person against whom the order is to be passed, has to be provided a reasonable opportunity of being heard. This is clear from the proviso to sub-sec. (4) and so also from the proviso to sub-section (5). Under Section 34 of the Act, the Central Government by notification in the official Gazette may direct that any power exercisable by it under this Act shall in such circumstances and under such conditions, if any, as may be specified in the direction, be exercisable also by the State Government or by the persons mentioned under the said section. In exercise of the powers conferred by sub-section (1) of S. 34 of the Act, the Central Government vide notification dated 18th May, 1971 published in the Gazette of India, Part II, Sec. 3 (ii), dated 10th July, 1971, delegated its powers under sub-sections (4) and (5) of S. 19 of the Act, to the State of Haryana, copy of which is Annexure P. 1 with CWP No. 3670 of 1975, for the purpose of specifying the principles of assessment of rent and damages in respect of the occupation partly or entirely without title or authority of agricultural land situated in rural and urban areas in the State of Haryana. The Haryana State Government while exercising the delegated powers of the Central Government referred to above, issued a notification copy of which is Annexure P. 2. with CWP No. 3670 of 1975, thus laying down the principle as follows :—

(i) Rural Evacuee Agricultural Lands: Rent shall be assessed and recovered at 20 times the land revenue subject to a minimum of Rs. 40/- per acre per harvest, whichever is higher.

(ii) Urban Evacuee Agricultural Lands: Rent shall be assessed and recovered at 100 times the land revenue or Rupees 400/- per acre per harvest, whichever is higher.

3. In pursuance of the said notification, the Tehsildar Panipat, acting as Managing Officer, issued demand against the petitioners for various amounts mentioned in the demand notices. The petitioners in these writ petitions, have challenged the notification of the Haryana Government, copy of which is Annexure P.2 with C. W. P. No. 3670 of 1975, and consequential demand notices issued to the petitioners by the Managing Officer. It is contended that the notification of the Haryana Government has not laid down the principle for assessment of the rent/damages as postulated in sub-sections (4) and (5) of the Act and that the rent/damages have been fixed arbitrarily whereby the whole income accruing to the petitioners from the property in dispute has been expropriated. It is claimed that the said notification infringes the fundamental rights of the petitioners as contained in Articles 14 and 19 (1) (f) of the Constitution of India.

4. After hearing the learned counsel for the parties, we do not find any merit in this contention. As is obvious, the evacuee land measuring in thousands of acres came to be occupied either unauthorisedly or the original occupation was legal in pursuance of the allotment or lease but subsequently the person concerned having not been found entitled to so much of allotment or lease, continued to occupy the same without any right, therefore, it was with a view to tackle such an enormous problem that the Legislature in its wisdom enacted the provisions of sub-sections (4) and (5) of Section 19 of the Act, assessment of rent or damages, as the case may be, so as to provide guidelines to the Managing Officer to assess the rent/damages, as the case may be. It is not disputed that the Central Government has validly delegated its authority to the State Government of Haryana under Sec. 34 of the Act. It may be observed that the Central Government had also prescribed similar guidelines under sub-secs. (4) and (5) of Section 19 of the Act directing to recover six times of the land revenue per acre regarding the lands falling under the category of suburban lands. The income from the agricultural produce having risen enormously in view of the continued process of devaluation of Rupee, the State of Haryana taking into consideration a unit per acre and on the basis of the assessed land revenue, prescribed the above-mentioned principles for the guidelines of the Managing officer. It cannot be successfully contended that the Managing Officer should in each case assess the actual damages or rent and only then he is to proceed to recover the said assessed rent or damages, as the case may be, as such a course would not be practicable because of enormous work involved in the process as it affects a large number of persons. The Legislature in its wisdom authorised the Central Government to lay down certain principles and in our considered opinion the said principles have been laid down by the Government in a reasonable manner with a view to achieve the object of the enactment and thus the principles have nexus with the objects to be achieved. A Division Bench of this court in Civil Writ No. 508 of 1963 (Som Parkash v. The Union of India), decided on 18-7-1966* upheld the earlier notification of the Government whereby the demand of rent was fixed six times the land revenue. It was held that the principles of assessment based on land revenue determined by the State cannot be held to be either arbitrary or whimsical or irrational. It would thus be seen that the said notification neither contravenes Art. 14 nor Art. 19 (1) (f) of the Constitution and, therefore, the argument of the learned counsel for the petitioners in this regard fails.

5. As regards the challenge to the demand notice, the contention of the learned counsel for the petitioners appears to be well-founded. The proviso to sub-sections (4) and (5) of Sec. 19 of the Act, clearly lays down that before passing an order under the said provisions, the Managing officer is enjoined upon to give the person concerned a reasonable opportunity of being heard. The learned Advocate General appearing on behalf of the respondents has made a statement before us during the course of arguments that the impugned demands be quashed and that the Managing officer will pass a fresh order after giving the petitioners an opportunity of being heard. We order accordingly and direct the petitioners through their counsel to appear before the Tehsildar-cum-Managing Officer, Panipat, on 20th November, 1978 at 10 A.M. in his office to plead their side of the case, if

*Reported in ILR (1967) 1 Punj 678.

they so desire, and the Managing Officer shall then pass a fresh order in accordance with law. If the petitioners fail to appear before the Managing Officer as directed above, it will not be necessary for the Managing Officer to issue fresh notices to the petitioners as the petitioners' counsel have undertaken that the petitioners will appear before him on 20th November, 1978, at 10.00 A. M. in his office.

6. For the reasons recorded above, writ petitions Nos. 82, 83, 84, 1238 and 3670 of 1975, are disposed of as observed above.

S. S. DEWAN, J.:— I agree.

Order accordingly.

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D. S. TEWATIA AND KULWANT SINGH TIWANA, JJ.

Darshan Lal, Petitioner v. State of Punjab, Respondent.

Civil Writ Petns. Nos. 1462, 1507, 1518 of 1976 and Criminal Misc. No. 2977 of 1977, D/- 7-11-1978.

(A) Constitution of India, Arts. 254, 366 (10) and 372 — Interpretation of Art. 372 — Punjab Excise Act and Rules giving effect to it are existing law within Art. 366 (10) and their continuance is saved from attack under Art. 254 by virtue of Art. 372.

The Punjab Excise Act and the various Rules giving effect to the provisions of the said Act fall within the category of the existing law, as defined by Cl. (10) of Art. 366 of the Constitution and their continued application, are saved by Article 372 of the Constitution of India till such time these are altered, repealed or amended by a competent legislature or other competent authority. AIR 1966 Punj 4 (FB), Rel. on. (Para 22)

The reason is that the expression 'other' in Art. 372 of the Constitution refers to the Articles other than Arts. 245 and 246 of the Constitution as interpreted by the Supreme Court in AIR 1964 SC 207. Therefore the attack on the provisions of the Punjab Excise Act, Punjab Intoxicating Spirituous Preparations, Import, Transport, Possession and Sale Rules, 1952 and the Punjab Excise and Fiscal Order, as being repugnant to the Drugs Act and the Medicinal and Toilet Preparations Act based on Articles 245 and 246 would fail. AIR 1964 SC 207 and AIR 1961 SC 272, Rel. on. (Paras 23, 24)

Anno: AIR Comm. Const. of India (2nd Edn.), Art. 254 N. 11; Art. 366 (10) N. 1 and Art. 372 N. 4.

(B) Punjab Excise Act (1 of 1914), Section 3 (14), (6) (12B) — Notification under S. 3 (14) No. S. O. 2/P. A. I/14/3/76 D/- 6-2-1976 — Punjab Intoxicating Spirituous Preparations, Import, Export, Transport, Possession and Sale Rules, (1952) — Punjab Excise and Fiscal Order — Legislative competence of State Legislature — Provisions in so far as they deal with Medicinal and Toilet preparations are not ultra vires. (Constitution of India, Arts. 47, 246 and Sch. 7 List II Entry 6).

The amplitude of the definition of the expression 'liquor' occurring in S. 3 (14) of the Excise Act, is wide enough, to cover all liquids and substances containing alcohol and, therefore, it cannot be said that the moment any liquid or substance containing alcohol is labelled to be a medicinal or a toilet preparation it would go out of the purview of the definition of the word 'liquor' and thus from the purview of the Excise Act.

While the 'drugs', which include medicinal preparations under the Government of India Act of 1935, was decidedly an exclusively State subject, as would be clear from Entry No. 31, the 'cosmetics' neither found any mention in any of the Lists in the Seventh Sch. to the Government of India Act, 1935 nor in any List of the Senventh Sch. of the Constitution of India. But the subject of 'public health', however, earlier in 1935 Act under Entry No. 14 (Provincial List II) and now under Entry No. 6 (State List II) under the Constitution of India continued to be exclusively a State subject. Both medicinal and toilet preparations have, something to do with the "health" and, therefore, the State legislature, more particularly, by virtue of Art. 47 of the Constitution of India, will be well within its right to enact legislation to regulate the use of medicinal and toilet preparations in a manner so that these do not affect the health of the citizens. The impugned notification, with the aid of 1952 Rules, is a measure of the aforesaid kind. AIR 1951 SC 318, Rel. on. (Para 19)

Anno: AIR Comm. Const. of India, (2nd Edn.), Art. 47 N. 1, Art. 246 N. 50 and Sch. 7 List II Entry 6 N. 2.

(C) Constitution of India, Arts. 13, 14 — Definition of liquor in S. 3 (14), Punjab Excise Act is neither ultra vires nor arbitrary. (Punjab Excise Act (1 of 1914) S. 3 (14)).

Article 13 of the Constitution provides that 'all laws in force in the territory of India immediately before the commencement of this Constitution, in so far as they are inconsistent with the provisions of this part (Fundamental Rights — Part III), shall, to the extent of such inconsistency, be void.' A finding that a given provision is not ultra vires the provisions of Art. 13 of the Constitution would amount to saying that the said provision of a statute is not ultra vires the provisions of Art. 14 etc. of Part III of the Constitution dealing with the Fundamental Rights of the citizens. AIR 1953 Punj 77 Foll. (Para 27)

The provisions of S. 3 (14) of the Punjab Excise Act cannot be said to suffer from any arbitrariness merely because the last part of the definition would enable the State Government to declare any substance as liquor. The last part has to be read in the context of the words preceding the same in the definition which are "liquor" means intoxicating liquor and includes Lahen and all liquid consisting of or containing alcohol and, therefore, the fears expressed by the petitioners of even a non alcoholic substance being declared as 'liquor' are purely imaginary. (Para 29)

Anno: AIR Comm. Const. of India 2nd Edn., Art. 13 N. 4; Art. 14 N. 32.

(D) Constitution of India, Arts. 301, 303 and 305 and 47 — Punjab Excise Act (1 of 1914), S. 9 (14) — Notification under D/- 6-2-1976 — Not violative of Arts. 301 and 303 as it is saved by Article 305.

The Punjab Excise Act being an existing law the impugned notification D/-6-2-1976 under S. 3 (14) thereof declaring all spirituous preparations containing more than 20 per cent proof strength of alcohol as liquor for purposes of Act is saved by Art. 305 of the Constitution from attack under Arts. 301 and 303 thereof. AIR 1966 Punj 4 (FB), Foll. (Paras 35, 36)

The action of the State Government in issuing the impugned notification was moreover dictated by its concern for the health of the citizens as directed by Art. 47 of the Constitution, because the unscrupulous druggists and chemists resorted to the misuse of so-called medicinal preparations containing alcohol to the detriment of the health of the citizens. The diversion of these preparations to illicit channel created an abnormal state of affairs and as notification No. S05/PAI 14/S.3/72, dated 12-3-1972 issued by the State Government exempting 53 medicinal and toilet preparations from the operation of the 1952 Rules was found inadequate to deal with the abuse which was assuming dangerous proportions, so as a last resort the impugned notification had to be promulgated. (Para 37)

Anno: AIR Comm. Const. of India (2nd Edn.), Art. 305 Notes 2, 3, Art. 47 N. 1; Art. 301 N. 5 Art. 303 N. 2.

Cases Referred: Chronological Paras

AIR 1966 SC 713 15
AIR 1966 Punj 4 (FB) 22, 27, 34, 35
AIR 1964 SC 207 23
AIR 1961 SC 272 24
AIR 1953 Punj 77 : 1953 Cri LJ 549 27, 30, 33
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1937 Lah LT 148 13

M. S. Jain, for Petitioner; S. K. Sayal, Asstt. Advocate General, Punjab, for Respondent.

D. S. TEWATIA, J.:— In these three writ petitions, namely, Civil Writs Nos. 1462, 1507 and 1518 of 1976, as also in Criminal Miscellaneous No. 2977 of 1977, common questions of law and facts, excepting the names of the parties and the places where they carry on their business, are involved and, therefore, we propose a common judgment for them. For the purpose of reference the facts and assertions stated in Civil Writ No. 1462 of 1976 and the respondent's return thereto shall be taken notice of wherever found necessary.

2. The petitioners are engaged in the business of selling drugs (medicinal preparations) and cosmetics (toilet preparations), alcoholic and non-alcoholic, in the State of Punjab under licences issued under the provisions of the Drugs and Cosmetics Act No. 23 of 1940, and the rules framed thereunder, as amended from time to time, (hereinafter called the 'Drugs Act').

3. The petitioners, besides impugning Notification No. S. O. 2/P. A.I/14/S.3/76,

dated 6-2-1976, Annexure P. 9 to the writ petition, issued in pursuance of the provisions of sub-sec. (14) of Sec. 3 of the Punjab Excise Act, 1914 (Punjab Act 1 of 1914), hereinafter referred to as the Excise Act, and all other powers thereunder whereby the Governor of Punjab declared all the medicinal and toilet preparations containing 20 per cent or more proof strength of alcohol as liquor except 19 items of medicinal and toilet preparations mentioned in the impugned notification, have also sought to have the provisions of S. 3 (14) of the Excise Act, the provisions of the Punjab Intoxicating Spirituous Preparations Import, Export, Transport, Possession and Sale Rules, 1952 and the provisions of Punjab Excise and Fiscal Order, 1932 (hereinafter referred to as the 1932 Fiscal Order) declared as invalid and ultra vires of Arts. 14, 19, 246, 252 and 254 of the Constitution of India insofar as the same concerned the manufacture, distribution, control, possession, import, export, transport and sale of the drugs (medicinal preparations) and cosmetics (toilet preparations). They have also sought a mandamus against the respondent not to declare the said drugs and toilet preparations under S. 3 (14) of the Excise Act as liquor.

4. According to the petitioners, the effect of the issuance of the impugned notification dated 6-2-1976 would be that all medicinal and toilet preparations containing 20 per cent or more proof strength of alcohol, except the items mentioned in the said notification, would be regarded as liquor and would be sold only by such dealers who would obtain licence under the Punjab Intoxicating Spirituous Preparations Import, Export, Transport, Possession and Sale Rules, 1952 (hereinafter referred to as the 1952 Rules), and such dealers would sell the medicinal and toilet preparations either to the other licencees or to a registered medical practitioner or a recognised dispensary or hospital only; that a dealer would not sell these preparations to any ordinary citizen for his use unless a registered medical practitioner had prescribed the use of such medicinal and toilet preparations that even when so prescribed the maximum quantity, which could be sold, would not exceed 30 millilitres at any one time — the petitioners' lament is that if a citizen wanted to get a toilet preparation such as Dettoline, After-shave Lotion, Eau-de-cologne, Listerin, Toilet Water, Hair Lacquer and Mist, Perfumes spray etc. and other medicinal preparations of ordiary use, which are generally used by a citizen and kept at home for use in case of accident and emergent treatment, he would not be able to do so without being put to lot of inconvenience, which the securing of the prescription and the limited quantity that could be obtained thereon would entail as result of the impugned notification; and that the impugned notification, which attracted the application of the 1952 Rules to such medicinal and toilet preparations as contained 20 per cent or more proof strength of alcohol, imposed an unreasonable restriction on the rights of the petitioners under Article 19 (1) (g) of the Constitution of India.

5. In the affidavit in reply of Shri S. R. Sharma, Assistant Excise and Taxation Commissioner, the stand taken is that neither the impugned provisions of the Excise Act, nor of the 1952 Rules are invalid or ultra vires of any of the provisions of the Constitution nor the impugned notification and the provisions, which are attracted as a result of the said notification to the medicinal and toilet preparations containing 20 per cent or more proof strength of alcohol impose any unreasonable restriction on the fundamental rights of the petitioners under Art. 19 (1) (g) of the Constitution of India.

6. As would be clear from the prayer clause in the writ petition and the law points canvassed in para. 21 (a) of the petition, the attack against the impugned notification, the relevant provisions of the Excise Act, of the 1952 Rules, and the 1932 Fiscal Order, falls under three heads:

(1) that to the extent the impugned notification, the provisions of the Excise Act, the provisions of the 1952 Rules, and the provisions of the 1932 Fiscal Order dealing with the manufacture, distribution, control, possession, import, export, transport and sale of the medicinal and toilet preparations containing 20 per cent or more proof strength of alcohol, are invalid, as the same are beyond the legislative competence of the State legislature, as the subject of drugs (medicinal preparations) and cosmetics (toilet preparations and the levy of duty thereon) exclusively fall within the legis-

lative jurisdiction of the Union Parliament;

(2) that the provisions of S. 3 (14) of the Excise Act confers an unguided, arbitrary and unregulated power to declare any substance to be 'liquor' even if the same did not contain alcohol and thus the said provision is ultra vires the provisions of Art. 14 of the Constitution; and

(3) that the said impugned notification and the provisions of the 1952 Rules impose unreasonable restriction under Article 19 (1) (f) and (g) of the Constitution and are ultra-vires the said provision and thus invalid.

7. Let us first examine the validity of the relevant provisions of the Act, the 1952 Rules, the 1932 Fiscal Order, and the impugned notification from the standpoint of the legislative competency of the State legislature and the State Government, for an agreement with the contention of the learned counsel for the petitioners on this point would render further consideration of the matter on other grounds unnecessary.

To appreciate the point, a little history of the constitutional development and the enactment of the various statutes having a bearing on the articles brought within the purview of the expression 'liquor' is clearly called for.

8. Regarding the legislative sphere the position under the Government of India Act, 1935 (Seventh Schedule) was that the intoxicating liquor, opium and other narcotic drugs were included in the Provincial List, vide item No. 31 which reads—

"LIST II— Provincial Legislative List.

* * * * *

31. Intoxicating liquors and narcotic drugs, that is to say, the production, manufacture possession, transport, purchase and sale of intoxicating liquors, opium and other narcotic drugs, but subject as respects opium to the provisions of List I and, as respects poisons and dangerous drugs, to the provisions of List III."

Opium was included in List I — Federal Legislative List — vide item No. 31, which is as under:

" LIST I— Federal Legislative List.

* * * * *

31. Opium, so far as regards cultivation and manufacture, or sale for export."

Poisons and dangerous drugs were included in the Concurrent List — Concurrent Legislative List — vide item No. 19 on List III, which reads—

"LIST III — Concurrent Legislative List.

* * * * *

19. Poisons and dangerous drugs."

The subject of levying duty of excise on medicinal and toilet preparations containing alcohol manufactured in the province was included in the Provincial Legislative List. vide item No. 40 of List II, which reads—

" LIST II — Provincial Legislative List.

* * * * *

40. Duties of excise on the following goods manufactured or produced in the province and countervailing duties at the same or lower rates on similar goods manufactured or produced elsewhere in India—

(a) alcoholic liquors for human consumption;

(b) opium, Indian hemp and other narcotic drugs and narcotics; non-narcotic drugs;

(c) medicinal and toilet preparations containing alcohol or any substance included in sub-para. (b) of this entry."

9. On the promulgation of the Constitution of India, the subject of 'narcotic drugs' was taken out of the Provincial List II and all kinds of drugs were put in the Concurrent List III, vide entry No. 19 of Concurrent List III of the Seventh Sch. to the Constitution of India which entry is in the following terms—

"19. Drugs and poisons, subject to the provisions of entry 59 of List I with respect to opium."

The subject of levying duty of excise on medicinal and toilet preparations is included in the Union List I of the Seventh Schedule to the Constitution of India, vide entry No. 84 which is in the following terms—

"84. Duties of excise on tobacco and other goods manufactured or produced in India except—

(a) alcoholic liquors for human consumption;

(b) opium, Indian hemp and other narcotic drugs and narcotics, but including medicinal and toilet preparations containing alcohol or any substance included in sub-para. (b) of this entry."

10. The result has been that the contents of entry No. 31 of List II — Provincial List — in Government of India Act, 1935, have shrinked to the one mentioned against entry No. 8 on List II — State List — in the Seventh Sch. to the Constitution of India, which reads—

"8. Intoxicating liquors, that is to say, the production, manufacture, possession, transport, purchase and sale of intoxicating liquors."

Entry No. 59 in Union List I in the Constitution (Seventh Schedule) is equivalent to Entry No. 31 in the Federal List I of the Government of India Act, 1935, and it reads—

"31. Opium, so far as regards cultivation, and manufacture or sale for export."

The contents of Entry No. 40 pertaining to the levy of excise duty in the Provincial List II in the Government of India Act, 1935, have undergone a change, as would be clear from the corresponding Entry No. 51 in the State List II of the Constitution of India (Seventh Sch.) which is in the following terms—

"51. Duties of excise on the following goods manufactured or produced in the State and countervailing duties at the same or lower rates on similar goods manufactured or produced elsewhere in India:

(a) alcoholic liquors for human consumption;

(b) opium, Indian hemp and other narcotic drugs and narcotics; but not including medicinal and toilet preparations containing alcohol or any substance included in sub-para. (b) of this entry."

11. As a result of this change, the power of the State legislature to provide for levy of excise duties on medicinal and toilet preparations containing alcohol or any substance included in sub-para. (b) of Entry No. 51 in the State List II of the Constitution of India (Seventh Sch.) had been excluded.

12. The Government of India appointed an Excise Committee which made its recommendations regarding the excise matters. The Government of India accepted the conclusions of the Excise Committee as to the necessity for a new enactment and approved the lines on which the new excise Acts were to be framed. However, it decided that instead of an Act of general application being passed, each Province should enact for itself a separate Act. It was, in these circumstances, that the Punjab Excise Act, 1914, was enacted. Initially, it referred to excisable articles, whose possession, manufacture, sale, import, export and transport was regulated by the provisions made in the Act. 'Excisable articles' were initially defined in S. 3 (6) as meaning 'any liquor or intoxicating drug as defined by or under this Act.' The expression 'liquor' was defined in S. 3 (14) and the expression 'intoxicating drug' was defined in S. 3 (13). The definition of the expression 'intoxicating drug' was substituted by Government of India Act (Act II of 1935) and the present definition continues to be the same.

Since it was for the first time under Government of India Act, 1935, that vide Entry No. 40 of List II the State legislature could legislate regarding imposition of the excise duty on medicinal and toilet preparations containing alcohol, so instead of framing a separate legislation in that regard, the needful was done by incorporating necessary amendments in the Excise Act by Government of India (Adaptation of Laws) Order, 1937, issued on 18-3-1937 under S. 293 of 1935 Act empowered His Majesty's Government to provide for the adaptation of any law in force in British India or any part of British India till they were repealed or amended by the competent legislature.

13. The amendments to the Excise Act mentioned in Sch. 'VI' of the said Order were adopted with such modifications as mentioned in the said Schedule. The Punjab Excise Act was referred to at p. 148 of 1937 Lah. L. T. The Act had referred to the 'excisable articles' in all the provisions of the Act. It was provided in the said Order that reference to 'excisable articles' will be substituted with the expression 'intoxicants' in all the sections of the Act except in Ss. 31 and 32 (referring to levy of duty and fees on excisable articles). The definition of 'excisable articles' was changed in sub-sec. (6) of S. 3 of the Act as a result to read as under:

"3. (6) 'excisable article' means—

(a) any alcoholic liquor for human consumption; or

(b) any intoxicating drug."

A new sub-sec. (12-a) of S. 3 of the Excise Act was added to define "intoxicant" as under—

"3. (12-a) 'intoxicant' means any liquor or intoxicating drug."

14. In view of the change brought about by the contents of Entry No. 84 in the Union List and Entry No. 51 of the State List, maintains the learned counsel, a change became necessary in the definition of 'excisable articles" occurring in sub-sec. (6) of S. 3 of the Excise Act which was brought about by the Government of India (Adaptation of Laws) Order, 1950, whereby sub-cl. (c) of sub-sec. (6) of Sec. 3 of the Excise Act was deleted. However, excise duty on medicinal and toilet preparations containing alcohol continued to be levied under the Excise Act in view of the provisions of Art. 372 of the Constitution till the Union Parliament translated its powers under Entry No. 84 of the Union List by enacting the Medicinal and Toilet Preparations (Excise Duties) Act No. 16 of 1955, which came into force on 1-4-1957. S. 21 thereof provided that—

"21. If, immediately before the commencement of the Act there is in force in any State any law corresponding to this Act, that law is hereby repealed;

* * * * *"

15. Section 103 of the Government of India Act, 1935, empowered the Federal legislature to pass an Act on a subject falling within the Provincial List for two or more than two Provinces if the legislatures of those States passed resolutions empowering the Federal legislature to pass the same. The Provincial legislatures passed resolutions and the Federal legislature acting thereon enacted the Drugs Act of 1940 with a view to regulate the import, manufacture and sale of drugs. The Act was amended in 1962 with a view to bring in the subject of 'cosmetics' under the purview of the Act and the Act was then renamed as the Drugs and Cosmetics Act, 1940. The Act was further amended to regulate the manufacture and sale of Ayurvedic (including Siddha) and Unani drugs and it is this Act, as held in the Indian Chemical and Pharmaceutical Works, Hyderabad v. State of Andhra Pradash, AIR 1966 SC 713, which is mainly concerned with the manufacture of standard and quality drugs.

16. The learned counsel for the petitioners has advanced two contentions in the context of the changes in the contents of entries in the Seventh Sch. in the Government of India Act specifying the subjects which fell within the legislative sphere of the Provincial legislature the Federal legislature and the common sphere of both brought about after the promulgation of the Constitution of India and the changes made in the definition of 'excisable articles' occurring in sub-sec. (6) of S. 3 of the Act by the Government of India (Adaptation of Laws) Orders 1937 and 1950.

17. The first contention is that medicinal and Toilet Preparations containing alcohol formed never a part of either the expression 'intoxicant' or the expression 'liquor' as defined in sub-s. (14) of S. 3 of the Act, for medicinal and toilet preparations containing alcohol were included in the definition of 'excisable articles' only for the purpose of levy of excise duty, because it was for the first time in the Government of India Act of 1935 that the subject of levy of excise duty on medicinal and toilet preparations was included within the legislative sphere of the Provincial legislature by way of Entry No. 40 in List II. Seventh Schedule to the Government of India Act, 1935. It was open to the Provincial legislature to enact separate law dealing with the excise duty on medicinal and toilet preparations. Instead of doing so, it chose to so amend the provisions of the Excise Act as to levy excise duty on medicinal and toilet preparations by the very Act thus obviating a separate legislation for the said purpose, which purpose was achieved by substituting the expression 'excisable articles' by the expression 'intoxicants' in all the provisions of the Act excepting those in S. 3 which defines various expressions and Ss. 31 and 32 which deal expressly with the levy of excise duty.

18. Since after the promulgation of the Constitution of India, the subject pertaining to the levy of excise duty on medicinal and toilet preparations containing alcohol was included in the Union List, vide Entry No. 84, so it became necessary to bring the Punjab Ex-

cise Act in accord with the constitutional provisions. This was achieved again with a simple device of omitting Cl. (c) of sub-sec. (6) of S. 3 from the definition of 'excisable articles'.

19. The amplitude of the definition of the expression 'liquor' occurring in Section 3 (14) of the Excise Act, as already observed, is wide enough, as was found by their Lordships of the Supreme Court in the State of Bombay v. F. N. Balsara, AIR 1951 SC 318, to cover all liquids and substances containing alcohol and, therefore, it cannot be said that the moment any liquid or substance containing alcohol is labelled to be a medicinal or a toilet preparation it would go out of the purview of the definition of the word 'liquor' and thus from the purview of the Excise Act.

While the 'drugs', which include medicinal preparations under the Government of India Act of 1935, was decidedly an exclusively State subject, as would be clear from Entry No. 31, the 'cosmetics' neither found any mention in any of the Lists in the Seventh Schedule to tre Government of India Act, 1935 nor in any List of the Seventh Schedule to the Government of India. But it may be noticed that the subject of 'public health', however, earlier in 1935 Act under Entry No. 14 (Provincial List II) and now under Entry No. 6 (State List II) under the Constitution of India continued to be exclusively a State subject. Both medicinal and toilet preparations have, in our view, something to do with the 'health' and, therefore, the State legislature, more particularly, by virtue of Art. 47 of the Constitution of India, will be well within its right to enact legislation to regulate the use of medicinal and toilet preparations in a manner so that these do not affect the health of the citizens. The impugned notification, with the aid of 1952 Rules, is a measure of the aforesaid kind.

20. The second contention advanced on behalf of the petitioners is that the provisions of the Excise Act, the 1952 Rules and the 1932 Fiscal Rules to the extent that these by virtue of the impugned notification, deal with the manufacture, distribution, control, possession, import, export, transport and sale of the drugs (medicinal, toilet and cosmetic preparations) and the levy of excise duty thereon went beyond the legislative competence of the State legislature inasmuch as that the subject of 'poisons and dangerous drugs' appeared in the Concurrent List by virtue of Entry No. 19 and the subject of 'duty of excise.....' (on medicinal and toilet preparations) fell exclusively within the Union List, vide Entry No. 84.

21. In substance the argument is that by virtue of the provisions of Articles 245 and 246 of the Constitution of India, which demarcated the legislative sphere of the State legislature and the Union Parliament and Art. 254 of the Constitution of India, which rendered void any provisions of a State Act to the extent it came in conflict with the Act of the Union Parliament dealing with a subject on the Concurrent List, the provisions of the Excise Act and the 1952 Rules and the 1932 Fiscal Rules are said to be coming in conflict with the Drugs Act and the Medicinal and Toilet Preparations (Excise Duties) Act, 1955, in so far as a result of the impugned notification the State Government would be able to levy excise duty and be able to regulate the distribution etc. of such of the medicinal and toilet preparations as contained 20 per cent or more proof strength of alcohol.

22. The Punjab Excise Act and the various Rules giving effect to the provisions of the said Act fall within the category of the existing law, as defined by Cl. (10) of Art. 366 of the Constitution, and as had been held in Pritipal Singh Rattan Singh v. Chief Commr. of Delhi, AIR 1966 Punj 4 (FB), and their continued application, are saved by Art. 372 of the Constitution of India till such time these are altered, repealed or amended by a competent legislature or other competent authority.

23. The attack on the provisions of the said Act, which fall within the category of the 'existing law' i. e. law in force before the commencement of the Constitution of India, on the strength of Arts. 245 and 246 of the Constitution of India, was repelled by their Lordships of the Supreme Court as far back as in 1964 (see in this connection South India Corporation (Pvt.) Ltd. v. Secretary, Board of Revenue, Trivandrum, AIR 1964 SC 207). When their Lordships while interpreting the scope of Art. 372 of the Constitution of India held that the expression 'other' occurring in the said article referred to the Articles other

than Arts. 245 and 246 of the Constitution of India, as would be clear from the following observations (at p. 213):

"The object of this article is to maintain the continuity of the pre-existing laws after the Constitution came into force till they were repealed, altered or amended by a competent authority. Without the aid of such an article there would be utter confusion in the field of law. The assumption underlying the article is that the State laws may or may not be within the legislative competence of the appropriate authority under the Constitution. The article would become ineffective and purposeless if it was held that pre-Constitution laws should be such as could be made by the appropriate authority under the Constitution. The words 'subject to the other provisions of the Constitution' should, therefore, be given a reasonable interpretation, an interpretation which would carry out the intention of the makers of the Constitution and also which is in accord with the constitutional practice in such matter. The article posits the continuation of the pre-existing laws made by a competent authority notwithstanding the repeal of Article 395; and the expression 'other' in the article can only apply to provisions other than those dealing with legislative competence."

24. As to whether the expression 'other' occurring in Art. 372 of the Constitution of India refers to Art. 254 thereof, the doubts in this regard were dispelled by their Lordships of the Supreme Court much earlier in B. V. Patankar v. C. G. Sastry, AIR 1961 SC 272, when dealing with the validity of the Mysore House Rent Control Order of 1948 on the ground of repugnancy with the provisions of the T. P. Act, as would be clear from the following (at p. 274):

"The argument, therefore, that as from April 1, 1951, as a result of repugnancy the House Rent Control Order of 1948 stood repealed must be repelled as unsound and cannot be sustained, because it was an existing law which was saved by Art. 372 of the Constitution and remained unaffected by Art. 254....."

25. The only point now in the above context that survives for consideration is the constitutional validity of the provisions of the Excise Act, the 1952 Rules and the 1932 Fiscal Rules insofar as the same authorised the levy of excise duty on such medicinal and toilet preparations as contained 20 per cent or more proof strength of alcohol in view of Section 21 of the Medicinal and Toilet Preparations (Excise Duties) Act, 1955, which repealed the corresponding provisions in the State Act. It was argued that since the competent legislature or authority had repealed the corresponding provisions envisaging levy of excise duty in the aforesaid State Act and the rules made thereunder, so the same could no longer be regarded as 'existing law' and thus being saved under Art. 372 of the Constitution of India insofar as the levy of excise duty on the notified medicinal and toilet preparations is concerned.

26. In para 20 (a) to (c) of the return filed by the respondent, reference is made to Order 8 of the Punjab Excise Fiscal Order, 1932, which expressly provides that medicinal and other preparations containing rectified spirit would be exempt from the provisions of the Punjab Excise Act insofar as the levy of excise duty thereon is concerned. Although it is further expressly mentioned that if a spirituous preparation was declared to be liquor under Sec. 3 (14) of the Excise Act, the said exemption would not be applied. In the return, it is further made clear that the respondent would not levy any duty on medicinal and other preparations falling within the ambit and scope of the Medicinal and Toilet Preparations (Excise Duties) Act, 1955, and the rules made thereunder.

27. It may be stated here that in certain respects the matter before us is not res integra. This Court has dealt with the matter at two earlier occasions — Once in the case of Dr. Bishambar Nath v. State of Punjab, AIR 1953 Punj 77; and again in the case of Pritipal Singh Rattan Singh (AIR 1966 Punj 4) (supra), Full Bench. In Dr. Bishamber Nath's case, out of the three propositions that were formulated, one was whether the definition of 'liquor' in the Excise Act of 1914 was ultra vires the Constitution. Following the Supreme Court in F. N. Balsara's case (AIR 1951 SC 318) (supra), in which their Lordships had to consider an identical attack on the definition of the word 'liquor' as given in S. 2 (24) of the Bombay Pro-

hibition Act, 1949, which was identical with the definition as given in S. 3 (14) of the Excise Act and, in fact, had taken into account the definition as given in the Excise Act and held that the said provisions of the Bombay Act did not contravene Art. 13 of the Constitution, this Court also held in Dr. Bishambar Nath's case (supra) that the provisions of S. 3 (14) of the Excise Act did not contravene the provisions of Art. 13 of the Constitution. Art. 13 of the Constitution provides that 'all laws in force in the territory of India immediately before the commencement of this Constitution, in so far as they are inconsistent with the provisions of this Part (Fundamental Rights — Part III), shall, to the extent of such inconsistency, be void'. A finding that a given provision is not ultra vires the provisions of Article 13 of the Constitution would amount to saying that the said provision of a statute is not ultra vires the provisions of Art. 14 etc. of Part III of the Constitution dealing with the Fundamental Rights of the citizens. With respect, we find ourselves in entire agreement with the view taken by the Division Bench of this Court in Dr. Bishambar Nath's case (supra) in this regard.

28. The learned counsel for the petitioners, however, pointed out that the words occurring at the fag-end of the definition of 'liquor' given in Sec. 3 (14) of the Excise Act "also any substance which the State Government may by notification declare, to be liquor for the purposes of this Act" do not occur in the definition of 'liquor' as given in Section 2 (24) of the Bombay Prohibition Act, 1949, and by virtue of the definition of 'liquor' as given in Sec. 3 (14) of the Excise Act, it would be open to the State Government to declare as 'liquor' even a substance which does not include alcohol.

29. We do not think the provisions of S. 3 (14) of the Excise Act suffer from such arbitrariness. The objectionable expression, to which reference has been made by the learned counsel, has to be read in the context of the words preceding the same in the definition which are "'liquor' means intoxicating liquor and includes Lahen and all liquid consisting of or containing alcohol" and, therefore, the fears expressed by the petitioners of even a non-alcoholic substance being declared as 'liquor' are purely imaginary.

30. This Court in Dr. Bishambar Nath's case (AIR 1953 Punj 77) (supra) had also specifically examined the validity of the contention that the restriction imposed by the 1952 Rules regarding the sale of the articles declared to be 'liquor' was contrary to the provisions of Art. 19 (1) (f) of the Constitution of India. Before the Division Bench, the petitioners in that case, in support of their contention, placed reliance on the Supreme Court decision in F. N. Balsara's case (AIR 1951 SC 318) (supra), in which provisions of Ss. 12 and 13 of the Bombay Prohibition Act, 1949, were struck down as imposing unreasonable restriction on the fundamental rights of the citizens under Art. 19 (1) (f) of the Constitution. The Division Bench after comparing the provisions of Ss. 12 and 13 of the Bombay Prohibition Act with the provisions of S. 24 of the Excise Act, which deal with the possession of intoxicants, and S. 26, which deal with the sale thereof, held that there was wide difference between the provisions of Ss. 12 and 13 of the Bombay Act and and the provisions of Ss. 24 and 26 of the Punjab Act.

31. Sections 12 and 13 of the Bombay Prohibition Act, 1949, are as follows:

"12. No person shall—

(a) manufacture liquor;

(b) construct or work any distillery or brewery;

(c) import, export, transport or possess liquor; or

(d) sell or buy liquor."

"13. No person shall—

(a) bottle any liquor for sale;

(b) consume or use liquor; or

(c) use, keep or have in his possession any materials, still, utensils, implements or apparatus whatsoever for the manufacture of any liquor."

32. Sections 24 and 26 (only the relevant portion) of the Punjab Act are as follows:

"24. (1) No person shall have in his possession any quantity of any intoxicant in excess of quantity as the State Government has under S. 5, declared such to be the limit of retail sale, except under the authority and in accordance with the terms and conditions of—

(a) a licence for the manufacture, sale or supply of such article; or

(b) in the case of intoxicating drugs, a licence for the cultivation or collec-

tion of the plants from which such drugs were produced; or

(c) a permit granted by the Collector in that behalf.

* * * * *

26. No liquor shall be bottled for sale and no excisable article shall be sold, except under the authority and subject to the terms and conditions of a licence granted in that behalf * * * *"

33. It was observed that in the Bombay Act prohibition was absolute while the Punjab Act did not envisage absolute prohibition and, therefore, the ratio of the judgment of the Supreme Court in Balsara's case (AIR 1951 SC 318) (supra) did not apply to the facts of Dr. Bishambar Nath's case (AIR 1953 Punj 77). It was further observed that in the case before them the Government was not prohibiting the possession and sale of medicinal drugs which fell within the definition of 'liquor' under the Punjab Excise Act, as it merely regulated their possession and sale in the general public interest and allowed possession and sale to take place under conditions which were neither un-understandable nor oppressive by means of licences and permits.

34. The aforesaid view of the Division Bench of this Court was approved by a Full Bench of this Court in Pritipal Singh Rattan Singh's case (AIR 1966 Punj 4) (supra) while considering the reasonableness of the restrictions regarding sale etc. of all liquids and substances, besides the exempted ones containing 20 per cent proof strength of alcohol, as declared to be 'liquor' by the Chief Commissioner, Delhi, under S. 3 (14) of the Excise Act. The rules, that were under consideration, were the Delhi Intoxicating Spirituous Preparations, Import, Export, Transport, Possession and Sale Rules, 1952, as amended up to 13-12-1961. These rules were the virtual copy of the 1952 Rules without any substantial modifications but only modifications in the designation of the authorities under the Rules. The reason for that was that the authorities in Delhi, for the purposes, did not have the designation of offices comparable to those in the Punjab. The 1961 Delhi Rules, which were under challenge, amended the 1952 Delhi Rules, but by and large followed exactly the same pattern with slight modification necessitated by the new development and circumstances. The only change that had been made by the 1961 Rules was the extension of definition of the word 'liquor' consequent upon the first impugned notification by the Chief Commissioner declaring spirituous preparations containing more than 20 per cent proof strength of alcohol to be 'liquor' under S. 3 (14) of the Act. By that declaration the subject of the Rules had not remained confined to 37 items of intoxicating spirituous preparations as under the 1952 Rules, for as a result of the declaration by the Chief Commissioner all spirituous preparations with 20 per cent or more proof strength of alcohol in them were declared to be liquor, Mehr Singh, J. as he then was, who delivered the opinion for the Bench, observed that (at p. 14)—

"The impugned notification of Dec. 7, 1961, merely extends the scope of the application of the rules from 37 intoxicating spirituous preparations to all spirituous preparations having contents 20 per cent proof alcohol. Now this extension by itself would apparently be seen not to make any substantial alteration or change in the situation. It probably results in a certain measure of irksomeness but that is no ground for striking down either the rules or the notifications as constitutionally invalid ....."

The learned Judge examined the reasonableness of each rule and while dealing with Rr. 3 and 3-A which made the prescription of a registered medical practitioner necessary and also gave the right to such a practitioner to set the limit of purchase of intoxicating spirituous preparation in the prescription, held that there was nothing unreasonable or, in any way, objectionable in that a person who was to buy for himself or for a relation or a friend any intoxicating spirituous preparation being a medicine would not be purchasing such a preparation except when prescribed by a medical practitioner and in accordance with such a prescription, Mehr Singh, J. distinguished the ratio of F. N. Balsara's case (AIR 1951 SC 318) (supra) in holding the relevant impugned provisions to be reasonable and finally observed (at p. 15 of AIR 1966 Punj) :

"The 1961 Rules when read with the notification of Dec. 7, 1961, make the picture quite clear that the sale of intoxicating spirituous preparations with

20 per cent proof alcohol content is only permissible subject to the 1952 and 1961 Rules and so also the possession, import, export and transport of the same. The position with regard to the present impugned rules and notifications is not the same as in Balsara's case, 1951 SCR 682 : (AIR 1951 SC 318) where the challenge was to the constitutional validity of the Bombay Prohibition Act, 1949. In considering whether restrictions as in the impugned rules and the notifications are reasonable or are not reasonable, the circumstances which have led to them cannot be ignored and the other matter that has to be kept in view is whether they are so excessive as to be in themselves unreasonable. Reference has already been made to the circumstances which have compelled the authorities to proceed in the manner in which they have done by the impugned rules and the notifications so as to put a stop to the use of intoxicating alcohol and not as medicine. The main matters which are provided by the impugned rules and the notifications are the limitation of the quantity that may be purchased by a person and the requirement of a licence or a permit or a pass as a particular situation demands under the rules. Neither in its term is an excessive restriction. The limitation on the quantity permitted to be sold is only circumscribed with the requirements of person for the purposes of his health and hence on the basis of a medicinal prescription. This cannot be considered excessive from any angle. The requirement of a licence or a permit or a pass as has been explained is not excessive either. So that this last argument on the side of the petitioner cannot be accepted that the rules to which reference has been made, and no other rule has been under attack by the learned counsel for the petitioner, are in any way providing unreasonable restrictions on the sale, possession, import, export or transport of intoxicating spirituous liquors in so far as the petitioner as a druggist and a chemist is concerned or in so far as the general public is concerned in purchasing such preparations as a requirement for health."

35. Yet another argument, advanced in Pritipal Singh Rattan Singh' case (AIR 1966 Punj 4) (FB) (supra) and reiterated before us, that the impugned notification made under S. 3 (14) of the Excise Act declaring all spirituous preparations containing more than 20 per cent proof strength of alcohol for the purposes of the Act was violative of Art. 301 of the Constitution, was repelled by the Bench on the ground that the Excise Act being existing law including S. 3 (14) thereof, under which the impugned notification had been issued, was thus saved by Art. 305 of the Constitution from an attack based on Arts. 301 and 303 of the Constitution of India.

36. With respect, we not only concur in the aforesaid view, but, in fact, so far as this Court is concerned, are bound by the said authoritative view of the Full Bench of this Court.

37. What is more one has to take notice of the fact that Art. 47 enjoins upon the State to improve public health. The action of the State Government in issuing the impugned notification was dictated by its concern for the health of the citizens, because the unscrupulous druggists and chemists resorted to the misuse of so-called medicinal preparations containing alcohol to the detriment of the health of the citizens and the abuse and misuse of the intoxicating spirituous preparations had assumed menacing proportions to such an extent that liquor addicts not having means to purchase foreign liquor or country liquor began to satisfy their cravings by taking spirituous preparations as substitute for liquor to the detriment of their health. The diversion of these preparations to illicit channel created an abnormal state of affairs and as notification No. SO5/PAI/14/S.3/72, dated 12-3-1972, issued by the State Government exempting 53 medicinal and toilet preparations from the operation of the 1952 Rules was found inadequate to deal with the abuse which was assuming dangerous proportions. So as a last resort the impugned notification had to be promulgated.

38. For the reasons stated, we find no merit in these writ petitions and the same are dismissed, as also the miscellaneous petition, but we make no order as to costs.

KULWANT SINGH TIWANA J.:— I agree.

Petitions dismissed.

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J. M. TANDON J.

Nar Singh Dass and others, Petitioners v. State of Punjab and another, Respondents.

Civil Writ No. 6785 of 1976, D/- 23-1-1979.

(A) Constitution of India, Art. 226 — Delay in applying — Effect.

Where one notification under Section 4 read with S. 17 of the Land Acquisition Act and the other under S. 6 read with S. 17 of the said Act were made on 18-4-1972 for acquisition of certain village land for the storage of food grains and the possession of the land in pursuance of those notifications was taken over by the Government on 19-3-1973, the writ petition filed by the landowners on 27-9-1976 was obviously belated. The omission on the part of the landowners to challenge the notifications immediately after they were made or even when they were dispossessed in March, 1973, was suggestive that they had nothing to urge against the application of S. 17 of the Act. The writ petition must fail on account of extraordinary delay.

(Paras 4, 5)

Anno: AIR Comm. Constn. of India (2nd Edn.) Art. 226 N. 25, 42 (P).

(B) Constitution of India, Art. 226 — Suppression or falsity of facts by applicant — Effect.

Where in writ petition challenging the notifications under S. 4 and S. 6 read with S. 17 of Land Acquisition Act, dated 18-9-1972 the averments of the petitioner that the District Food Controller secured affidavits from them in June to September 1975 stating that they would not claim damages, and thereupon they were permitted to resume possession of the land, was patently false deliberately made with ulterior motive when the State Government had not given up acquisition of land and the land was not ordered to be restored to the petitioners apart from the fact that the Government had already taken over possession of the acquired area on 19-3-1973. The writ petition must fail on this ground.

(Para 6)

Anno: AIR Comm. Constn. of India (2nd Edn.) Art. 226 N. 21.

(C) Land Acquisition Act (1 of 1894), S. 17 — "Urgency" of acquisition — Satisfaction of Government — Justification.

Where there was acute shortage of storage accommodation for food grains in 1972 and the Government expected bumper Rabi Crop in 1972, the assessment of the Government on the eve of Rabi 1972 that the storage of food grains purchased in bulk by the Government was likely to cause acute problem, could not be condemned as misconceived and/or termed as unjustified or perverse. The very nautre of thing made it imperative that the necessary arrangements, including the suitable land for setting up of open storage complexes ought to have been completed beforehand, so that the decision in this regard if and when taken could be implemented forthwith. The acquisition of land could not be postponed till the arrival of food grains in the Mandis as it might have turned out to be too late. The satisfaction of the Government that the land of the landowners which was suitable for open storage complexes was urgently required was, therefore, apt and the application of S. 17 of the Act was justified.

(Para 7)

Anno: AIR Manual (3rd Edn.) Land Acq. Act S. 17 N. 3, 4.

Anand Swarup (M. L. Bansal with him) for Petitioners; N. S. Bhatia, for the State.

ORDER:— The Government vide notifications (Annexure P. 1) dated April 18, 1972, under S. 4 read with S. 17 of the Land Acquisition Act (hereinafter the Act) sought to acquire land of the petitioners measuring 150 Kanals 2 Marlas (18 Acres 6 Kanals and 2 Marlas) in village Jandiala Guru, District Amritsar, for the storage of food grains. The Government issued another notification (Annexure P. 2) on the same date under S. 6 read with S. 17 of the Act. Out of the acquired area 104 Kanals was meant to be utilised by the Food Corporation of India and the remaining by the Markfed and the State Government. The petitioners filed the present writ on Sept. 27, 1976, alleging that they had been wrongly deprived of their valuable right under S. 5-A of the Act by the application of S. 17 on the ground of urgency which in fact did not exist. The non-existence of

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urgency stands demonstrated by the fact that the acquired land has still not been utilised for the requisite public purpose.

It has further been alleged that the District Food Controller, Amritsar, permitted them to resume possession of the acquired land during the months of June to Sept. 1975, on their furnishing affidavits that they will not claim damages. The petitioners continue to be in possession of the land since then. The Government apparently did not apply its mind to the existence of any urgency about the proposed acquisition of the land and it was just in routine that S. 17 was mentioned in the notifications depriving the petitioners of their right to file objectons under Section 5-A of the Act against the proposed acquisition. The petitioners consequently prayed that notifications (Annexures P. 1 and P. 2) be quashed being illegal and void.

2. The State Government (respondent No. 1) raised preliminary objections that the petition was highly belated and material facts have been suppressed therein. On merits, it was stated that the possession of the entire acquired area was taken by the Food and Supplies Department through the revenue authorities on March 19, 1973, and the possession of the land which fell to the share of Food Corporation of India was given to it on April 18, 1973. The urgency of the acquisition did exist on April 18, 1973 due to shortage of availability of godown accommodation. The affidavits were obtained from the petitioners in 1975 that they will not claim damages if the land was released. The petitioners were never permitted to resume possession of the land and they in fact are not in possession thereof. As no decision could be taken to instal open storage complexes the acquired land was not utilised.

3. The written statement on behalf of the Food Corporation of India has been submitted by the Senior Regional Manager, Chandigarh. He also raised two preliminary objections that the writ petition was highly belated having been filed after more than 4½ years of the issuance of the impugned notifications and further the petitioners have made deliberately false and misleading statements therein inasmuch the State Government took possession of the acquired area on March 19, 1973, out of which the possession of 104 Kanals was given to the Food Corporation of India on April 18, 1973 and the same continues to be in their possession ever since. On merits, it was repeated that the urgency of acquisition of the land existed on account of shortage of godown accommodation for storage of bumper Rabi Crop. The acquired area was selected as it was considered more suitable for setting up of open complexes for storage of foodgrains.

The State Government or the District Food Controller had no right or authority to invite or entertain any application or affidavits of the petitioners in 1975 for restoring the land to them. The State Government did make reference to the Food Corporation of India in this respect but it was not agreed to and the Government was informed accordingly. No further action was taken by the Government thereafter. The Food Corporation of India is immediately going to raise godowns of 15,000 tons capacity for storage of food grains over the acquired land for which necessary sanction has been conveyed by the head office of the Corporation after examining the feasibility and completion of other formalities.

4. The notifications one under S. 4 read with Section 17 of the Act (Annexure P. 1) and second under S. 6 read with S. 17 of the Act (Annexure P. 2) were published in the Punjab Government gazette dated April 18, 1972. The possession of the land in pursuance of these notifications was taken over by the Government on March 19, 1973. The petitioners filed the present writ on September 27, 1976. The petition is obviously highly belated.

5. The learned counsel for the petitioners has argued that the petitioners waited till September, 1976, to be on a strong footing to challenge the application of urgency provision under S. 17 of the Act effectively. This is hardly a satisfactory explanation to justify the delay of 4½ years in filing the petition. The omission on the part of the petitioners to challenge the notifications immediately after they were made or even when they were dispossessed in March, 1973, is suggestive that they had nothing to urge against the application of S. 17 of

the Act. It being the case the writ is liable to fail on account of extraordinary delay.

6. The Government took possession of the acquired area in pursuance of notifications (Annexures P. 1 and P. 2) on March 19, 1973. According to the petitioners, the District Food Controller, Amritsar, secured affidavits from them in the months of June to September, 1975 that they will not claim damages and thereupon they were permitted to resume possession of the land. It has been categorically denied by the State Government (respondent No. 1) as also the Food Corporation of India (respondent No. 2). The State Government in its written statement filed through the Deputy Secretary to Government, Food and Supplies Department, has admitted that the affidavits were secured from the petitioners to the effect that they will not claim damages if the land was released but they were never permitted to resume possession of the land. It was asserted that the petitioners were not in possession of the land. The Food Corporation of India in the separate written statement has averred that the land measuring 104 Kanals continues to be in their possession since April 18, 1973.

It is evident that the Govt. has not given up acquisition of the land. The land was not ordered to be restored to the petitioners at any stage. In this background, the question of the District Food Controller. Amritsar, allowing the petitioners to resume possession of the acquired area in the months of June to September, 1975, did not arise especially when bulk of the acquired area (104 Kanals) was in possession of the Food Corporation of India since April 18, 1973. The avernment made by the petitioners in the petition that they were in possession of the acquired area since June to September, 1975, is patently false which obviously was made deliberately with ulterior motives. The writ petition is liable to fail on this ground as well.

7. It is the consistent stand of the Government and the Food Corporation of India that there was a great urgency of setting up of open complexes for storage of food grains of bumper Rabi crop on account of acute shortage of storage accommodation. There is nothing to doubt the veracity of the averments made by the respondents about the ute shortage of storage accommodaaction for food-grains in 1972 nor has it been controverted by the petitioners. The Government expected bumper Rabi crop in 1972 and it is difficult to condemn this assessment as misconceived. The Government does make assessment about the quantum of crop before its arrival in the Mandis. The assessment of the Government on the eve of Rabi 1972 that the storage of bumper Rabi crop food grains was likely to cause actue problem cannot as well be termed unjustified or perverse. In this situation, the Government was to gear up the machinery and provide wherewithal in anticipation and thus be in readiness immediately before the arrival of Rabi crop in the Mandis.

It is a matter of common knowledge that the Rabi food grains start pouring in the Mandis in April and flooding from May onwards. It was, therefore, natural for the Government and Food Corporation of India and other Government agencies who make bulk purchases of food grains to start thinking of setting up of open storage complexes on account of acute shortage of godown accommodation. The very nature of things made it imperative that the necessary arrangements, including the suitable land for setting up of open storage complexes should have been completed before hand, so that the decision in this regard if and when taken could be implemented forthwith. The final decision to stock the food grains in open storage complexes could be taken after the arrival of the food grains in the Mandis.

It was, therefore, necessary to be in possession of land which could be utilised for open storage complexes immediately when decision to stock the food grains in the open was taken. The acquisition of land could not be postponed till the arrival of food grains in the Mandis as it may have turned out to be too late. Under these circumstances, it would be wrong to say that there was no application of mind on the part of the Government to invoke urgency provision or there was no material to justify it. The satisfaction of the Government that the land of the petitioners which was suitable for open

storage complexes was urgently required was, therefore, apt and the application of Section 17 of the Act justified. In this situation the fact per se that the respondents did not or did not have to set up open storage complexes over the acquired land is hardly relevant.

8. In the result, the writ fails and is dismissed with costs.

Petition dismissed.

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SURINDER SINGH, J.

Ram Sarup, Appellant v. Food Corporation of India, Patiala and another, Respondents.

Ex. First Appeal No. 72 of 1975, D/- 12-1-1979.*

Civil P. C. (5 of 1908), Ss. 38, 47 — Powers of executing Court — No lack of inherent jurisdiction in Court passing decree — Executing Court cannot go behind decree.

Some land belonging to the appellant was acquired for a public purpose by the respondent and the appellant was awarded compensation for the same by the Collector as per his award. The compensation was later enhanced by the Additional District Judge. In the order there was a mention that the appellant was the owner of one-third share in the acquired land but no enhancement of compensation in regard to this land was ordered in the award of the Additional District Judge. Subsequently the appellant moved the Additional District Judge in this regard. The application was resisted by the respondent. However in answer to the specific allegation regarding acquisition of the above property in para 2 of the application, all that was said in reply was that "Para No. 2 is legal". The Additional District Judge allowed the enhancement on 1-9-1973. The respondent did not impugn that order in any higher Court by way of appeal, revision or otherwise. When the appellant applied for execution of the award as amendment on 1-9-1973, the respondent sought to resist the execution with a plea that the appellant had already received compensation for the property acquired from them and there was no reference made in their claim application with respect to one-third share for which the enhanced compensation was awarded. The Additional District Judge held that his earlier order passed on 1-9-1973 was without jurisdiction and was not executable. Allowing the appeal, the High Court,

Held that a party cannot be allowed to take benefit and avoid payment of compensation on mere technicalities. The order passed by the Additional District Judge became final for all intents and purposes. To say, therefore, that the order was without jurisdiction was not a correct approach to the matter. There is an essential difference between an inherent lack of jurisdiction and an erroneous exercise of jurisdiction vested in Court on account of some circumstance. An executing Court can go behind the decree of original Court only if there was an inherent lack of jurisdiction to deal with the matter by that Court: AIR 1962 SC 199 and AIR 1970 SC 1475, Foll. (Para 4)

Anno: AIR Comm. Civil P. C. (9th Edn.), S. 47 N. 29; S. 38 N. 5.

Cases Referred:	Chronological Paras
AIR 1970 SC 1475	4
AIR 1962 SC 199	4

D. S. Nehra with Arun Nehra, for Appellant; N. S. Bhatia for Advocate General, Punjab, for Respondents.

JUDGMENT:— The facts giving rise to this Execution First Appeal may be, briefly, recapitulated. Some land belonging to the appellant was acquired for a public purpose by the respondent-Food Corporation of India and the appellant was awarded compensation for the same by the Collector as per his award, dated August 30, 1968. The appellant feeling dissatisfied with the quatum of compensation, approached the Additional District Judge under Section 18 of the Land Acquisition Act, for enhancement of the compensation. The learned Additional District Judge (Shri Dev Raj Saini) after considering the matter which was contested by the parties, gave his award, dated June 25, 1971, enhancing the compensation regarding 7 kanals and 9 marlas of land owned by the appellant. In the order of Mr. Saini, there is, however, a men-

*(From order of A. L. Bahri, Addl. Dist. J. Patiala, D/- 12-11-1974.)

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tion that the appellant was the owner of one-third share in land measuring 17 marlas in which there is a well, a neem tree and a Kotha. No enhancement of any compensation in regard to this land was, however, ordered in the award of Mr. Saini. Subsequently, the appellant moved an application before the successor Additional District Judge (Shri Amrit Lal Bahri), Patiala, in which it was specifically urged that the learned Additional District Judge while granting enhanced compensation in respect of the land of the appellant, had omitted to grant enhancement of compensation in respect of one-third share in 17 marlas of land owned by the appellant, referred to above. This application was resisted by the respondent-Corporation who put in their written reply. However, in answer to the specific allegation regarding acquisition of the above property as, made in para 2 of the application, all that was said in the reply, is that "Para No. 2 is legal". In the wake of the respective stands of the parties, the learned Additional District Judge framed a general issue to the following effect:

"Whether the market value of the acquired land is inadequate. If so, what should be the market value of the land?"

2. After considering the material placed on the record by the parties, the learned Additional District Judge held that the claim made by the appellant was well based. The following observations in this behalf are worth noticing:

"Thus it is clear that though the claimant was onwer of 1/3rd share in 17 marlas of land, no compensation for the land was allowed to the claimant-applicant. This is only a matter of calculation. At the rate of Rs. 14000/- per kanal, the price of 17 marlas of land would be Rs. 11900/- and 1/3rd share of the applicant-claimant would be Rs. 3966.66 plus 15 per cent compulsory acquisition charges, i. e. total Rs. 4560.31 p. to which the claimant is entitled to have over and above the amount already awarded by judgment dated 25-6-1971. Thus the judgment dated 25-6-1971 is amended as stated above. The claimant-applicant will also be entitled to interest at 6 per cent per annum on Rs. 4560.31 p. from 15-4-1968 till realisation. No costs."

The order of the learned Additional District Judge passed in this behalf is dated September 1, 1973. It is not disputed that the respondent-Corporation did not impugn this order of the Additional District Judge in any higher Court by way of appeal, revision or otherwise.

3. It transpires that when the appellant applied for execution of the award of the Additional District Judge as passed by Mr. Saini and amended by Mr. Amrit Lal Bahri by means of the order, dated September 1, 1973. the respondent-Corporation sought to resist the execution with a plea that the appellant had already received compensation for the property acquired from them and there was no reference made in their claim application with respect to one-third share of 17 marlas of land for which the compensation was awarded by the order of Mr. Bahri, dated September 1, 1973. The matter was considered in execution proceedings by Mr. Amrit Lal Bahri, Additional District Judge, Patiala, himself. The learned Additional District Judge then passed the order, dated November 12, 1974, which is the subject-matter of dispute in the present appeal. In this order, the learned Additional District Judge held that his earlier order passed on September 1, 1973, was "without jurisdiction" and was, thus, not executable. The learned Additional District Judge, therefore dismissed the execution application as fully satisfied.

4. After hearing the learned counsel for the parties, I find that this appeal must succeed. Mr. D. S. Nehra, learned counsel for the appellant, has submitted that the learned Additional District Judge while dismissing the execution application had fallen into an apparent error in holding that his earlier order passed on Ist September, 1973 was not executable as the same was without jurisdiction. The only ground on which this finding has been given is that in the claim application filed by the appellant at the initial stage, no compensation was claimed for the 1/3rd share in 17 marlas of land, in respect of which the modified order was passed by the learned Additional District Judge on 1st September, 1973. The argument is twofold

Firstly it is contended that in the claim application there is a reference to the above land and furthermore even in the award of the Additional District Judge, granting enhanced compensation to the appellant, it was specifically observed that the appellant was the owner of 1/3rd share of 17 marlas of land. Another argument is that even if such a claim was not made at the initial stage, by making an application before the Additional District Judge, which was ultimately disposed of by him on 1st September, 1973 the claim for compensation of the aforesaid land can be deemed to have been made. I am in agreement with the contention of the learned counsel. A party cannot be allowed to take benefit and avoid payment of compensation on mere technicalities. It is material to note that the order passed by the Additional District Judge on 1st of September, 1973 was a result of contest between the parties and was not passed just behind the back of the respondents. After an adverse decision was recorded against them, these respondents never challenged the verdict of the Additional District Judge in appeal or otherwise. The result, therefore, is that the order passed by the Additional District Judge became final for all intents and purposes. To say, therefore, that the order was without jurisdiction is not a correct approach to the matter. There is an essential difference between an inherent lack of jurisdiction and an erroneous exercise of jurisdiction vested in Court on account of some circumstances. An executing Court can go behind the decree of original Court only if there was an inherent lack of jurisdiction to deal with the matter by that Court. The proposition is so well settled that hardly any case law is required to be cited. In any case if any reference has to be made, the same is found in Hira Lal Patni v. Sri Kali Nath, AIR 1962 SC 199 and Vasudev Dhanjibhai Modi v. Rajabhai Abdul Rehman, AIR 1970 SC 1475.

Even on merits, the respondents have no case. As already noticed in the earlier part of this judgment, a specific allegation was made in the application moved by the appellant before the Additional District Judge for the modification of the award that no compensation had been paid to him for 1/3rd share in the land measuring 17 marlas which had been acquired for the respondents. Instead of refuting this allegation, the respondents rest content by merely saying that the para in question "is legal". At the cost of repetition it may be stated that the verdict of the Additional District Judge, as contained in his order dated 1st September, 1973, was not challenged at any stage by the respondents.

The net result is that the order passed by the Additional District Judge dated 12th November, 1974, dismissing the execution application as fully satisfield, is set aside. The case is sent back to the learned Additional District Judge, Patialal (or his successor), to proceed with the execution application in accordance with law. There shall be no order as to costs.

Case remanded.

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FULL BENCH

S. S. SANDHAWALIA, C. J., PREM CHAND JAIN AND S. C. MITAL, JJ.

Punjab State Warehousing Corporation, Chandigarh, Petitioner v. Shangara Singh and others, Respondents.

Civil Revns. Nos. 1509 and 1510 of 1977, D/- 20-12-1978.*

Land Acquisition Act (1 of 1894), Ss. 3 (e) and 50 (2) — "Company" meaning of — Acquisition of land for company — Warehousing Corporation incorporated by an Indian law falls within S. 3 (e) — It can be permitted to appear and adduce evidence before court in pending reference. AIR 1970 Punj and Har 361, Overruled.

The Punjab State Warehousing Corporation established under the Warehousing Corporation Act being incorporated by an "Indian Law" is fully covered by the definition of 'company' in S. 3 (e). The word "company" has been used in Section 3 (e) for facility of reference or for purposes of description and by the user of this word, the

*(Decided by Full Bench on order of reference made by Bhopinder Singh Dhillon J; D/- 2-12-1977.)

DW/DW/B811/79/LGC

condition that it should be a company as understood in ordinary law has not become as one of the essential requirements to be fulfilled before any juristic person could fall within the definition of "Company" as given in Section 3 (e). From the bare reading of Section 3 (e), there does not appear to be any basis for the formulation of this condition. In the Act, the definition of the word "Company" has been given and for the purpose of interpretation, it is always safe and proper to advert to the provisions of the statute and not to have recourse to the dictionaries. AIR 1970 Punj and Har 361, Overruled; AIR 1963 SC 1890 and AIR 1968 SC 870 Rel. on. (Paras 20, 23)

In view of the provisions of Section 50 (2) the Warehousing Corporation can be permitted to appear, before the Court in pending reference, and adduce evidence for the purpose of determining the amount of compensation. (Paras 24, 26)

Anno: AIR Manual (3rd Edn.), Land Acquisition Act, S. 3, N. 5; S. 50, N. 1.

Cases Referred: Chronological Paras

AIR 1970 Punj & Har 361 18, 19, 21, 23
AIR 1968 SC 870 20
AIR 1963 SC 1890 17, 18, 19, 21, 22, 23

C. B. Goel with Anil K. Ahuja, for Petitioner;

M. S. Grewal, for Respondents.

PREM CHAND JAIN, J.:— This judgment of ours would dispose of Civil Revisions No. 1509 of 1977 and 1510 of 1977 as common question of law arises in both these petitions.

2. The land of Shangara Singh and other respondents, who were the landowners, was acquired. The Collector gave an award determining the compensation to which the landowners were found entitled to. Dissatisfied from the award, Shangara Singh and others, made an application under S. 18 of the Land Acquisition Act (hereinafter referred to as Act) requiring the Collector to make a reference to the Court. During the pendency of the reference before the Court the Punjab State Warehousing Corporation (hereinafter referred to as Corporation) made an application praying that the Corporation be impleaded as a party and be permitted to appear and defend the case and to lead evidence. The application was opposed on behalf of the landowners. The learned Additional District Judge, Amritsar, vide his order dated 16th of August, 1977, dismissed the application of the Corporation. Feeling aggrieved from the order of the learned Additional District Judge, Amritsar, the Corporation has preferred the present revision petition.

3. The learned single Judge before whom the petition was placed for preliminary hearing, issued notice of motion. The landowners put in appearance in response to the notice of motion. B. S. Dhillon, J. who was seized of the matter at the motion hearing stage, found that the point involved in the petition deserved to be decided by a larger Bench and consequently the reference was made. That is how the matter has been placed before us.

4. The only contention advanced by Mr. C. B. Goel, learned counsel for the petitioner was that the Corporation had a right to appear and defend the case before the Court in the proceedings which were initiated on reference and that the learned Additional District Judge acted illegally and with material irregularity in disallowing the prayer of the Corporation in that respect. Reliance in support of his contention was placed on S. 50 (2) of the Act.

5. On the other hand, Mr. Grewal, learned counsel for the respondents contended that the provisions of S. 50 (2) of the Act are not applicable to the Corporation as it did not fall within the definition of 'Company,' that the Corporation had no right to claim that if should be permitted to defend the case and lead evidence, and that the order of the learned Additional District Judge, Amritsar, was perfectly legal.

6. Section 50 of the Act reads as under:

"(1) Where the provisions of this Act are put in force the purpose of acquiring land at the cost of any fund controlled or managed by a local authority or of any Company, the charges of and incidental to such acquisition shall be defrayed from or by such fund or Company,

(2) In any proceeding held before a Collector or Court in such cases the local authority or Company concerned may appear and adduce evidence for the purpose of determining the amount of compensation:

Provided that no such local authority or Company shall be entitled to demand a reference under S. 18."

7. The expression 'Company' has been defined in the Act in S. 3 (e). The said definition is in the following terms:—

"The expression 'company' means a company registered under the Indian Companies Act, 1882, or under the English Companies Acts, 1862 to 1890, or incorporated by an Act of Parliament of the United Kingdom or by an Indian law or by Royal Charter or Letters Patent and includes a society registered under the Societies Registration Act, 1912, or any other law relating to Co-operative Societies for the time being in force in any State."

8. In order to decide whether the Corporation is or is not a Company within the meaning of the Act, it appears to be necessary to refer to some of the provisions of the Warehousing Corporation Act, 1962 (hereinafter referred to as Corporation Act) under which the Corporation has been constituted.

9. Section 3 (1) provides that with effect from such date as the Central Government may, by notification in the Official Gazette, specify in this behalf, the Central Government shall establish a Corporation by the name of the Central Warehousing Corporation which shall be a body corporate having perpetual succession and a common seal with power to acquire, hold and dispose of property and to contract and may, by the said name, sue and be sued.

10. Section 4 makes a provision about the authorised share capital and the description of the share-holders. Section 5 provides that the shares of the Corporation shall be guaranteed by the Central Government as to the repayment of the principal and the payment of the annual dividend at such minimum rate as may be fixed by the Central Government, by notification published in the official Gazette, at the time of the issue of the shares.

11. Section 6 makes a provision as to how the management of the Corporation is to be carried out. S. 7 tells us the manner in which the Board of Directors is to be constituted. Section 8 talks of the disqualification for office of the Director of the Corporation and S. 9 prescribes the manner in which a Director from office can be removed.

12. Next section to which a reference may be made is S. 18 which forms part of Chapter III relating to the State Warehousing Corporations. Under this Section, the State Government, with the approval of the Central Warehousing Corporation, is given the power to establish a Warehousing Corporation for the State.

13. Section 19 talks of the authorised capital of the State Warehousing Corporation and the manner in which the capital is to be subscribed by the share-holders. Section 20 makes provision as to how the management of a State Warehousing Corporation is to be carried out; S. 21 talks of the disqualifications of the Director and S. 22 provides the procedure for the removal of the Directors.

14. Section 26 requires the Corporation to prepare before the Commencement of each year, a statement of programme of its activities during the forthcoming year as well as a financial estimate in respect thereof.

15. Section 30 prescribes the procedure for the disposal of the profits and S. 34 provides voting right to a share-holder.

16. Adverting now to the merits of the case, the first question which calls for decision is whether the Warehousing Corporation established under S. 3 (1) of the Corporation Act is a Company within the meaning of S. 3 (e) of the Acquisition Act or not.

17. The answer of the aforesaid question, in my view, is not far to seek and is available from the judgment of their Lordships of the Supreme Court in Valjibhai Muljibhai Soneji v. State of Bombay, AIR 1963 SC 1890, wherein the State Transport Corporation which was incorporated by an "Indian Law" was held to be a Company within the meaning of S. 3 (e) of the Land Acquisition Act.

18. However, the difficulty has arisen in view of a judgment of the Division Bench of this Court in Raja Ram Baru Ram v. State of Punjab, AIR 1970 Punj and Har 361, wherein the Food Corporation of India, though incorporated by an "Indian Law" was held not to be a Company within the meaning of S. 3 (e) of the Acquisition Act, and the judgment in Valjibhai's case was

distinguished. The observations of the Division Bench, in this respect, which appear at p. 368 of the report, read as under:—

"In order to bring an artificial person within the four corners of "Company," as defined in the Act, two conditions must be fulfilled viz:—

(i) It should be a Company as understood in ordinary law; and

(ii) It should be registered under any of the statutes mentioned in cl. (e) of S. 3 of the Act, or incorporated by an Indian Law.

The Food Corporation of India (referred to as the Corporation in this judgment) has, no doubt, been incorporated by the Food Act, which is an Indian Law and, therefore, it is beyond dispute that the second ingredient of the statutory definition of 'Company' contained in the Act stands satisfied in this case. In Valjibhai Muljibhai Soneji's case, AIR 1963 SC 1890 (supra), Mudholkar, J., was mainly dealing with the second ingredient of S. 3 (e) of the Act while deciding whether the Bombay State Transport Corporation, established under the Road Transport Corporations Act, 1950, was or was not a Company within the meaning of that provision. It was held that the State Transport Corporation was a Corporation incorporated by an "Indian Law." The question whether State Transport Corporation satisfied the first ingredient of S. 3 (e) or not was neither raised, nor decided in the Bombay case. In view of the provisions of the Road Transport Corporations Act, 1950, it was rightly assumed in that case that the Bombay State Transport Corporation was a juristic person which would in ordinary parlance be called a Company ....."

From the aforesaid observations, it is evident that the learned Judges formulated two conditions which were to be satisfied before any juristic person could be brought within the definition of Company in S. 3 (e) of the Act.

19. Mr. C. B. Goel, learned counsel for the petitioner challenged the correctness of decision in Raja Ram's case and submitted that condition (i) enumerated by the learned Judges was not pre-requisite for bringing any juristic person within the definition of Company; that the only necessary condition that was required to be fulfilled was condition (ii) as formulated by the Bench and that the judgment in Valjibhai's case was wrongly distinguished.

20. After giving my thoughtful consideration to the entire matter, I find myself in agreement with the contention of the learned counsel for the petitioner. The Corporation in this case has been incorporated by an "Indian Law" and is fully covered by the provisions of S. 3 (e) of the Act. To me, it is quite evident that the word "Company" has been used in S. 3(e) for facility of reference or for purposes of description and by the user of this word, condition (i) has not become as one of the essential requirements to be fulfilled before any juristic person could fall within the definition of "Company" as given in S. 3 (e) of the Act. From the bare reading of Section 3 (e) of the Act, there does not appear to be any basis for the formulation of condition (i). In the Act the definition of the word "Company" has been given and for the purpose of interpretation, it is always safe and proper to advert to the provisions of the statute and not to have recourse to the dictionaries, as has been held by their Lordships of the Supreme Court in Ishwarlal Girdharlal Joshi etc. v. State of Gujarat, AIR 1968 SC 870, wherein it has been observed thus (at p. 880):—

"All this discussion by us was necessary to dispel the inferences drawn from dictionaries and reports of cases from England and Ireland, but the safest guide, as always, is the statute itself which is being considered.

21. Moreover, with utmost respect, I am unable to agree with the reasoning adopted by the learned Judges of the Division Bench in Raja Ram Baru Ram v. State of Punjab, AIR 1970 Pun and Har 361 in distinguishing the judgment of the Supreme Court in Valjibhai's case (AIR 1963 SC 1890):—

22. In Valjibhai's case, the question, with which we are faced in the instant case, was directly involved, and on consideration of the statutory provisions of the Road Transport Corporation Act, 1948, which are closely analogous with the provisions of the Corporation Act, the learned Judges held that the State Transport Corporation, having been incorporated by an "Indian Law" fell within the definition of S. 3 (e) of the Land Acquisition Act.

23. Thus, in view of my aforesaid discussion, I hold that the view taken by the learned Judges in Raja Ram's case (AIR 1970 Punj & Har 361) that condition (i) had also to be satisfied before taking the benefit of S. 3 (e) of the Land Acquisition Act, does not lay down the correct law and goes counter to the judgment of the Supreme Court in Valjibhai's case (AIR 1963 SC 1890). I am, therefore, constrained to overrule Raja Ram's case on the specific point. I further hold that the Warehousing Corporation satisfies the condition (ii) as it has been incorporated by an Indian law and thus falls within the definition of S. 3 (e) of the Land Acquisition Act.

24. This brings me to the next question as to what is the right of the Company in the proceedings on reference taken by the learned District Judge. Mr. C. B. Goel, learned counsel, did not press his prayer that the petitioner be permitted to be impleaded as a party under Order 1, rule 10 of the Code of Civil Procedure. The only relief which the learned counsel claimed was that the petitioner should be permitted to appear and adduce evidence for the limited purpose of determining the amount of compensation. This relief was not opposed by Shri Grewal, learned counsel for the respondents. Even otherwise, in view of the provisions of sub-sec. (2) of S. 50 of the Act, the petitioner is entitled to this relief.

25. No other point was urged.

26. For the reasons recorded above, I allow this petition, set aside the impugned order of the learned Additional District Judge, Amritsar and permit the State Warehousing Corporation, Chandigarh to appear and adduce evidence, if necessry, for the purpose of determining the amount of compensation. In the circumstances of the case, I make no order as to costs.

27. The parties through their learned counsel have been directed to appear before the learned Additional District Judge, on 22nd of January, 1979.

S. S. SANDHAWALIA, C. J.:— I agree.

S. C. MITAL, J.:— I agree.

Petition allowed.

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S. S. SANDHAWALIA C. J. AND RAJENDRA NATH MITTAL J.

Govt. of Haryana and others, Appellants v. Hakam Singh and another, Respondents.

Letters Patent Appeal Nos. 345, 342 to 344 and 386 to 389 of 1974, D/- 15-1-1979*.

(A) Land Acquisition Act (1 of 1894), Ss. 4 and 6 — 'Public purpose' — Purpose of integrated development of an area for providing commercial and residential accommodation in industrial township is public purpose — Entrustment of development to private company does not make it colourable. Civil Writ No. 1666 of 1973, D/- 6-5-1974 (Punj & Har), Reversed.

Acquisition of land by the State for integrated and compact development of an area in a growing industrial township to provide residential and commercial accommodation to the residents of the town is a public purpose and entrustment of such function to a private body even for considerations of profit to that body, does not in any way detract from that larger public purpose or does not make the purpose colourable. It is but natural that if a Company undertakes any work, it is done to earn some profit. Civil Writ No. 1666 of 1973. D/- 6-5-1974 (Punj & Har), Reversed. AIR 1963 SC 151, AIR 1966 SC 1788, Foll. (Paras 10, 19)

The expression public purpose has been used in a generic sense. It includes a purpose in which the general interest of the community as opposed to particular interest of individuals is directly concerned. It will also include the purpose in which a fraction of the community is interested. All that is necessary is that it should serve the general interests of the society. It is well settled that public purpose varies with the times and prevailing conditions in localities. Therefore, acquisition of land for developing residential and commercial plots is for a public purpose. AIR 1966 SC 1788, Foll. (Para 6)

Anno: AIR Manual (3rd Edn.) Land Acquisition Act. S. 4 N. 2 S. 6 N. 7.

(B) Land Acquisition Act (1 of 1894), S. 6 — Acquisition for public purpose

*(Against order of Premchand Jain J. in C. W. No. 1666 of 1973, D/- 6-5-1974.)

by State Government by paying entire compensation out of public revenues — No need to resort to provisions of Part VII. AIR 1971 SC 1033, Foll. (Para 14)

Anno: AIR Manual (3rd Edn.) Land Acquisition Act, S. 6 N. 8.

Cases Referred:	Chronological Paras
AIR 1971 SC 1033: (1971) 1 SCC 671	7, 10, 14
AIR 1970 SC 984	5, 7
AIR 1966 SC 1788	6, 7
AIR 1963 SC 151	4, 5, 7, 10, 14
(1963) 67 Cal WN 647	7
AIR 1960 SC 1203	5
AIR 1955 SC 41	5, 7
AIR 1914 PC 20	5

S. C. Mohunta Advocate General, Haryana, for Appellants; H. L. Sibal Sr. Advocate, with R. C. Setia, C. D. Dewan with N. C. Jain, for Respondents.

RAJENDRA NATH MITTAL, J.:— This judgment will dispose of Letters Patent Appeals Nos. 342 to 345 and 386 to 389 of 1974 which involve similar questions of law. The facts in the judgment are being given from Letters Patent Appeal No. 345 of 1974.

2. Hukam Singh respondent No. 1 is the owner and in possession of land measuring about 57 Bighas situated within the revenue estate of village Sihi, Tehsil Ballabgarh, District Gurgaon which he has been using for agricultural purposes. D. L. F. Housing and Construction Private Limited (hereinafter referred to as the Company) respondent No. 2, proposed to develop sectors 10 and 11 of Faridabad. The said land falls within sector 10. It is averred that the Directors of the Company are influential people and they prevailed upon Government to issue notification under S. 4 of the Land Acquisition Act (hereinafter referred to as the Act) to acquire the land of respondent No. 1 which was later on withdrawn at his representation. Thereafter, another notification under S. 4 was issued by the State Government which was published on October 3, 1972. Respondent No. 1 again filed objections under S. 5-A of the Act and the State withdrew the notification on February 22, 1973. Subsequently, another notification dated February 23, 1973, was issued by the State under S. 4 of the Act which was published on the same day. Respondent No. 1 filed objections under S. 5-A. It is alleged that without conducting any inquiry, appellant No. 3 submitted a report to the Government and thereafter a notification under S. 6 was issued on May 3, 1973. Respondent No. 1 challenged the legality and propriety of the notification inter alia on the ground that it was colourable exercise of jurisdiction by the State Government that the land should have been acquired under Part VII of the Act as it was being done for the purpose of the Company and that the objections under Section 5-A of the Act were not properly disposed of.

3. The learned single Judge came to the conclusion that the notifications had been issued under colourable exercise of jurisdiction by the State Government. He did not consider it necessary to decide the other two points for the reason that the writ was being allowed by him. In view of the said finding, the learned Judge quashed the notifications issued under Ss. 4 and 6. Two appeals have been filed against the said order, one by the State Government etc. respondents Nos. 1, 2 & 3 (Letters Patent Appeal No. 345 of 1974) and the other by the Company (Letters Patent Appeal No. 387 of 1974). The other three writ petitions were filed by some other landowners on the same grounds. Those writ petitions were also allowed by the learned single Judge. In each case, two appeals have been filed, one by the State and the official respondents and the other by the Company Thus there are in all eight appeals.

4. The first question that arises for determination is whether the State issued notifications under Ss. 4 and 6 of the Act under colourable exercise of its jurisdiction. It cannot be disputed that sectors 10 and 11 are being developed as residential and commercial areas. In the impugned notifications, it has been specifically mentioned that the land was needed for a public purpose, namely for development of residential and commercial areas. It is well settled that a declaration under S. 6 of the Act, that the land is needed for public purpose, is conclusive evidence to prove the said fact. There is only one exception to the above principle. It is, that if there is colourable exercise of the power, the declaration will be open to challenge. The term colourable exercise of power has been interpreted by the Supreme Court in Somawanti v. State of Punjab,

AIR 1963 SC 151 as under (at p. 164):

"If it appears that what the Government is satisfied about is not a public purpose but a private purpose or no purpose at all, the action of the Government would be colourable as not being relatable to the power conferred upon it by the Act.....",

So the main question that requires decision is, what is a 'public purpose'? The argument of the learned counsel for the appellants is that if the land is needed for development of residential and commercial areas it is a public purpose even though the development is to be done by a Company. On the other hand the contention of the learned counsel for the respondents is that if the land is to be developed by the State itself, only then the acquisition can be considered for public purpose. According to him the purpose of the acquisition in the present case is to give the land to the Company for making profits and this cannot be said to be a public purpose.

5. The term public purpose has been defined in the Act as under:—

"the expression 'public purpose', includes the provisions of village-sites in districts in which the (appropriate Government) shall have declared by notification in the Official Gazette that it is customary for the Government to make such provision."

This being an inclusive definition is of not much assistance in order to determine the ambit of the term 'public purpose'. It has also been judicially interpreted in various cases. It shall be useful to refer to some of them. In Hamabai Framjee Petit v. Secy. of State, AIR 1914 PC 20 a similar matter came up before the Judicial Committee. In that case a lease was granted by the East India Company with a condition that it could resume the land for public purpose. The lease was proposed to be resumed later, in order to construct buildings for the purpose of housing employees of the Government. An argument was raised that the lease was not being resumed for the benefit of the public at large but for making accommodation for employees of the Government and it could not be termed as public purpose. The judicial committee approved the view taken by Bombay High Court, wherein Batchelor, J. defined the term as follows:

"General definitions are, I think rather to be avoided where the avoidance is possible and I make no attempt to define precisely the extent of the phrase "public purpose" in the lease; it is enough to say that, in my opinion the phrase, whatever else it may mean, must include a purpose, that is an object or aim, in which the general interest of the community, as opposed to the particular interest of individuals, is directly and vitally concerned."

Repelling the contention that if the land was not available to the public at large, it cannot be held that it was a public purpose, the Privy Council observed:

"That being so, all that remains is to determine whether the purpose here is a purpose in which the general interest of the community is concerned. Prima facie the Government are good judges of that. They are not absolute Judges. They cannnot say 'sic volo sic jebeo' but at least a Court would not easily hold them to be wrong. But here, so far from holding them to be wrong, the whole of the learned Judges who are thoroughly conversant with the conditions of Indian life, say that they are satified that the scheme is one which will redound to public benefit by helping the Government to maintain the efficiency of its servants. From such a conclusion their Lordships would be slow to differ, and upon its own statement it commends itself to their judgment."

From the above observations, it is clear that the public purpose meant a purpose in which general interest of the public as against the particular interest of the individuals is directly concerned. In State of Bombay v. Bhanji Munji, AIR 1955 SC 41, the vires of Bombay Land Acquisition Act of 1948 were challenged on the ground that it did not state in express terms the purpose for which property was being acquired by the Government. Bose, J. while speaking for the Bench held as follows (at p. 45):

"At that time the housing situation in Bombay was acute, largely due to the influx of refugees. Questions of public decency, public morals, public health and the temptation to lawlessness and crime, which such a situation brings in its train, at once arose; and

the public conscience was aroused on the ground of plain humanity. A race of proprietors in the shape of rapacious landlords who thrived on the misery of those who could find no decent roof over their heads, sprang into being. Even the efficiency of the administration was threatened because Government servants could not find proper accommodiation. Milder efforts to cope with the evil proved ineffective. It was necessary therefore for Government to take more drastic steps and in doing so they acted for the public weal. There was consequently a clear public purpose and an undoubted public benefit."

The question recurred before the Supreme Court in many other cases but I shall refer to three of them namely Babu Barkya Thakur v. State of Bombay, (now Maharashtra), AIR 1960 SC 1203; Somawanti v. State of Punjab AIR 1963 SC 151 and Ratilal v. State of Gujarat AIR 1970 SC 984. In Babu Barkya Thakur's case (supra), Sinha, C.J. speaking for the Court after referring to the decision in Bhanji Munji's case (supra), observed that in an industrial concern employing a large number of workmen, away from their homes, it is a social necessity that there should be proper housing accommodation available for such workmen. He further observed that where a large section of the community is concerned, its welfare is a matter of public concern. In Somawanti's case (supra), it was held that particularly speaking the expression 'public purpose' would include a purpose for which the general interest of individuals is directly and vitally concerned. Similarly, Hegde, J. in Ratilal's case (supra) ruled that a housing scheme for a limited number of persons is a public purpose.

6. From the above discussion, it emerges that the expression public purpose has been used in a generic sense. It includes a purpose in which the general interest of the community as opposed to particular interest of individuals is directly concerned. It will also include the purpose in which a fraction of the community is interested. All that is necessary is that it should serve the general interests of the society. It is well settled that public purpose varies with the times and prevailing conditions in localities (See Arnold Rodricks v. State of Maharashtra, AIR 1966 SC 1788). Therefore, acquisition of land for developing residential and commercial plots is for a public purpose.

7. The second limb of the argument is whether the acquisition of land by the State for its development for residential purposes by a Company would also constitute a public purpose. The Act does not provide that if some land is acquired by the State for public purpose, it must be so utilised by the State itself. The requirement of law for acquisition is that land is needed for public purpose and the compensation to be awarded is paid wholly or partly out of the public revenues or some funds controlled or managed by a local authority. It is not necessary that whole of the compensation should be paid by the State but it may be paid partly by the State and partly by other persons. The fact that the State's contribution is nominal is not sufficient to show that the transaction is a colourable transaction. The facts and circumstances of each case have to be gone into in order to decide whether the transaction is colourable or not. The matter is not res integra but has been noticed by the Courts. In Somawanti's case (AIR 1963 SC 151) (supra), the State of Punjab aquired the land for the purposes of a public Company which had to start a factory for manufacture of various ranges of refrigeration, compressors and ancillary equipment. The State contributed an amount of Rs. 100/- towards the total price of the land which was worth Rs. 4,50,000/-. It was held that the notification under S. 6 could not be challenged as a colourable exercise of the power in spite of the fact that there was no provision in the budget in respect of amount contributed by the State. In Arnold Rodricks's case (supra) the Government acquired land for handing over it to Maharashtra Industrial Development Corporation for its utilisation as an industrial and residential area. An argument was raised that the State Government was not entitled to acquire property from one person and give it to another. It was observed by Sikri, J. speaking for the Court as follows (at pp. 1797; 1799):—

"The purpose viz., "development and utilisation of the lands as industrial and residential areas" is a public purpose within the Land Acquisition Act as it

stood before the amendment made by the Bombay Legislature, AIR 1955 SC 41 (45) Rel. on.

'Public purpose' varies with the times and the prevailing conditions in localities, and in some towns like Bombay, the conditions are such that it is imperative that the State should do all it can to increase the availability of residential and industrial sites. It is true that these residential and industrial sites will be ultimately allotted to members of the public and they would get individual benefit, but it is in the interest of the general community that these members of the public should be able to have sites to put up factories. The main idea in issuing the impugned notifications was not to think of the private comfort or advantage of the members of the public but the general public good. At any rate where a very large section of the community is concerned its welfare is a matter of public concern and when the notifications served to enhance the welfare of this section of the community this is public purpose and the notifications are valid and cannot be impugned on the ground that they were not issued for any public purpose."

In this regard it will be beneficial to refer to Ratilal's case (AIR 1970 SC 984) (supra) also, wherein the land was acquired for housing scheme prepared by a registered Co-operative Society. One of the contentions was that as the land was being acquired for a Company, therefore, the provisions of Ss. 40 to 42 in Part VII of the Act which relate to the acquisition of land for Companies should have been complied with. The contention was repelled and it was observed that it cannot be held that the housing scheme for limited number of persons cannot be considered as a public purpose. Similarly in Jage Ram v. State of Haryana, (1971) 1 SCC 671: (AIR 1971 SC 1033) land was acquired by the State Government for benefit of a Company which had to set up a factory for the manufacture of Chinaware, Glazed Tiles etc. In that case as well the Government contributed a sum of Rs. 100/-. An argument was raised on behalf of the owners of the land that the Government should have resorted to provisions of Part VII of the Act as the purpose of the Company could not be considered to be a public purpose. The contention was not accepted and the acquisition was upheld. The counsel for the appellants also referred to A. N. Nath v. State of W. B., (1963) 67 Cal WN 647. In that case the land acquisition proceedings were started at the instance of college authorities of a private women's college for improvement of the institution. An objection was raised that the State Government could not acquire the property for the purposes of private college. It was held by a Division Bench that there was nothing in the Act which prevented the acquisition at the instance of a private agency as long as the purpose of the acquisition was a public purpose. It was further held that the acquisition for a public purpose since women students in large numbers would be given proper education facilities to equip themselves for life. From the aforesaid cases, it is evident that if the acquisition is made for public purpose the State Government after acquiring the property can hand it over to a Company which is to carry out the public purpose.

8. Now I advert to the facts of the present case. As already stated above the Company is developing sectors 10 and 11 at Faridabad which is a developing town and consists of large number of industries. It cannot be denied that many new industries are coming up there. The population of the town is also increasing with the increase of industries. In the circumstances, it is necessary to provide residential and commercial accommodation to the residents of the town. The Company has a large tract of land but some pockets in that area belong to the private respondents. In order to develop the sectors properly it is necessary that the pockets should be developed along with other area by the Company otherwise the development cannot be uniform. If individual owners are allowed to develop small pieces of land the development cannot be integrated one and is likely to give a shabby look. In order to avoid such results, integrated development of the sectors is the only solution.

9. The learned counsel for the respondents has vehemently argued that village Sihi was situated within the area to which the Punjab Scheduled Roads and Controlled Areas Restriction of Unregulated Development Act, 1963 (here-

inafter referred to as the Controlled Act) was applicable and no one could develop plots for residential and commercial purposes without the prior approval of the Director Town & Country Planning Department. He has further argued that the Company submitted plans to the Director for development of the area, wherein it showed the lands belonging to the private owners, as its own. The Director, thereupon, suggested to the Company to acquire the lands of the private owners. The Company, however, refused to do so on the ground that the private owners were demanding exorbitant price and requested the Government to acquire the land and hand it over to the Company. The Government at the instance of the Directors of the Company, who were influential persons, acquired the land and agreed to transfer it to the Company on getting in exchange 20 per cent more area at another place. The State, however, put no restriction on the sale price of the developed plots, in spite of the fact that the State had acquired land for the Company. The Company, the learned counsel contends, would make huge profit by selling the plots at the prices to be fixed by it. Mr. Sibal forcefully argues that in fact the land has been acquired not for a public purpose but for the benefit of the Company. According to him, these facts clearly go to show that acquisition has been made by the State in colourable exercise of its jurisdiction.

10. I have given due consideration to the argument of the learned counsel but regret my inability to accept it. The decision to acquire the land has been taken by the State in the interest of intergrated and compact development of Sectors 10 and 11. It cannot be disputed, if the lands of the private owners had not been acquired, the development of Sectors 10 and 11 could not be uniform. No doubt it is true that the State has agreed to hand over the lands of the private owners to the Company but on this ground it cannot be held that the transaction is colourable. In Somawanti's and Jage Ram's cases (AIR 1963 SC 151 and AIR 1971 SC 1033). (supra) the lands were acquired for the purpose of Companies and a small contribution was made by the State towards acquisition charges. The acquisitions were held to be good in both the cases. In the present case land has been acquired by making payment of the compensation out of the public funds for development of plots for residential and commercial purposes. I have already held that to provide developed plots to the citizens of the Country is a public purpose. The State is over-burdened with welfare activities and it may not be possible for it, either on account of lack of funds or otherwise to carry out all such activities. If it considers proper it can entrust some of the activities to private companies. In that situation, it cannot be said that it has been done with oblique motive because the private companies would make some profit out of the deal. It is but natural that if a Company undertakes any work, it is done to earn some profit. The private owners in the present case were demanding an exorbitant price of the land. In that eventuality the State chose to acquire the land from public funds and hand it over to the Company. The fact that 20 per cent more area has been taken by the State in exchange to the land acquired at another place also does not make any difference. After taking into consideration the circumstances of this case, I am clearly of the view that the acquisition of the land by the State is not in colourable exercise of its jurisdiction.

11. It is next sought to be argued by the learned counsel for the private respondent that an argument was raised before the learned single Judge that the respondent filed objections under Section 5-A of the Act before the Land Acquisition Collector and that no hearing was given to him and the matter was not dealt with properly by him. He further contends that the notifications were liable to be quashed on this short ground.

12. I am not convinced with the argument of Mr. Sibal. It is specifically stated in the written statement that the respondent was heard by the Land Acquisition Collector in respect of the objections filed under S. 5-A and thereafter the report was submitted for decision of the Government. Section 5-A contemplates a hearing by the Land Acquisition Officer of the owner either in person or through a pleader. In this case, it is evident, from the report that the provisions of S. 5-A had been duly

complied with. Therefore, I reject the contention of the learned counsel.

13. Mr. Sibal has then vehemently argued that the land was being acquired for a Company and the State Government should have resorted to the provisions of Part VII. He has further submitted that this matter was raised before the learned single Judge but it too has not been dealt with by him.

14. I also do not find any substance in it. Under S. 4 appropriate Government is authorised to acquire land whenever it is likely to be needed for any public purpose. In the present case the land has been acquired for public purpose and whole of the compensation was paid by the Government out of public revenues. The Government in such an eventuality need not resort to the provisions of Part VII of the Act. This matter is settled by the Supreme Court in Jage Ram's case (AIR 1971 SC 1033) (supra). In that case too an argument was raised on behalf of the owners that the acquisition should have been made by the Government under Part VII as the land was being acquired for the purpose of the Company. It was observed by Hegde, J. as follows (at p. 1035):—

"We were informed at the bar that the State Government had contributed a sum of Rs. 100/- towards the cost of the land which fact is also mentioned in the award of Land Acquisition Officer. That being so it was not necessary for the Government to proceed with the the acquisition under Part VII of the Act (See Somavanti's case (AIR 1963 SC 151) (supra)."

The above observations are fully applicable to this case. I, therefore, reject this contention of the learned counsel also.

15. For the reasons recorded above, the appeals are accepted and the order of the learned single Judge is set aside. The Parties are, however, left to bear their own costs.

SANDHAWALIA, C. J.:— 16. As the inevitable drift of people from villages towards the towns gains momentum in a country already over-populated, the problems of quick urbanisation loom large and, indeed, sometimes appear to defy solution. It is, hence, indisputable that the regulated development of urban areas for residential, commercial and industrial purposes in the altogether new or developing towns assumes a momentous significance and would, therefore, fall clearly within the ambit of a public purpose. This position is, indeed, admitted on all hands.

17. Once that is so, the question that follows and inevitably arises is as to who is to be entrusted with the coordinated development of urban areas. As a counsel of perfection it may well be said that the State should itself discharge this important function. But what if the State does not have the wherewithal, the expertise, the finance or even the will to lay out and take over the urban development in each and every city and town or other areas within its jurisdiction? In such a case, would it be permissible for the State to allow private enterprise to enter this field and aid and assist it for the larger public purpose of the development and utilisation of land for urbanisation? This indeed, is the material question which falls for determination in this case.

18. The learned single Judge seems to have taken the view that if in the procees of acquisition and later urban development of land, the State aids the private Corporation or the latter has a profit motive in the scheme it must be deemed as a colourable exercise of power under the statute. It was observed by the learned Judge:—

"I have no manner of doubt in my mind that the impugned notifications suffer from the vice of colourable exercise of jurisdiction. The necessity of issuing the notifications arose in order to achieve the object of the Company, which it would not achieve by negotiations with the landowners. The Company owned some land in Sectors 10 and 11. There were other landowners, including the petitioner, who also owned land in these Sectors. The Company could not purchase the land of the landowners, rather the fact appears to be that the Company did not want to purchase the land, though the pretence shown was that exorbitant price was being demanded by the landowners, as it had successfully managed to get it acquired. By using the agency of the Government, the Company achieved what it could not legally achieve otherwise under the provisions of the Controlled Act."

19. The aforesaid streak of reasoning and this premise seems to basically underlie the whole judgment of the learned Single Judge. With great respect, I am clearly inclined to take a contrary view. It appears inevitable and perhaps even desirable that in case of the inability of the State itself to take over the whole burden of coordinated urbanisation in all the towns, or otherwise for good reasons private enterprise should not only be not debarred but even encouraged to enter this field so long as the larger public purpose of urban development of land is clear and unobscured. To expect that any private organisation will take on the onerous burden of urban development for merely altruistic considerations and devoid of any motive of gain or profit would be too utopian an ideal. Inevitably, therefore, once the larger public purpose of regulated development is clear, the entrustment of such function to a private body even for considerations of profit would not in any way detract from that larger public purpose or be deemed colourable.

20. Nor am I able to agree that providing some aid by way of acquisition (obviously at a market price) to a private organisation in order to facilitate the purpose of regulated urbanisation would be a colourable exercise of power. As the present case discloses the respondent-landowners refused to part with their patch of land in the centre of the planned urban sector by private negotiations and apparently wanted their pound of flesh nearest to the heart. If in the interest of the coordinated development of the rising industrial town of Faridabad, the State stepped in to acquire and pay them the market value for their property in the larger public interest then I am unable to see why such action should either be deprecated or held colourable.

21. The view which the learned Single Judge has taken, when carried to logical conclusion, would rule out all State or statutory aid for regulated urban development unless it is done by the State itself and that too perhaps without a profit motive. It deserves recalling and perhaps highlighting that in many urban areas development by the State itself is not wholly devoid of an element of profit. The recent development of the town of Chandigarh is perhaps a salient example nearer home. With respect, I feel that if the view of the learned Single Judge is subscribed to then it would tend to hamstring all urban development except by governmental agencies and in the event of the latter being unable to do so it would raise the monster of uncontrolled and unregulated rise of slums around towns which can ultimately choke the whole development of an urban complex.

22. I am, therefore, of the view that the learned Single Judge erred primarily in holding that because the entrustment of urban development was made to a private organisation and the State aided the same, it would necessarily become a colourable exercise of power. With these few added words I entirely concur with what has fallen from the pen of my learned brother Mittal, J. in his elaborate and lucid judgment.

Appeal allowed.

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FULL BENCH

S. S. SANDHAWALIA, C. J.,
P. C. JAIN AND S. C. MITAL, JJ.

Harchand Singh, Petitioner v. The Collector, Agrarian, Bhatinda, and another, Respondents.

Civil Writ Petn. No. 3558 of 1974, D/- 18-12-1978.*

(A) Pepsu Tenancy and Agricultural Lands Act (13 of 1955), S. 32-MM — Some land declared surplus — Such land not utilised and remaining in possession of owner — Total holding reduced during consolidation proceeding — Owner is entitled to claim that the new area be taken into consideration to determine his permissible area — (Precedents — Stare decisis principle.)

There is a long line of unbroken precedent that in case of the diminution of an area of a landlowner due to consolidation before the surplus area proceedings are completed and finalized, he would be entitled to claim that

*(Decided by Full Bench on order of reference made by M. R. Sharma J., D/- 5-11-1974).

DW/DW/B304/79/MVJ

his new area be taken into consideration for determining his permissible area and not that held by him prior to the consolidation. This view has held the field without a discordant note and there is no reason whatsoever to deviate from this string of authorities on the point. 1969 Pun LJ 323; 1966 Punj LJ 81; 1966 Punj LJ 238 and 1970 Punj LJ 93, Approved. (Para 4)

(B) Pepsu Tenancy and Agricultural Lands Act (13 of 1955), S. 32 MM — Authorities are entitled to separate the area of land allotted to the landowner after the process of consolidation. (Para 4)

Cases Referred: Chronological Paras

1970 Pun LJ 93 4
1969 Pun LJ 323 4
1966 Pun LJ 81 4
1966 Pun LJ 238 4
1964 Pun LJ 155 4
(1963) Civil Writ Petn. No. 1366 of 1962, D/- 4-2-1963 (Punj), Bachan Singh v. Financial Commr., Punjab 4

G. S. Grewal, for Petitioner; S. K. Sayal, Addl. Advocate General, for Respondents.

S. S. SANDHAWALIA, C. J. :— Doubts about the correctness of a long line of precedent consistently followed in this Court for nearly two decades have necessitated this reference to a Full Bench.

2. The facts are neither in dispute nor in a wide compass. An area of 1.78 S. A. was declared surplus in the hands of Harchand Singh petitioner by the authorities under the Pepsu Tenancy and Agricultural Lands Act, 1955. However, it is the common case that this area was never utilised as such and continued to be in the possession of the petitioner till September 14, 1973, when consolidation proceedings commenced in his village with regard to his holding. The scheme of the consolidation was duly prepared and the repartition announced wherein no separate tak for him had been carved out, at the stage of preferring the writ petition. It is the common case that under the scheme of consolidation the total holding of the petitioner was reduced by more than 5 per cent due to the general cut made for the reservation of the land for various common purposes such as the extension of the abadi, Panchayat Farm, School playground etc. It is averred that the holding of the petitioner came to be reduced by more than 3 S.As. with the result that no land of the petitioner would be rendered surplus in his hands under the Pepsu Tenancy and Agricultural Lands Act.

3. On the enforcement of the Punjab Land Reforms Act, 1972, the petitioner duly filed his forms under Section 5 thereof and according to the provisions of the said statute also, it is his case that no land would be surplus in his hands. However, vide Annexure P-1 dated the 22nd of June, 1974, the Collector Agrarian, Bhatinda, issued a notice to the petitioner directing him to deliver possession of an area of 1.78 S. A. which had been earlier declared surpuls in his hands way back in 1961. The petitioner then preferred the present writ petition challenging the notice on the primary ground that because of the statutory consolidation proceedings and the consequent reduction in the acreage of his holding, the area in his possession was clearly within the permissible limit.

4. The case first came up before M. R. Sharma, J., and therein it seems to be more or less assumed that the benefit of the decrease of the acreage due to consolidation would inevitably have to go to the petitioner. However, the learned Judge took the view that after the coming into force of the Punjab Land Reforms Act, 1972, it would be a moot point whether the surplus area in his hands should be determined afresh under the Punjab Land Reforms Act, 1972, or he should be allowed to retain the 30 S. As. of land under the Pepsu Tenancy and Agricultural Lands Act. Taking the view that this issue raised important questions of law which would govern a number of similar cases, the learned Judge referred the matter to a larger Bench for determining the aforesaid specific question. When the matter came before the Division Bench, this issue, however, seems to have taken an entirely secondary status. This was so because the Bench chose to express a vacillating doubt about the correctness of a number of Single Bench and Division Bench judgments of this Court holding that the landlord is entitled to have the diminution of his land in

consolidation - proceedings taken into consideration for the purposes of the declaration of his surplus area before the proceedings thereof are completed. It was briefly observed by the Division Bench that there appeared to be no good reason for the earlier determination of the surplus area to become questionable just because consolidation proceedings have taken place later on. Consequently, the case was referred to a Full Bench to test the correctness of the settled view of the Court.

Now it deserves highlighting that within this Court there is a long line of unbroken precedent that in case of the diminution of an area of a landowner due to consolidation before the surplus area proceedings are completed and finalized, he would be entitled to claim that his new area be taken into consideration for determining his permissible area and not that held by him prior to the consolidation. This was apparently so held by Harbans Singh, J. (as he then was) in Civil Writ Petn. No. 1366 of 1962 (Bachan Singh v. Financial Commr., Punjab) decided on the 4th of February, 1963 (Punj). This view found favour with H. R. Khanna, J. (as his Lordship then was) in Maghar Singh v. State of Punjab, 1964 Pun LJ 155 and it was observed as follows:—

"Perusal of the different provisions of the Act goes to show that the occasion for the declaration of the surplus area would arise only if a landowner holds land in excess of the permissible limit. Further, it is plain that it is only the area which is in excess of the permissible limit that can be declared to be surplus. In case the proceedings under the Act are still pending and in the meanwhile as a result of consolidation proceedings the total area, to which a landowner becomes entitled, is less than the area previously held by him, it is, in my opinion, that new area which should be taken into consideration and not the area which was held by him before the consolidation. There is nothing in the Act which prohibits the Collector from taking into account the reduction brought about in the area held by a landowner by consolidation. The Act in question is a piece of legislation which results in expropriation and as such its provision should be construed strictly and unless a case falls within the express provisions of the Act the benefit must go in favour of the landowner."

The judgment aforesaid was subjected to appeal and the Letters Patent Bench in State of Punjab v. Maghar Singh, 1969 Pun LJ 323, reaffirmed the ratio thereof with even greater vigour.

Equally it deserves notice that an identical view has been taken by A. N. Grover, J., in Amar Singh v. State of Punjab, 1966 Pun LJ 81 and Narula, J. (as he then was) in Bhag Singh v. State of Punjab, 1966 Pun LJ 238. In Jang Singh v. State of Punjab, 1970 Punj LJ 93, to which I was a party, the writ petition was directly admitted to a hearing by the Division Bench which categorically expressed its agreement with the enunciation of the law by the Court earlier and allowed the petition in accordance therewith.

I must confess that we have not had the benefit of any serious debate on the point. Learned counsel for the petitioner inevitably relied on the catena of judgments noticed above and canvassed for their affirmance. What deserves notice, however, is that Mr. Syal appearing for the respondent-State frankly conceded his inability to challenge the correctness of the view enunciated therein and fairly stated that there was not a single judgment to the contrary. Indeed he ultimately himself took the stand that no flaw in the impeccable reasoning of the Single Bench and Division Bench judgments was discernible which could possibly merit any reconsideration. Nor can one fail to recall that the land reforms and agrarian legislation after Independence was initiated by the Punjab Security of Land Tenures Act, 1953 and the Pepsu Tenancy and Agricultural Lands Act, 1955 in the two States of Punjab and Haryana. The settled view of this Court with regard to surplus area under both these provisions in the context of consolidation proceedings has held the field without a discordant note. In the aforesaid context, we are unable to discern any reason whatsoever to deviate from the string of authorities on the point. Apart from a passing observation, the learned Judges of the Division Bench making the reference have not adequately indicated their reasons for the vacillating doubt raised therein. It appears that the matter was not ed-

equately canvassed before their Lordships nor have they adverted in detail to the authorities noticed by them or sought to repel the reasoning thereof. With respect we are unable to hold that the settled view of this Court on the point calls for any reconsideration or deviation therefrom. We would, therefore, reaffirm the reasoning and the ratio of the judgments noticed above.

Coming to the second aspect of the case, it again appears that both the sides took the stand that the present case is not a matter of redetermination of the surplus area afresh either under the Pepsu Tenancy and Agricultural Lands Act, 1955 or the Punjab Land Reforms Act 1972. The common stand taken was that in essence the matter now is the separation of the surplus area from the permissible area after the process of consolidation has taken place. In this context what calls for poinfed notice are the provisions of Sub-section (2) of Section 32-MM of the Pepsu Tenancy and Agricultural Lands Act, 1955, which are as under:—

"(1) * * * * * *

(2) Where, after the declaration of the surplus area of any person and before the utilisation thereof, his land has been subjected to the process of consolidation, the officers referred to in sub-section (1) shall be competent to separate the surplus area of such person out of the area of land obtained by him after consolidation."

It is not in dispute that analogous, if not identical, provisions thereto exist in Section 24-A (2) of the Punjab Security of Land Tenures Act, 1953 and Section 13 (2) of the Punjab Land Reforms Act, 1972. A bare reference to these provisions would show that the authorities thereunder are entitled to separate the surplus area out of the area of land allotted to the landowner after the process of consolidation. This, indeed, is what is required to be done in the present case as well and not a re-determination of the surplus area as such. Consequently, in our view, the question whether the provisions of the Pepsu Tenancy and Agricultural Lands Act, 1955, or the Punjab Land Reforms Act, 1972, would govern the re-determination of the surplus area does not fall for determination here and, the more so, because of the common stand taken by the parties on this issue.

Adverting now to the merits of the case, from the pleadings it is not crystal clear as to the quantum of reduction in acreage of the petitioner which may have ensued consequent on the process of consolidation. Whilst the petitioner had claimed in para 7 (b) of the writ petition that his holding has been reduced by about three standard acres with the result that no surplus area is left in his hands, the respondent-State whilst admitting that consolidation proceedings are going on in the village has taken the stand that it was not possible to ascertain the precise quantum of the reduction in the area to be allotted to the petitioner thereafter. It is, thus, plain that the exact reduction in the petitioner's holding is a matter which as yet remains to be finally determined.

In the light of the aforesaid legal and factual position this writ petition is hereby allowed and Annexure P-1 thereto is quashed. This would, however, not preclude the respondent-State from resorting to sub-section (2) of Section 32-MM of the Pepsu Tenancy and Agricultural Lands Act, 1955, for separating the surplus area provided there is now any such area left in the hands of the petitioner after the reduction in its acreage. The parties will bear their own costs of this petition.

PREM CHAND JAIN, J.:— I agree.

S. C. MITAL, J.:— I agree.

Petition allowed.

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M. R. SHARMA, J.

Brij Lal Puri and another, Petitioners v. Smt. Muni Tandon, Respondent.

Civil Revn. No. 1720 of 1978, D/-10-11-1978.

(A) East Punjab Urban Rent Restriction Act (3 of 1949), S. 15 — Appeal — Powers of appellate authority — Whether it has inherent power to remand a case. (Civil P. C. (1908), S. 151).

The procedural provisions of a statute under which a Court or a quasi-judicial authority is invested with the jurisdiction to decide a lis between two parties

are exhaustive to the extent to which the subject-matter has been specifically dealt with by the Legislature and in respect of the matters which have not been so specifically dealt with, such an authority can pass an appropriate order to achieve the ends of justice in exercise of its inherent powers. (Case law discussed). (Para 15)

In the instant case the Appellate Authority had earlier remanded the case because the application filed by the landlady was not in proper form inasmuch as the same did not contain one of the two allegations required to be made under the statute, i. e., that the landlady did not vacate some residential building in the same urban area without a sufficient cause. In other words, the plea of the landlady about her personal necessity had not at all been considered by the Rent Controller on merits. The order of remand made by the Appellate Authority under these circumstances could not at all be regarded as being one without jurisdiction. (Para 16)

(B) East Punjab Urban Rent Restriction Act (3 of 1949), S. 15 — Revision — Petitioner tenant enjoyed full benefit of trial after remand of case by appellate authority — He would be estopped to challenge legality of order of remand. (Evidence Act (1872). S. 115).

Where a tenant enjoys full benefit of the trial after the case is remanded by the Appellate Authority, he would be estopped to challenge the legality of the order of remand in subsequent proceedings. Since the order of remand in the instant case, was made because a relevant issue had not been tried by the Rent Controller on merits and since the petitioners had themselves derived benefit under this order of remand it was not open to the petitioners to challenge its legality in revision. 1972 Ren CR 530. (Punj), Foll. (Para 17)

(C) East Punjab Urban Rent Restriction Act (3 of 1949), S. 13 (3) (a) (iv), 2nd Proviso — Scope and object — Several tenants — Landlady succeeding in ejecting one tenant in the same building — Application for ejectment against other tenant is not barred under Proviso.

A plain reading of the 2nd proviso to S. 13 (3) (a) (iv) shows that a landlord after getting one building vacated, which can reasonably meet his hands, cannot get another building vacated. The proviso does not lay down that if the entire building, which is needed by a landlord for his personal use, is occupied by more than one tenant, he or she cannot take out eviction proceedings against the other tenants after having evicted one. The object of this proviso is that a landlord should not be allowed to seek unreasonable ejectments of tenants from independent buildings if he has already succeeded in evicting a tenant from a building which is sufficient for his personal occupation. (Para 19)

(D) East Punjab Urban Rent Restriction Act (3 of 1949), S. 15 — Revision — New plea — Plea that since the landlady succeeded in ejecting one tenant from the building application for ejecting the other tenant is barred under 2nd Proviso to S. 13 (3) (a) (iv) of the Act not taken either before Rent Controller or before appellate authority — It cannot be allowed in revision.

Where valid defences are open to a party, the proof of which necessitates the taking of further evidence it would not be a proper exercise of discretion by the revisional court for allowing such pleas to be raised at that late stage. AIR 1970 SC 406, Rel. on. (Para 19)

(E) East Punjab Urban Rent Restriction Act (3 of 1949), S. 13 (3) — Application for ejectment on ground of personal necessity— Son of landlady running a cottage industry in a part of building in dispute — Maintainability of petition.

It is open to a landlord to put his property to any reasonable use including its use by his sons or daughters for running a cottage industry and yet seek the eviction of tenants from a part of the same building on the ground of personal necessity. The Rent Controller while deciding an application under S. 13 (3) of the Act made by a landlord has to take into consideration all the relevant circumstances for determining whether the need of the landlord is bona fide or not, but the law does not require that a landlord should render his son or daughter jobless first and then seek eviction of a tenant from his building. (Para 20)

Cases Referred: Chronological Paras

1972 Ren C. R. 530 (Punj) 17
AIR 1970 SC 406 19

(1963) Civil Revn. No. 676 of 1962, D/- 15-4-1963, (Punj) Laj Pat Rai v. Harikishan Dass 13, 16
(1961) 63 Punj LR 865 8, 14
(1958) Civil Revn. No. 169 of 1958, D/- 29-9-1958 (Punj), Din Dayal v. Ram Chander 11
(1958) Civil Revn. No. 641 of 1957, D/- 29-4-1958 (Punj), Moti Ram v. Ram Sahai 8, 11
ILR (1955) Patiala 481 11

R. L. Aggarwal with Amar Dutt, for Petitioners; R. S. Bindra, Sr. Advocate with S. S. Dhaliwal and Mrs. K. Kochhar, for Respondent.

ORDER:— Smt Muni Tandon alias Urmila Tandon, the respondent herein had filed an ejectment application against the petitioners on the ground of personal necessity. According to her, she had five unmarried school-going daughters and the accommodation already available with her was not satisfactory. The petitioners controverted these allegations. This application was allowed by the then learned Rent Controller on March 30, 1974. The petitioners went in appeal and urged that the application was not in proper form in as much as the respondent had not specifically pleaded in the application for ejectment that she was not in possession of sufficient accommodation. Faced with this situation, the respondent filed an application for amendment of the application for ejectment which was granted and she was allowed to bring her application in conformity with the requirements of S. 13 (3) (a) (i) of the East Punjab Urban Rent Restriction Act, 1949 (hereinafter called the Act). The learned Appellate Authority set aside the order of ejectment and remanded the case for a fresh trial.

2. The petitioners filed a fresh written statement to the amended application for ejectment. The learned Rent Controller then framed the following issues:—

1. Whether the applicant has locus standi to file the application?

2. Whether respondents are liable to ejectment on the grounds mentioned in paras 3 to 7, 9 and 10 of the application?.

3. Whether any valid notice of termination of the tenancy was necessary? If so, whether any such notice was served?

3. The parties led fresh evidence before the learned Rent Controller who decided all the issues against the petitioners and ordered their ejectment on March 10, 1977.

4. The petitioners filed an appeal and at that stage raised an objection that the trial held by the learned Rent Controller was not in conformity with law because Shri Des Raj Mahajan, the learned Additional District Judge who exercised the powers of the Appellate Authority under the Act, had no jurisdiction to remand the case. They also contended that the order under appeal was wrong on merits inasmuch as there was no real necessity for the landlady to get the premises in dispute vacated.

5. The learned Appellate Authority held that the order of remand passed by the earlier Appellate Authority not having been challenged had become final and since the respondent landlady had genuine need of the premises in dispute for her personal residence, there was no merit in the appeal. The petitioners have challenged this order in revision.

6. In response to the notice of motion issued by my learned brother R. N. Mittal, J., Shri R. S. Bindra, the learned counsel for the respondent, has appeared to oppose the admission of the petition.

7. On behalf of the petitioners, it has been argued that the learned Appellate Authority had no jurisdiction to remand the case and as such the subsequent trial held by the learned Rent Controller was without jurisdiction. It was also submitted that the respondent landlady had during the pendency of these proceedings got some premises vacated and under second proviso to S. 13 (3) (a) (iv) of the Act she was not competent to file the instant petition. The third point raised was that the son of the respondent landlady was admittedly running handlooms in a portion of the building and since that portion could be utillised for residential purposes the respondent landlady had failed to prove that her requirement for personal residence was a bona fide one.

8. In support of the first contention Shri R. I. Aggarwal, the learned counsel for the petitioners has placed reliance on a Division Bench Judgment of this Court in Shri Krishan Lal Seth v. Smt. Pritam Kumari, (1961) 63 Pun LR

865. In that case the landlady had sought ejectment of the tenant on the ground of non-payment of rent as also on the ground of personal necessity. Since the rent, interest etc., was paid on the first date of hearing, that ground was no longer available to her. The learned Rent Controller dismissed her application on the ground that the landlady had not averred in the application for ejectment that she had not vacated any building without any sufficient cause after the commencement of the Act in the urban area in which the premises in dispute were situate. The landlady went in appeal. The learned Appellate Authority characterised the order of the learned Rent Controller as perverse and illogical by saying that her application could not be thrown out on the technical ground on which it had been dismissed. It set aside the order of the learned Rent Controller and remanded the case for retrial on the question whether the landlady needed the premises for her own use and occupation or not. That order was challenged by the tenant in a revision petition. It was argued before the Division Bench that if the learned Appellate Authority was somehow or other dissatisfied with the trial of the application for ejectment, it could either make a further enquiry as it thought fit or had it conducted through the learned Rent Controller, but it had no power to remand the case. The Bench observed that it was not necessary for the landlady to restate in the application the statutory conditions under which she sought ejectment of the tenant and for her omission to refer to those conditions in the application, her application could not possibly be dismissed. On this basis, the Division Bench set aside the order of remand and directed the learned Appellate Authority to decide the case in accordance with law. I might add at this place that the view held by the Division Bench that landlord or a landlady is not under an obligation to refer to these statutory conditions in his/her application for ejectment has been modified and no longer holds the field now. While holding that the learned Appellate Authority under the Act had no power to remand a case, the Division Bench also referred to Civil Revn. No. 641 of 1957 (Moti Ram v. Ram Sahai) decided by Grover, J. (as the learned Judge then was) on 29-4-1958 (Punj). In that case, the learned Judge observed:—

"It is quite clear that the statute makes no provision for an order of remand for retrial or fresh decision and the obvious intention of the legislature seems to be that the Appellate Authority should itself decide the points, and if for the purpose of doing so, it become necessary to make some further enquiry that can be done by the Appellate Authority itself or through the Controller."

9. It was contended before the learned Judge that there was an inherent power in any appellate authority to remand a case for retrial and fresh decision. The contention was based on the analogy of Order 41, Rule 23, Code of Civil Procedure. This contention was negatived on the ground that there was no corresponding provision in the Act. At the same time, the learned Judge observed as under:—

"Assuming that the Appellate Authority had a general power of remand similar to the power of remand which the appellate Courts under the Code exercise under the provisions of Section 151, even then there seems to be no reason or justification in the present case for remanding the matter for fresh decision by the Rent Controller."

10. It is, thus, clear that in that case, on merits, it was found that the case was not one which should have been properly remanded by the Appellate Authority, and the learned Judge did not expressly lay down that the Appellate Authority did not exercise inherent powers.

11. Moti Ram's case Civil Revn. No. 641 of 1957, D/- 29-4-1958 (Punj) (supra) came up for consideration before Dua, J., (as the learned Judge then was) in Din Dayal v. Ram Chander, Civil Revn. No. 169 of 1958, decided on 29-9-1958 (Punj). It was argued before the learned Judge that the power of remand was inherent in every court of appeal and in every appellate tribunal when it had to perform judicial or quasi-judicial functions. In support of this submission, reliance was placed on ILR (1955) Patiala 481 in which a learned Judge of the Patiala High Court had taken that view. The learned Judge

observed that there was some force in the submission made before him and observed:—

"There may be cases where the Controller has disposed of a matter on a preliminary point without adjudicating upon the merits of the dispute and if the appellate authority disagrees with that decision it would undoubtedly be desirable to hold in favour of there being inherent power vesting in the appellate authority to remand the case to the Rent Controller to try the petition on merits."

12. He was inclined to refer the case to a larger Bench but the parties before him agreed that the learned District Judge should either himself visit the spot or appoint some other expert to inspect the site in dispute and submit his opinion to enable the Appellate Authority to finally decide the appeal.

13. A similar question cropped up before Falshaw C. J. in Lajpat Rai v. Harkishan Dass, Civil Revn. No. 676 of 1962, decided on 15-4-1963 (Punj). In that case an allottee of the evacuee property filed an application for ejectment against the tenant who had been inducted into that property prior to its allotment. The tenant contested the application for ejectment on every conceivable ground including the denial of any relationship of landlord and tenant between the parties. He also pleaded that the application for ejectment was premature in view of the provision of Section 29 of the Displaced Persons (Compensation and Rehabilitation) Act, 1954, which prohibits the ejectment of persons in lawful possession of the former evacuee properties transferred to other persons for a period of two years except on certain grounds. The learned Rent Controller framed issues on all the points and allowed the parties to lead the evidence on all the issues, but he dismissed the landlord's petition on the finding that there was no relationship of landlord and tenant and that the ejectment petition was premature. No decision was given by him on the remaining issues. The landlord went up in appeal. The Appellate Authority reversed the decision of the learned Rent Controller on the first point, on the second point he held that the landlord's application was not premature and remanded the case to the learned Rent Controller for decision on the remaining issues. The tenant filed a revision petition against the order of remand which came up for hearing before the learned Chief Justice. While negativing the argument, the learned Chief Justice observed as under:—

"I do not, however, consider that that decision applies to the present case in which it is not so much a matter of the learned Rent Controller's not having dealt satisfactorily with some point which arose in the case as of his not having dealt with the merits at all after accepting certain preliminary objections. In my opinion, there is nothing in the words of the section which prohibits a remand in such a case."

14. In other words, the learned Chief Justice distinguished Krishan Lal Seth's case (1961) 63 Pun LR 865 (supra) on the ground that that authority applied only to a case where the Rent Controller had not dealt separately with some point which arose in the case in contradistinction with his not having dealt with the merits of the case at all after accepting certain preliminary objections. The fact, however, remains that the learned Chief Justice did accept the proposition that under certain situations it is open to an Appellate Authority under the Act to remand the case.

15. Speaking for myself, I am prima facie of the view that the procedural provisions of a statute under which a Court or a quasi-judicial authority is invested with the jurisdiction to decide a lis between two parties are exhaustive to the extent to which the subject-marter has been specifically dealt with by the Legislature and in respect of the matters which have not been so specifically dealt with, such an authority can pass an appropriate order to achieve the ends of justice in exercise of its inherent powers. As far as the Code of Civil Procedure is concerned, the orders of remand were usually passed by the Appellate Authority under Order 41, Rule 23, C. P. C. and if a matter did not fall squarely within the provisions of that Order the cases were remanded in exercise of inherent powers. At the same time unnecessary and avoidable orders of remand passed by the appellate courts were invariably frowned upon by the superior

courts because such orders tended to give further spurt to litigation, but where entirely new and relevant matters crop up before the appellate courts the decision on which becomes essential in the just disposal of the case it does look proper that such a matter should be decided at the lowest level so that the hands of the appellate courts do not remain tied up with original matters. In this connection the observations made by Dua, J., which have been extracted above, appear to be quite pertinent. Had the matter rested here, I would have felt inclined to refer the case to a larger Bench but since Chief Justice Falshaw has distinguished the earlier Division Bench judgment, I would like to examine whether the same or similar distinction is also available in the instant case or not.

16. As stated above, in the instant case the learned Appellate Authority had earlier remanded the case because the application filed by the respondent landlady was not in proper form in as much as the same did not contain one of the two allegations required to be made under the statute, i.e., that the land lady did not vacate some residential building in the same urban area without a sufficient cause. In other words, the plea of the respondent landlady about her personal necessity had not at all been considered by the learned Rent Controller on merits. It would, thus, appear that the observations made by Falshaw C. J. in Lajpat Rai's case Civil Revn. No. 676 of 1962, D/- 15-4-63 (Punj) (supra) fully apply to the present case and as laid down by him the order of remand made by the learned Appellate Authority under these circumstances could not at all be regarded as being one without jurisdiction. The first contention raised by Mr. Aggarwal deserves to be repelled on this short ground.

17. However, there is another way of looking at the problem. An order of ejectment had been passed earlier against the petitioners by the learned Rent Controller, which was set aside by the learned Appellate Authority who remanded the case after allowing the respondent landlady to amend her application so that the issue regarding her personal necessity be again gone into. The petitioners obtained full advantage of this order of remand and took the chance of disproving this issue by leading evidence. After they had failed to do so, it would be improper on the part of the learned Appellate Authority or the revisional court to allow them to turn round and assert that the order of remand was without jurisdiction. The plea of estoppel would adequately confront them in such a situation. In Ram Diwaya v. Kanhaya Lal, 1972 Rev CR 530, under somewhat similar circumstances it was held by a learned Judge of this Court that where a tenant enjoys full benefit of the trial after the case is remanded by the Appellate Authority, he would be estopped to challenge the legality of the order of remand in subsequent proceedings. Since the order of remand was made because a relevant issue had not been tried by the learned Rent Controller on merits and since the petitioners had themselves derived benefit under this order of remand, I hold that neither the order of remand was illegal nor was it open to the petitioners to challenge its legality at this stage.

18. In order to understand the second contention raised by Mr. Aggarwal, it becomes necessary to notice the statutory provisions. The relevant portion of Section 13 of the Act reads as under:—

"Section 13 (3) (a) (i) (a)
A landlord may apply to the Controller for an order directing the tenant to put the landlord in possession—

(i) in the case of a residential building if—

(a) he requires it for his own occupation."

"2nd proviso to Section 13 (3) (a) (iv) provided further that where the landlord has obtained possession of a residential building or rented land under the provisions of sub-paragraph (i) or sub-paragraph (ii) he shall not be entitled to apply again under the said sub-paragraph for the possession of any other building of the same class or rented land."

19. The precise argument raised is that if the landlord or the land-lady has succeeded in ejecting a tenant from any building situate in the same urban area, he or she shall not be entitled to make another application for ejectment of a tenant from another building on

the ground of personal necessity. It has been argued by Mr. Aggarwal that in the same building there was another tenant also and since the respondent landlady succeeded in ejecting him, the present application was barred under the aforementioned proviso. This argument is also devoid of any merit. A plain reading of the proviso mentioned above shows that a landlord after getting one building vacated, which can reasonably meet his needs, cannot get another building vacated. The proviso does not lay down that if the entire building, which is needed by a landlord for his personal use, is occupied by more than one tenant, he or she cannot take out eviction proceedings against the other tenants after having evicted one. The object of this proviso is that a landlord should not be allowed to seek unreasonable ejectments of tenants from independent buildings if he has already succeeded in evicting a tenant from a building which is sufficient for his personal occupation. In any event the aforementioned plea was not taken either before the learned Rent Controller or before the learned Appellate Authority. Had such a plea been taken, the respondent landlady would have led evidence for proving the defences open to her. Where valid defences are open to a party, the proof of which necessitates the taking of further evidence it would not be a proper exercise of discretion by the revisional court for allowing such pleas to be raised at that late stage. In Baldevdas Shivlal v. Filmistan Distributors (India) Pvt. Ltd., AIR 1970 SC 406, it was held that a High Court could not give a finding on the question of res judicata where the trial Court had not decided this issue. In the circumstances. I have no hesitation in repelling the second contention raised by Mr. Aggarwal.

20. Last of all, it was argued that since the son of the respondent landlady was running handlooms in a part of the building in dispute and that part was capable of being used for residential purposes, the claim made by the respondent that she requires the premises in dispute for her own use should be held mala fide. It is difficult for me to accept this contention either. It is open to a landlord to put his property to any reasonable use including its use by his sons or daughters for running a cottage industry and yet seek the eviction of tenants from a part of the same building on the ground of personal necessity. The learned Rent Controller while deciding an application under S. 13 (3) of the Act made by a landlord has to take into consideration all the relevant circumstances for determining whether the need of the landlord is bona fide or not, but the law does not require that a landlord should render his son or daughter jobless first and then seek eviction of a tenant from his building.

21. No other point was raised before me.

22. For the reasons mentioned above, there is no merit in this petition which is dismissed in limine with no order as to costs. The petitioner is allowed two months time to vacate the premises provided they pay or deposit in court arrears of rent, if any, and the rent for this period within fifteen days from today.

Petition dismissed.

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FULL BENCH

S. S. SANDHAWALIA, C. J.,
P. C. JAIN AND S. C. MITAL, JJ.

M/s. Jindal Strips Ltd., Petitioner v. Income-tax Officer, Central Circle III, New Delhi and another, Respondents.

Civil Writ No. 1501 of 1977, D/- 6-12-1978.*

Income-tax Act (43 of 1961), Section 133 (6) — Power to call for information — Detection of concealed income — I. T. O. has power to seek assistance of valuation officer to ascertain value of asset.

Whatever an Income-tax Officer can do directly in the exercise of his powers can be got done with the assistance of a Valuation Officer. The words "any proceeding under the Act" occurring in Section 133 (6) of the Act include detection of concealed income. (Para 9)

Where in consequence of the search, the Intelligence Wing of the Depart-

*(Decided by Full Bench on Order of reference made by M. R. Sharma and S. S. Sidhu JJ., D/- 28-7-1977.)

DW/DW/B805/79/GDR

ment processed the case and reported to the Income-tax Officer, inter alia, that large amounts of unaccounted money appeared to have been spent on the construction of the assessee mill and the Income-tax Officer was accordingly advised to make an enquiry regarding the cost of construction of the mill, the reference by the Income-tax Officer to the Valuation Officer to ascertain the true value of the mill in question at the relevant time was valid. Mentioning of Section 55-A of the Income-tax Act, in letter by the Income-tax Officer to the Valuation Officer was of no consequence, since the proceedings were otherwise in accordance with Section 133 (6). (Para 9)

Bhagirath Dass with B. K. Gupta, and Jaswant Jain, for Petitioner; D. N. Awasthy with B. K. Jhingan, for Respondents.

S. C. MITAL, J.:— The question for determination before this Bench is, whether in the facts and circumstances of this case, reference by the Income-tax Officer to the Valuation Officer to ascertain the value of the mill in question at the relevant time, is valid.

2. The salient facts are that somewhere in 1970 and May 1971 M/s. Jindal Strips Limited, hereinafter referred to as the Company, constructed strip-skelp mill shed, hereinafter referred to as the mill on its premises in Hissar. For the year ending 31st December, 1971 (Assessment Year 1972-73), the Company in its return valued the mill at Rs. 15,30,064.34. p. The valuation was accepted by the Income-tax Officer, who then dealt with the case, by his order dated 7th January, 1974. For the subsequent Assessment years 1973-74, 1974-75 the above-said value of the mill was repeated, with due depreciation being shown. The Income-tax Officers concerned in their orders dated 16th February, 1976, and 2nd March, 1976, accepted the valuation. Thus, the assessment proceedings for the above-said three years are complete in all respects.

3. For the Assessment Year 1975-76, the return filed by the Company on 29th August, 1975, was pending when on 26th November, 1976, the Income-tax Officer (Respondent No. 1) purporting to act under Section 55-A of the Income-tax Act, hereinafter referred to as the Act, wrote to the valuation Officer (Respondent No. 2) to evaluate the mill for the Assessment Year 1972-73. By his letter dated 6th December, 1976 (Annexure P. 3), the Valuation Officer asked the Company to supply, inter alia, complete set of the drawings of the property, balance sheet and profit and loss account from the date of inception of the Company till 31st December, 1972. With a view to evaluate the mill, on 1st March, 1977, the Valuation Officer visited the premises of the Company. The Company did not object to it. Thereafter, letters dated 9th and 15th March, 1978 (Annexures P. 5 and P. 6) were received by the Company from the Valuation Officer requiring the Company to produce vouchers of the expense incurred in the construction of the mill for the relevant period and certain other information for revaluating the same. At that stage, by its reply (Annexure P. 7), the Company objected to the authority of the Valuation Officer to ask for the above said information on the ground that the assessment proceedings for the years 1972-73, 1973-74 and 1974-75 being complete, there was no occasion for the Company to comply with the demand of the Valuation Officer. Since he insisted upon compliance with the directions contained in the two letters mentioned above, the Company filed the present writ petition challenging the authority of the Income-tax Officer to seek the assistance of the Valuation Officer in the exercise of his powers under Section 55-A of the Act. Before proceeding further, it may be mentioned that the proceedings for the Assessment year 1975-76 concluded during the pendency of this writ petition. Learned counsel for the company made a passing reference to the assessment order but did not consider it necessary, for the decision of the writ petition, to place a copy thereof on record.

4. The department's case is that in June 1974, a search was conducted on the business and residential premises of all the concerns of the Jindal Group of Companies and Industries, including the petitioner-Company. The collected material was duly processed by the Intelligence Wing. Final report thereof, inter alia, was that large amounts of unaccounted money appeared to have been spent on the construction of the mill.

Accordingly, the Income-tax Officer was advised to make enquiry regarding the cost of construction of the mill. The Act makes ample provision and confers wide powers on the Income-tax authorities, engaged in the computation of the total income of an assessee, to detect concealed income. For this purpose, the Company was asked to furnish report of an approved Valuer as to the value of the mill. Since the valuation given by the said Valuer was found to be considerably below the valuation discovered by the Intelligence authorities, further probe was considered necessary to find out the exact cost of construction of the mill by making reference to the Valuation Cell of the Income-tax Department. This is how the assistance of the Valuation Officer has been sought

5. In his letter (Annexure P-2, the Income-tax Officer, asking the Valuation Officer to ascertain the value of the mill at the relevant time, has made mention of S. 55-A of the Act. As said above the Valuation Officer took action on the strength of Annexure P. 2. Learned counsel for the Company contends that wherever the assistance of Valuation Officer is considered necessary, the Act has provision. Reference in this regard was made to S. 269-L of the Act, which admittedly has no application to the present case. As regards S. 55-A of the Act, the learned counsel argues that it does not in terms apply to this case. Relevant part of S. 55-A of the Act reads:—

"With a view to ascertaining the fair market value of a capital asset for the purposes of this Chapter, the Income-tax Officer may refer the valuation of the capital asset to a Valuation Officer—

(a) in a case where the value of the asset as claimed by the assessee is in accordance with estimate made by a registered valuer, if the Income-tax Officer is of the opinion that the value so claimed is less than its fair market value;

(b) in any other case, if the Income-tax Officer is of opinion—

(i) that the fair market value of the asset exceeds the value of the asset as claimed by the assessee by more than such percentage of the value of the asset as so claimed or by more than such amount as may be prescribed in this behalf; or

(ii) that having regard to the nature of the asset and other relevant circumstances, it is necessary so to do.

Emphasis has been laid on the words "for the purposes of this Chapter" used in S. 55-A. This section occurs in Chapter IV of the Act which is in the following parts:—

A—Salaries-Sections 15 to 17,

B— Interest on Securities—Sec. 18 to 21,

C— Income from House Property — Sections 22 to 27,

D— Profits and gains of business or profession—Sections 28 to 44D,

E—Capital gains—Sections 45 to 55-A.

F— Income from other sources— Sections 56 to 59.

6. The contention of the learned counsel for the Company further is that S. 55-A is exclusively meant for Part "E" of Chapter IV dealing with "capital gains." The other provisions of the Act having bearing upon the contention of the learned counsel for the Company are discussed hereinafter. S. 2 (14) of the Act lays down:—

"'Capital asset" means property of any kind held by an assessee, whether or not connected with his business or profession ....."

The definition excludes certain things which are not relevant for our purpose, because it has not been urged before us that the mill in question does not fall within the definition of "capital asset." Now it is pertinent to reproduce the definition of "fair market value" (vide S. 2 (22-A) which in relation to a capital asset, means:—

(i) the price that the capital asset would ordinarily fetch on sale in the open market on the relevant date; and

(ii) where the price referred to in sub-section (i) is not ascertainable, such price as may be determined in accordance with the rules made under this Act:

Part "E" of Chapter IV of the Act dealing with "capital gains" starts with S. 45 which provides that any profits or gains arising from the transfer of a capital asset effected in the previous year, shall, save as otherwise provided in Ss. 53, 54, 54B, 54D and 54E be chargeable to income-tax under the head "capital gains" and shall be deemed to be the income of the previous year in which the transfer took place.

S. 46 deals with capital gains or distribution of assets by companies in liquidation. S. 47 enumerates transactions not falling within the purview of S. 45 The mode of computing income chargeable under the head "capital gains" is given in S. 48. Acquisition of capital asset (S. 49); computing of the cost of acquisition in the case of depreciable assets (S. 50); advance money received (S. 51); consideration for transfer in cases of under-statement (S. 52); capital gains exempt from tax (S. 53); profit on sale of property used for residence (S. 54) etc. are other matters contained in part "E" of Chapter IV of the Act In this context, the contention of the learned counsel for the Company is that the scope of S. 55-A, as evident from its terms, is confined to ascertainment of the fair market value of capital asset which has been subject-matter of transfer.

7. Learned counsel for the department has argued that Chapter IV deals with "computation of total income." That is so, but the manner in which the Legislature, in its wisdom has divided this chapter under distinct heads A to F cannot be easily lost sight of. Since S. 55-A occurs in Part "E-capital gains," it thus appears to apply to capital gains alone. In any case, our attention has not been drawn to any such terms of Section 55-A or to any of the provisions of the other parts of Chapter IV, so as to show that S. 55-A wherein the words "under this Chapter" occur, has relevance to any transaction other than "capital gains." For the foregoing reasons, it seems difficult to overrule the contention of the learned counsel for the Company that S. 55-A of the Act does not in terms apply to the facts and circumstances of this case.

8. With respect to the powers of the Income-tax officer, learned counsel for the Department places strong reliance on S. 133 (6) of the Act laying down :—

"The Income-tax. Officer, the Appellate Assistant Commissioner or the Inspecting Assistant Commissioner may for the purposes of this Act—

* * * * *

(6) require any person, including a banking company to furnish information in relation to such points or matters, or to furnish statements of accounts and affairs verified in the manner specified by the Income-tax Officer, the Appellate Assistant Commissioner or the Inspecting Assistant Commissioner, giving information in relation to such points or matters as, in the opinion of the Income-tax Officer the Appellate Assistant Commr. or the Inspecting Assistant Commissioner, will be useful for or relevant to, any proceeding under the Act."

9. It has not been disputed before us that if the Income-tax Officer directly requires the petitioner-Company to furnish the information sought for by the Valuation Officer, the Income-tax Officer will be within the exercise of his powers. Accordingly, learned counsel for the Department deduced that whatever an Income-tax Officer can do directly in the exercise of his powers can be got done with the assistance of a Valuation Officer. Emphasis is then laid on the words "any proceeding under the Act" occurring in S. 133 (6) of the Act. It would be seen that detection of concealed income is such a proceeding.

Sections 131 to 135 of the Act lay down the powers of the Income-tax authorities. S. 131 confers powers regarding discovery or production of evidence etc. on Income-tax officer and other authorities. The power of search and seizure is provided for by S. 132. Then comes S. 132-A conferring power to requisition books of account etc. power to call for information is conferred by S. 133 and power of survey by S. 133-A. It is pertinent to point out here that "proceeding" is defined by Explanation (b) to S. 133-A as under:—

"The proceeding means any proceeding under the Act in respect of any year which may be pending on the date on which the powers under the section are exercised or which may have been completed on or before such date and includes also all proceedings under this Act which may be commenced after such date in respect of any year."

Section 134 confers on the Income-tax Officer and the authorities specified therein the power to inspect registers of Companies. That being so, it has not been argued before us that the search of Jindal Group of Companies, includ-

ing the petitioner-Company, wan not "a proceeding under the Act." As said above, in consequence of the search, the Intelligence Wing of the Department processed the case and reported to the Income-tax Officer, inter alia, that large amounts of unaccounted money appeared to have been spent on the construction of the mill. The Income-tax Officer was accordingly advised to make an enquiry regarding the cost of construction of the mill. It is in this context that the assistance of the Valuation Officer has figured. Significance thereof lies in the fact that for ascertaining the true value of the mill, the Income-tax Officer has chosen to have the advantage of the technical knowledge of the Valuation Officer (Respondent No. 2), who is not other than the Superintending Engineer (Valuation) of the Income-tax Department. That the Income-tax Officer is entirely seized of the matter needs no emphasis. In the nature of things, the report of the Valuation Officer would not bind the Income-tax Officer and the Company can have its say in the matter. Mentioning of Section 55-A of the Income-tax Act, in letter Annexure P. 2 by the Income-tax Officer to the Valuation Officer, is of no consequence, in that, when the proceedings are otherwise in accordance with law, mentioning of a wrong section will not vitiate them.

10. The other aspect of the matter referred to by the learned counsel for the department is that the information sought for by the Valuation Officer from the Company is in the interest of the latter. Learned counsel further stresses that the Income-tax Officer has been quite fair to the Company in not launching proceedings under S. 147 of the Act straightway. Instead, he has chosen a very fair course to associate the Company in ascertaining the value of the mill and it may be that if the Company furnishes the required information, need for reopening the assessments starting from 1972-73 may not arise.

11. In view of the discussion above the question formulated, in the beginning of the judgment, is answered in the affirmative. The writ petition fails and the same is hereby dismissed. The parties are, however, left to bear their own costs.

S. S. SANDHAWALIA C. J.:— I agree.

P. C. JAIN J.:— I also agree.

Petition dismissed.

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PREM CHAND JAIN AND J. M. TANDON, JJ.

M/s. Mohan Meakin Breweries Ltd. Petitioner v. Municipal Corporation of Jullundur City and others, Respondents.

Civil Writ No. 1215 of 1978, D/- 30-11-1978.

(A) Punjab Municipal Act (3 of 1911), S. 61 (2) — Punjab Excise Act (1 of 1914), S. 16 — Scope — Punjab Municipal Account Code (1930), R. V, 17-(3) — Importer storing liquor in bonded warehouse within municipal limits without payment of excise duty — Levy of octroi tax at time of exit — Excise duty can be included in invoice value for octroi duty.

Section 16 of the Excise Act is mandatory about the payment of excise duty for importing liquor and actual payment thereof stands deferred on execution of a bond. It is, therefore, clear that the execution of the bond defers the payment and not liability to pay excise duty. The excise duty shall thus be deemed to have been levied at the time of import and its actual payment deferred till its issue from the warehouse. (Para 8)

It is undisputed that if the excise duty is paid and included in the invoice, the octroi will be chargeable on the value of liquor including the excise. The value of an article is essentially linked with the amount spent for acquiring it. It would not be very relevant if a part of the amount for acquiring an article is paid at one place and the remaining part at another. But if the authority has reason to suspect that the value of the article given in the invoice, which may not be fake, is not real, he will be competent to make a departure therefrom and to find its true value otherwise. (1971) 73 Pun LR (D) 138, Criticised. (Para 11)

Where the petitioner had executed a bond for the payment of excise duty under S. 16 of the Excise Act for import of liquor to Jullundur for storing it in its bonded warehouse within Municipal limits the excise duty shall be deemed to have been levied at the time of import and its actual payment deferred till it is

issued from the warehouse. Therefore the potential value of the liquor shall be taken to have been increased to the extent of the excise duty payable thereon for payment of octroi. The value of the liquor shown in the invoice without the excise duty will not be real. The authority under sub-rule (3) of R. V. 17 of the Municipal Account Code will thus be competent to ignore the invoice and assess the value of the liquor by including the excise duty payable thereupon. (Para 12)

(B) Punjab Municipal Corporation Act (42 of 1976), Ss. 90 (3) and 113 — Constitutional validity — Not ultra vires of Art. 14 for want of guidelines. (Constitution of India, Art. 14).

Sections 90 (3) and 113 of the Corporation Act, which empower the State Government to fix rates of octroi are not ultra vires Article 14 of the Constitution for want of guidelines. The guidelines for specifying the rates of octroi are contained in the Corporation Act. It will be immaterial if they are effective qua the Corporation or the Government. These guidelines would have circumscribed the discretion of the Corporation if it was exercisable by it. The guidelines need not necessarily be prescribed in the relevant section and can be inferred from the Act. Viewed in that light the Corporation Act does contain guidelines to limit the discretion of the Government in the matter of specifying octroi rates under sub-section (3) of Section 90 and S. 113. AIR 1965 SC 1107 and AIR 1967 SC 1895 and AIR 1968 SC 1232, Rel. on. (Para 16)

Anno: AIR Comm. Constn. of India (2nd Edn.), Art. 14, N. 42.

(C) Punjab Municipal Corporation Act (42 of 1976), S. 428 — Imposition of octroi on import of liquor — Absence of notification under Act — Prior notification under Municipal Act neither inconsistent nor superseded by Corporation Act is saved.

In view of S. 428 of the Corporation Act the notifications and taxes already issued and imposed by the Municipal Committee, Jullundur, under the Punjab Municipal Act, shall continue to be in force so long as not specifically superseded under the Corporation Act. It is understood that the notification issued under the Punjab Municipal Act regarding octroi is neither inconsistent with nor has been superseded under the Corporation Act. The Municipal Corporation of Jullundur, therefore, cannot be held incompetent to charge the impugned octroi from the petitioner. (Para 17)

Cases Referred:	Chronological	Paras
(1971) 73 Pun LR (D)	138	9, 10, 11
AIR 1968 SC 1232		16
AIR 1967 SC 1895		14
AIR 1965 SC 1107		14, 15
AIR 1961 SC 552		13
AIR 1958 SC 538		13

V. N. Koura, Bar-at-law (R. K. Chibbar with him), for Petitioner; D. N. Awasthy (B. S. Bindra with him) (for Nos. 1 and 3) and M. P. Singh Gill, Dy. Advocate-General, Punjab (for No. 4), for Respondents.

J. M. TANDON, J.:— In this writ petition, a challenge has been laid to the competency of the respondents to charge octroi from the petitioner for the import of Indian made foreign liquor to its warehouse within the limits of Municipal Corporation, Jullundur City.

2. The petitioner sells Indian made foreign liquor in the State of Punjab and for this purpose maintains a bonded warehouse, licensed under S. 22 (a) of the Punjab Excise Act, 1914 (hereinafter referred to as the Excise Act), within the limits of Municipal Corporation of Jullundur City. The liquor imported by the petitioner is stored in the bonded warehouse without payment of excise or countervailing duty. The liquor passes the octroi barrier of the Municipal Corporation, Jullundur, to reach its destination. Prior to the setting up of the Municipal Corporation, Jullundur City, there was a Municipal Committee governed by the Punjab Municipal Act, 1911. A Municipal Committee has power to levy octroi on the entry of goods within its local area under S. 61 (2) of the Punjab Municipal Act. The Municipal Committee, Jullundur, had levied octroi tax ad valorem on Indian made foreign liquor. After the Municipal Corporation, Jullundur City, was set up in 1977, it continued to charge octroi from the petitioner for the import of liquor to its bonded warehouse. The octroi was charged not on the basis of the invoice value of the liquor, but on its potential value including the excise/countervailing duty which was to be paid by the petitioner to the Excise authorities within the State of Punjab when it was issued for sale from the bonded warehouse. The petitioner feeling aggrieved by the impugned levy, appealed to the Commissioner, Jullundur Division, challeging the authority of the Corporation to charge octroi and in any event to

charge it on the potential value of the liquor including excise/countervailing duty. The Commissioner dismissed the appeal. It is under these circumstances that the present writ has been filed wherein the competency of the respondents to charge octroi and further to include the excise duty payable by the petitioner at the time of issue of liquor from the bonded warehouse for assessing its value for the purposes of octroi has been questioned. The petitioner has also challenged the vires of Sections 90 (3) and 113 of the Punjab Municipal Corporation Act, 1976 (hereinafter referred to as the Corporation Act), which relate to the levy of octroi.

3. The respondents, in their written statements, denied that the levy of octroi was illegal or Ss. 90 (3) and 113 of the Corporation Act ultra vires, as alleged by the petitioner.

4. The learned counsel for the petitioner has urged the following three points:

1. The value of the liquor for the purpose of octroi could not include the excise payable by the petitioner at the time of its issue from the bonded warehouse within the limits of Municipal Corporation, Jullundur.

2. Sections 90 (3) and 113 of the Corporation Act, which empower the State Government to fix rates of octroi are ultra vires Article 14 of the Constitution for want of guidelines.

3. In the absence of a notification under Ss. 90 (3) and 113 of the Municipal Corporation Act, no octroi can be charged.

5. We will discuss these points seriatim. It is admitted that the liquor is manufactured outside Punjab and is brought by the petitioner to be stored in its bonded warehouse at Jullundur. The excise duty on the imported liquor remains unpaid when it passes the octroi barrier of Municipal Corporation, Jullundur. It is further admitted that the Corporation authorities include the excise duty payable on the liquor for assessing its value for charging octroi. The value of liquor reflected in the invoice at the time of import does not include excise.

6. A licensed warehouse can be established under S. 22 of the Excise Act and S. 23 thereof prohibits the removal of intoxicants without payment of excise duty. These two sections read:

"22. The Financial Commissioner, subject to such restrictions or conditions as the State Government may impose, may —

(a) establish or license a warehouse wherein any intoxicant may be deposited and kept without payment of duty;

(b) discontinue any warehouse so established.

23. No intoxicant shall be removed from any distillery, brewery, warehouse; or other place of storage established or licensed under this Act, unless the duty (if any) payable under Chap. 5 has been paid or a bond has been executed for the payment thereof."

Section 16 of the Excise Act deals with import, export and transport of liquor. It reads:

"16. No intoxicant shall be imported, exported or transported except —

(a) after payment of any duty to which it may be liable under this Act or execution of a bond, for such payment; and

(b) in compliance with such conditions as the State Government may impose."

It is apparent that S. 16 shall be attracted in the instant case inasmuch as liquor is imported by the petitioner for storing in its bonded warehouse at Jullundur. Under sub-section (a) of this section, it is obligatory for the petitioner to pay the excise duty on liquor for its import. It is, however, open to the petitioner to execute a bond for payment of excise duty and in the event of such option being exercised, the liquor would be allowed to be imported for being stored in the bonded warehouse without actual payment of excise duty at that time. Section 32 of the Excise Act provides the manner in which the excise duty may be levied. The second proviso to this section, which is relevant for the purpose of this case, reads:

"Provided further that, where payment is made upon issue of an excisable article for sale from a warehouse established or licensed under S. 22 (a) it shall be made —

(a) if the State Government by notification so directs, at the rate of duty which was in force at the date of import of that article; or

(b) in the absence of such direction by the State Government, at the rate of duty which is in force on that article on the date when it is issued from the warehouse."

7. The learned counsel for the petitioner has argued that the excise duty becomes payable on the liquor when it is

issued from the bonded warehouse at Jullundur. No duty is consequently payable on the liquor when it passes the octroi barrier of Municipal Corporation, Jullundur. The value of liquor for purposes of octroi can, therefore, be its invoice value which does not include the excise duty payable thereon. The learned counsel for the petitioner has also placed reliance on R. V.17 of the Punjab Municipal Account Code, 1930, to which reference will be made a little later. The point to be considered at this stage, therefore, is whether the excise duty is leviable on the liquor at the time of its issue from the bonded warehouse or earlier. It is understood that if the excise duty on the liquor is held leviable earlier to its reaching the bonded warehouse and its payment only deferred, the value for purpose of octroi shall include the excise duty.

8. Under S. 16 of the Excise Act, the liquor cannot be imported without payment of excise duty. The petitioner can exercise option on executing a bond for its actual payment when it is issued from the warehouse. Will the execution of the bond render the excise duty leviable at the time of its issue from the warehouse or only defer its payment till the time of its issue? In our opinion, the bond executed by the petitioner will only defer the payment of excise duty on liquor and not postpone its levy. The learned counsel for the petitioner has argued that the second proviso to Section 32 supports the inference that the levy is postponed because in the absence of a notification to the contrary, the petitioner shall have to pay excise duty prevalent on the date of its issue from the warehouse and not at the rates which were in force on the date of import. The argument proceeds that there can be no levy of excise, whether actual or potential, so long as it is not quantified and it will happen only when the liquor is issued from the warehouse. There is no merit in this contention. The fact that the rate of excise in force at the time of issue of liquor from the warehouse may differ from the rate which was in force on the date of import may entitle the petitioner to the refund of excess payment of octroi, if any, but it would not make its import to the warehouse duty-free. Section 16 of the Excise Act is mandatory about the payment of excise duty for importing liquor and actual payment thereof stands deferred on execution of a bond. It is, therefore, clear that the execution of the bond defers the payment and not liability to pay excise duty. The excise duty shall thus be deemed to have been levied at the time of import and its actual payment deferred till its issue from the warehouse.

9. The learned counsel for the petitioner has drawn our attention to R. V.17 of the Municipal Account Code and has contended that according to the provisions contained therein, the value of an article for the purpose of octroi is to be determined on the basis of its price given in the invoice plus the cost of freight. In support of his contention, he has cited Jai Dayal v. The Municipal Committee, Nahan, (1971) 73 Pun LR (D) 138.

10. Rule V. 17 of the Municipal Account Code reads:

"V. 17 (1). The octroi payable in respect of goods imported otherwise than by rail for consumption, use or sale within octroi limits shall be assessed —

(a) by the officer-in-charge of the barrier of import, if:

(i) the octroi is leviable by weight or tale, or

(ii) the octroi is leviable ad valorem according to the provisions of R. V. 12.

(b) by the Octroi Superintendent.

(2) When ocroi liable ad valorem is to be assessed by an officer-in-charge of a barrier, he shall calculate their value on the information at his disposal with regard to the invoice produced by the importer or the value declared by the importer.

(3) When octroi leviable ad valorem is to be assessed by the Octroi Superintendent, he shall, if no invoice is presented with the goods, calculate the value of the goods on the information at his disposal with due regard to the value declared by the importer, and, if an invoice is presented, calculate the value on the value entered in the invoice plus the cost of freight unless he has reason to suspect that the invoice is not genuine, in which case he shall proceed as if no invoice had been presented."

A near similar situation to the one under discussion arose in Jai Dayal v. The Municipal Committee, Nahan (supra). A liquor licensee of Nahan imported liquor for sale within the limits of Municipal Committee, Nahan. He was liable to pay octroi to be assessed ad valorem. It was necessary for him to pay excise duty on the liquor that he proposed to import to the Collector of Nahan, who, on receipt of the same, issued an excise per-

mit. The licensee purchased liquor on the basis of the import permit issued to him by the Collector of Nahan. He consequently paid the price of the liquor to the supplier. The invoice issued contained the price that was paid to the supplier and not the excise that had already been paid to the Collector. The Municipal authorities charged octroi from the licensee on the price of the liquor including the excise. The licensee challenged the action of the Municipal Committee and the stand taken by him was that as provided under sub-rule (3) of R. V.17 of the Municipal Account Code, 1930, which was applicable to Nahan, the value of the liquor for the purpose of octroi was to be restricted to its invoice and the excise duty already paid by him to the Collector of Nahan for importing the same could not be taken into account. The learned single Judge upheld the stand of the licensee holding that the value of the article as given in the invoice could only be taken into account for payment of octroi under sub-rule (3) of R. V.17. It was further held that a departure from the invoice could be made only if it was not genuine. As the invoice of the licensee was genuine and not fake, the Municipal Committee, Nahan, could not include the excise duty for determining the value of liquor for charging octroi.

11. It is undisputed that if the excise duty is paid and included in the invoice, the octroi will be chargeable on the value of liquor including the excise. The value of an article is essentially linked with the amount spent for acquiring it. It would not be very relevant if a part of the amount for acquiring an article is paid at one place and the remaining part at another. The value of the liquor imported by the licensee of Nahan, therefore, did include the excise duty paid by him irrespective of the fact that he paid the same at Nahan for procuring an import permit. The learned single Judge in Jai Dayal's case (1971-73 Pun LR (D) 138) (supra), while considering the scope of sub-rule (3) of R. V. 17 of the Municipal Account Code, concluded that if the invoice was not fake then the value of the article imported within the municipal limits for the purpose of octroi could not exceed that given therein. With respect we are unable to agree with the narrow interpretation of the word "genuine" given by the learned single Judge in that case. In our opinion, if the authority has reason to suspect that the value of the article given in the invoice, which may not be fake, is not real, he will be competent to make a departure therefrom and to find its true value otherwise. In Jai Dayal's case (supra), the excise duty as also the price of the liquor stood paid already when it passed the octroi barrier. The invoice was genuine but the price of the liquor shown therein was not true because it did not include excise. In such a situation, the authority under sub-rule (3) of R. V. 17 ibid can make departure from the invoice to determine the real value of the liquor for octroi.

12. The petitioner executed a bond for the payment of excise duty under Section 16 of the Excise Act for import of liquor to Jullundur for storing it in its bonded warehouse. We have already held that the excise duty shall be deemed to have been levied at the time of import and its actual payment deferred till it is issued from the warehouse. In view of this finding, the value or potential value of the liquor shall be taken to have been increased to the extent of the excise duty payable thereon for payment of octroi. The value of the liquor shown in the invoice without the excise duty will not be real. The authority under sub-rule (3) of rule V.17 of the Municipal Account Code will thus be competent to ignore the invoice and assess the value of the liquor by including the excise duty payable thereupon. The first point is decided against the petitioner.

13. The Corporation Act makes it obligatory for the Corporation to levy certain taxes including octroi. Sub-secs. (1) and (3) of S. 90 thereof, which are relevant, read:—

"90 (1). The Corporation shall, for the purposes of the Act, levy the following taxes:—

* * * * *

(b) octroi;

* * * * *

"(3) The taxes specified in sub-sec. (1) and sub-sec. (2) shall be levied at such rates as may, from time to time, be specified by the Government by notification and shall be assessed and collected in accordance with the provisions of this Act and the bye-laws made thereunder."

It is clear that the rates of octroi to be charged by the Corporation under sub-sec. (1) of S. 90 are to be specified by the Government. Under S. 113 of the Corporation Act, which deals with the levy of octroi, it is again provided that

"the Corporation shall levy octroi on articles and animals, imported into the City, at such rates as may be specified by the Government." The contention of the learned counsel for the petitioner is that sub-section (3) of S. 90 and S. 113 of the Corporation Act are violative of Art. 14 of the Constitution because no guidelines are prescribed therein for specifying the rates of octroi. In support of his contention, he has cited Ram Krishna Dalmia v. Justice Tendolkar, AIR 1958 SC 538, wherein it was held that the Court will strike down the statute if it does not lay down any principle or policy for guiding the exercise of discretion by the Government in the matter of selection or classification, on the ground that the statute provides for the delegation of arbitrary and uncontrolled power to the Government so as to enable it to discriminate between persons. The other authority cited in support of this proposition is Kunnathat Thathunni Moopil Nair etc. v. State of Kerala, AIR 1961 SC 552.

14. The learned counsel for the respondents has contended that there are sufficient guidelines in the Corporation Act itself for exercise of discretion by the Government under sub-sec. (3) of S. 90 and S. 113. The substance of the contention is that the Corporation is an autonomous body and it needs funds for various objects and development schemes. A budget of the Corporation involving its income and expenditure is prepared every year. The expenditure involved is a sufficient guideline for the Government for specifying rates of octroi. Reliance has been placed on the Corporation of Calcutta v. Liberty Cinema, AIR 1965 SC 1107, wherein S. 548 of the Calcutta Municipal Act, 1951, was under scrutiny. It was provided therein that a licensee of a cinema house under Section 443 of that Act would pay a fee at such rate as may from time to time be provided. It was argued that Sec. 548 was invalid on the ground that it amounted to illegal delegation of legislative functions to the Corporation because it left it entirely to the latter to fix the amount of the tax and provided no guidance for that purpose. This contention was repelled. It was held that delegation of essential legislative power would be bad but the fixation of the rates of taxes is not of the essence of legislative power of taxation. The fixation of rates of taxes may be legitimately left by a statute to a non-legislative authority, for there is no distinction in principle between delegation of power to fix rates of taxes to be charged on different classes of goods and power to fix rates simpliciter and if power to fix rates in some cases can be delegated then equally the power to fix rates generally can be delegated. It was further held that the validity of the guidance cannot be tested by a rigid uniform rule and that must depend on the object of the Act giving power to fix the rate. For a statutory provision for raising revenue for the purposes of the delegates, the needs of the taxing body for carrying out its functions under the statute for which alone the taxing power was conferred on it, may afford sufficient guidance to make the power to fix the rate of tax valid. The guidance furnished must be held to be good if it leads to the achievement of the object of the statute which delegated the power. All taxes including the one under Sec. 548 could be collected and used by the Corporation only for discharging its functions under the Act. The Corporation which is an autonomous body has to perform various statutory functions. For all this it needs money and its needs will vary from time to time with the prevailing exigencies. In the case of a self-governing body with taxing powers, a large amount of flexibility in the guidance to be provided for the exercise of that power must exist. There was sufficient guidance in the Act as to how the rate of levy was to be fixed. While discussing Liberty Cinema's case (supra) in Devi Das Gopal Krishnan v. State of Punjab, AIR 1967 SC 1895, it was observed that a power to fix rates must be supported by some reasonable guidance given in the Act whereunder the said power was conferred.

15. The learned counsel for the petitioner has argued that under Sec. 548 of the Calcutta Municipal Act, 1951, the power to fix rates had been given to the Corporation whereas under the Corporation Act the said power is exercisable by the Government and not by the Corporation. The considerations which prevailed with the Supreme Court for deciding Liberty Cinema's case (AIR 1965 SC 1107) (supra), would not therefore, hold good in the instant case. We are unable to appreciate this contention. It is significant to note that the Government, in exercise of power under sub-sec. (3) of S. 90 and Section 113

of the Corporation Act, is to specify rates of octroi to be charged by the Corporation. According to the learned counsel for the petitioner, this power, if exercisable by the Corporation, may have been valid but not when it is exercisable by the State Government. The guidelines for specifying the rates of octroi are contained in the Corporation Act. It will be immaterial if they are effective qua the Corporation or the Government. These guidelines would have circumscribed the discretion of the Corporation if it was exercisable by it. It is difficult to hold that they will not be so because the discretion to fix rates is exercisable by the Government and not by the Corporation. In our opinion, the ratio of Liberty Cinema's case is applicable to the facts of the present case irrespective of that the power to fix rates of octroi is exercisable by the Government.

16. In the Municipal Corporation of Delhi v. Birla Cotton, Spinning and Weaving Mills, Delhi, AIR 1968 SC 1232 Section 150 of the Delhi Municipal Corporation Act was examined and the argument raised was that it was unconstitutional inasmuch as it suffered from the vice of excessive delegation of legislative power and was, therefore, ultra vires with the result that no tax could be levied by the Corporation thereunder. It was held that in spite of the fact that no guidelines were prescribed in S. 150 itself, there were various circumstances which did provide guidance to the Corporation in carrying out the duties imposed upon it thereunder. The guide or control on the limit of taxation was to be found in the purposes of the Act. The Corporation had been assigned certain obligatory functions which it must perform and for which it must find money by taxation. It had also been assigned certain discretionary functions. If it undertook any one of them, it must find money. The limit to which the Corporation could tax was, therefore, circumscribed by the need to finance the functions, obligatory or optional. Another circumstance was the necessity of adopting budget estimates every year. The budget showed the revenue and the expenditure and these must balance so that the limit of taxation could not exceed the needs of the Corporation as shown in the budget. Still another circumstance was the provision contained in S 150 that the rates fixed by the Corporation had to be submitted to the Government for sanction. The legislature had thus made Government the watch-dog to control the actions of the Corporation in the matter of fixing rates and other incidents of taxes. This authority supports the contention of the learned counsel for the respondents that guidelines need not necessarily be prescribed in the relevant section and can be inferred from the Act. Viewed in that light the Corporation Act does contain guidelines to limit the discretion of the Government in the matter of specifying octroi rates under sub-sec. (3) of S. 90 and S. 113. These provisions, therefore, cannot be held ultra vires Art. 14 of the Constitution.

17. The last contention of the learned counsel for the petitioner is that no notification has been made under Sections 90 and 113 of the Corporation Act regarding the imposition of octroi and its rates and in the absence thereof, the Municipal Corporation, Jullundur, has no authority to charge octroi from the petitioner for the import of liquor to Jullundur for storing it in its warehouse. We find no merit in this contention as well. Section 428 of the Corporation Act is a saving provision and sub-section (1) of this section reads:

"428. Save as expressly provided otherwise in this Act:

(a) any appointment, delegation, notification, notice, tax, order, direction, scheme, licence, permission, registration, rule, bye-law, regulation, form made, issued, imposed or granted under the Punjab Municipal Act, 1911, or any other law in force in any local area, constituted to be a City or included in a City, immediately before the appointed day shall in so far as it is not inconsistent with the provisions of this Act, continue in force until it is superseded by any appointment, delegation, notification, notice, tax, order, direction, scheme, licence, permission, registration, rule, bye-law or form made, issued, imposed or granted under this Act or any other law as aforesaid, as the case may be.

x x x x x x."

It is evident that all notifications and taxes (including octroi) issued and imposed under the Punjab Municipal Act, 1911, continue to be valid and deemed to have been issued or imposed under the Corporation Act. In view of this saving provision, the notifications and taxes already issued and imposed by the Municipal Committee, Jullundur, under

the Punjab Municipal Act, shall continue to be in force so long as not specifically superseded under the Corporation Act. It is understood that the notification issued under the Punjab Municipal Act regarding octroi is neither inconsistent with nor has been superseded under the Corporation Act. The Municipal Corporation of Jullundur, therefore, cannot be held incompetent to charge the impugned octroi from the petitioner.

18. In the result, the writ petition fails and is dismissed with no order about costs.

Petition dismissed.

AIR 1979 PUNJAB & HARYANA 149
= 1979 LAB. I. C. 575

FULL BENCH

S. S. SANDHAWALIA, P. C. JAIN AND S. C. MITAL, JJ.

S. K. Verma and others, Petitioners v. State of Punjab and others, Respondents.

Civil Writ Petn. No. 1050 of 1978, D/- 19-5-1978*

(A) Constitution of India, Art. 16 — Matters relating to appointment — Regularisation of ad hoc employees — Validity.

Neither the fixing of a date for purposes of regularisation of ad hoc employees can be termed as arbitrary, nor would any question of discrimination arise betwixt persons who satisfied the conditions laid down for regularisation as against others who do not (obiter). 1976 Lab IC 1177 (Punj & Har), Foll. (Para 6)

Anno: AIR Comm. Constn. of India (2nd Edn.), Art. 16. N. 3 (d) (i).

(B) Constitution of India, Art. 311 — Persons in temporary service — Word "ad hoc employee" — Meaning — Termination of services of ad hoc employee — Art. 311, if attracted. C. W. P. No. 2268 of 1977, D/- 9-12-1977 (Punj. & Har.), Overruled.

The term 'ad hoc employee' is conveniently used for a wholly temporary employee engaged either for a particular period or for a particular purpose and one whose services can be terminated with the maximum of ease. Therefore, having regard to the ordinary meaning of the term, no distinction can reasonably be drawn betwixt a temporary employee whose services are terminable without notice or otherwise and an employee characterised as ad hoc and employed on similar terms.

As against the permanent, quasi-permanent, and temporary employee, the ad hoc one appears at the lowest level implying that he had been engaged casually, or for a stop-gap arrangement for a short duration or fleeting purposes. (Paras 9, 10)

The issue of the termination of the services of an ad hoc employee is strictly confined betwixt him and the State. Neither the academic qualifications of a proposed incumbent to fill the vacancy nor the nature of the tenure offered to him should have any legal consequences on the power or otherwise of the employer State to dispense or not with the services of an ad hoc employee. C. W. P. No. 2268 of 1977, D/- 9-12-1977 (Punj & Har) Overruled. (Paras 12 to 15)

In the case of a simple termination of services in accordance with the contract of employment clearly specifying that these may be dispensed with any time without giving any notice, no question of Article 311 being attracted arises. The services of the ad hoc employees not being governed by any statute or service rules, none of these interposed to bar the right of termination of the services of such employees in accordance with the letters of appointment. (Para 16)

Anno: AIR Comm. Constn. of India (2nd Edn.), Art. 311, N. 4.

(C) Constitution of India, Arts. 14, 16 — Scope and applicability — Termination of services of ad hoc employees — Art. 16, if attracted.

Arts. 14 or 16 are attracted only when equals are treated unequally or to put it in reverse unequals are treated equally. The ad hoc employees cannot claim any hostile discrimination qua some unspecified persons, who are not even parties to this petition and who in some eventuality may later come to hold the posts, which they are being asked to vacate. The equality clause can interpose only in the context of specific

*(Decided by Full Bench on order of reference made by D. S. Tewatia and D. B. Lal JJ., D/- 31-3-1978.)

persons or a specific class. An ad hoc employee with an existing service record cannot be deemed in the eye of law as identically equivalent to an aspirant for the post which he is likely to vacate. Thus, in the case of termination of the services of ad hoc employees in accordance with letter of their appointment (in order to replace them by another ad hoc employees), Article 16 could not even remotely be invoked. C. W P. No. 2268 of 1977, D/- 9-12-1977 (Punj & Har). Overruled.

(Paras 18, 19)

Anno: AIR Comm. Constn. of India (2nd Edn.), Art. 14, N. 41-A (aa), Article 16, N. 3 (d) (iii).

Cases Referred: Chronological Paras

(1977) CWP No. 2268 of 1977, D/- 9-12-1977 (Punj & Har) Krishna Devi v. Punjab State 1, 7, 11, 20

1976 Lab IC 1177: (1976) 1 Serv LR 570 (Punj & Har) 6

R. K. Chopra, for Petitioners; I. S. Tiwana, Addl. Advocate General, Punjab, for Respondents.

S. S. SANDHAWALIA, J.:— Whether the services of an ad hoc public servant can be terminated and another ad hoc employee appointed in his place is the somewhat interesting question, which falls for determination by this Full Bench. This reference has been necessitated in the wake of doubts raised about the correctness of the observations made by the Division Bench at the motion stage in Krishna Devi v. Punjab State (C. W. P. 2268 of 1977 decided on 9-12-1977 (Punj & Har)).

2. Though the issue is pristinely legal, yet a passing reference to the facts becomes inevitable. The three petitioners were recruited as Junior Auditors in the office of the District Food & Supplies Controller vide identical letters of appointment (Annexure P. 1). The relevant portion thereof deserves quotation:—

"The appointment is against a temporary post, the sanction of which is granted from time to time. If the post is abolished then your appointment is liable to be terminated as you are being appointed on temporary basis. It is therefore, made clear that your services can be terminated at any time without giving any notice."

3. It is the petitioners' case that though the temporary post against which they were appointed are yet continuing, nevertheless their services are sought to be terminated and the respondents have sent requisitions to the Employment Exchanges for appointment of fresh candidates in place of the petitioners on ad hoc basis. It is not in dispute that the respondent-State has issued an order (Annexure P. 2) inter alia providing for the regularisation of certain categories of its ad hoc employees, who had completed at least a minimum period of one year's continuous service on 31-3-1977 and further satisfied the requisite conditions specified in the said order. Admittedly none of the petitioners satisfied the basic conditions spelled out in Annexure P. 2, in order to attract its application. Nevertheless, a challenge is laid to the apprehended termination of the petitioners' services primarily on the ground that their employment cannot be dispensed with as long as the posts against which they were appointed continue and in order to make room for other ad hoc employees.

4. In the return filed on behalf of the State, it is highlighted that the appointments of the petitioner ab initio were on ad hoc basis and their services were liable to be terminated without notices in accordance with letters of their appointment. It has been categorically averred that the petitioners' case is not covered by the Government instructions (Annexure P. 2) and consequently the stand is that the petitioners have no legal right either for regularisation of the services or to challenge the termination thereof in accordance with the terms of their appointment.

5. The consideration as to who replaces them thereafter has been characterised as wholly irrelevant and extraneous to the issue.

6. To clear the ground for the consideration of the main question, it may be noticed at the very outset that a half-hearted attempt was made by Mr. Chopra to take some advantage of Annexure P. 2 for the regularisation of the petitioners' services. It was contended that the fixation of the date of 31-3-1977 for purposes of regularisation of ad hoc employees was arbitrary and discriminatory, and consequently despite the fact that the petitioners did-

not satisfy the conditions spelled out in that order, they were nevertheless entitled to claim the benefits thereof. On this point, however, the matter stands concluded against the petitioners by the Division Bench judgment in Gian Chand v. Director, Hydel Designs, Punjab, (1976) 1 Serv LR 570 : (1976 Lab IC 1177) (Punj). It has been authoritatively held that neither the fixing of a date for purposes of regularisation of ad hoc employees can be termed as arbitrary, nor would any question of discrimination arise between persons who satisfied the conditions laid down for regularisation as against others who do not. Faced with the aforesaid unsurmountable hurdle, the learned counsel for the petitioners did not press this aspect of the case at all.

7. The anchor-sheet of the petitioners' case, as already noticed, are the observations of the Division Bench in Krishna Devi's case (CWP No. 2268 of 1977, D/- 9-12-1977 (Punj)) made at the motion stage to the following effect :—

"The order Annexure P. 2 dated Feb. 19, 1977, passed by the Headmaster Government High School, Ghumiara, shows that the services of the petitioner are being terminated on the appointment of another employee by the District Education Officer, Faridkot. The order does not say that the other employee has been recruited as a regular teacher. We are highly doubtful whether it would be open to the Dist. Education Officer to terminate the services of an ad hoc employee who is better qualified for making the appointment of another employee with lesser qualifications on ad hoc basis. In the circumstances, we hold that the petitioner on the basis of her qualifications is entitled to hold the post of a Hindi teacher and she will not be removed from service merely because another employee is available for appointment on ad hoc basis. It shall, however, be open to the department to terminate her services if a regularly selected Hindi teacher is available for appointment. With these observations, this petition stands disposed of with no order as to costs."

8. Relying on the above, the learned counsel for the petitioner has raised two contentions. Firstly, that the services of even an ad hoc employee can be terminated only if a permanent and regular employee is to take his place if the post against which he was appointed is continuing. Secondly, on a lower plane it is contended that in any case the services of an ad hoc employee cannot be terminated in order to replace him by another ad hoc employee of equivalent or inferior academic qualification. It was, however, fairly conceded that the services of an ad hoc employee may be terminated if the post against which he was appointed is abolished.

9. We do not propose to get enmeshed in any abstruse discussion about the precise legal connotation of the term 'ad hoc employee' or to attempt a precise definition thereof. Indeed, it appears to us that this convenient appellation for a wholly temporary employee cannot be raised to the pedestal of a term of art. Mr. Chopra had without much success attempted to draw a sharp line of distinction between a temporary employee and an ad hoc employee. According to him, an ad hoc employee is one who is appointed for a specified period of time as against a temporary one, who may be appointed without specifying the period of his appointment at all.

However, Mr. Chopra could neither cite any principle nor precedent for this supposed distinction. We are wholly unable to find any merit therein and indeed, it would be vain to attempt a legal definition of a loose and convenient word of common parlance. To our mind, the term 'ad hoc employee' is conveniently used for a wholly temporary employee engaged either for a particular period or for a particular purpose and one whose services can be terminated with the maximum of ease. The dictionary meaning of ad hoc in Webster's New International Dictionary has been given as 'pertaining to or for the sake of this case alone.' In the Random House Dictionary its meaning has been given as 'for this special purpose, with respect to this subject or thing."

10. Therefore, having regard to the ordinary meaning of the term, no distinction can reasonably be drawn betwixt a temporary employee whose services are terminable without notice or otherwise and an emplo-

yee characterised as ad hoc and employed on similar terms. Indeed, it appears to us that in the gamut of service law an ad hoc employee virtually stands at the lowest rung. As against the permanent, quasi-permanent, and temporary employee, the ad hoc one appears at the lowest level implying that he had been engaged casually, or for a stop-gap arrangement for a short duration or fleeting purposes.

11. Now going back to the observations of the Division Bench in Krishna Devi's case (CWP No. 2268 of 1977, D/-9-12-1977 (Punj)) on which primary reliance has been placed, it appears manifest that these are obviously of first impression. As noticed earlier they were made in passing at the motion stage and perhaps in the context of a more or less agreed order, and in any case without serious opposition by the respondent-State therein. It is more than evident from its two paragraphs that the issue was never seriously canvassed before their Lordships of the Division Bench. Neither principle nor precedent seems to have been cited nor adverted to. It is, therefore, with great respect and regret that we find ourselves wholly unable to agree with the line of reasoning indicated in those observations.

12. As we look at the matter, the issue of the termination of the services of an ad hoc employee is strictly confined betwixt him and the State. The primary and indeed what appears to us as the sole consideration here is whether the employer State has a legal right to terminate the services of an ad hoc employee or not. Viewed from the opposite angle, it is whether the latter has a legal right to continue in his post. The lis, if one may say so, is hence confined to these two parties. The consideration whether consequent upon such a termination the respondent State would choose to employ any one at all in the same post, and if so, whether such an employment would be of regular or transitory nature, appears to us as wholly extraneous for the determination of the rights and liabilities of the employer and employee. Similarly the question of academic qualifications and the suitability, etc., of the proposed incumbent of the post, who may later come to occupy the same, appears to us on an identical footing.

13. Now if the employer has the power to terminate the services of his employee in accordance with the terms of contract or otherwise, we are unable to see how the academic qualifications of the existing employee or of the one, who on an off-chance, is likely to succeed him, would become relevant to the question. Similarly the nature of the tenure whether permanent or temporary that might later on be offered to the new incumbent cannot in our view in any way enlarge or constrict the power of termination of services if otherwise vested in the employer. With great respect it appears to us that these matters are not only extraneous to the issue, but are an unnecessary extension into a field which must necessarily remain conjectural.

14. Undoubtedly academic qualifications of an employee are relevant and even important, but by themselves they do not and should not necessarily ensure either permanency of tenure or invariably implying a superiority to hold a particular post. To take a homely example, for a menial or ministerial job higher academic qualifications might well prove to be a handicap. Experience has shown that in such like situations, persons of superior academic qualifications may remain wholly dissatisfied and disgruntled in a post of this nature, while others of lesser and lowly academic standing may value and cherish such a job.

15. We are firmly of the view that neither the academic qualifications of a proposed incumbent to fill the vacancy nor the nature of the tenure offered to him should have any legal consequences on the power or otherwise of the employer State to dispense or not with the services of an ad hoc employee.

16. Once the aforesaid considerations are out of the way, it appears to us that the right of the respondent State, and for that matter of any employer to terminate the services of an employee in accordance with the terms of his appointment is inherent and well recognised by law. Of course such a right may be cut into or constricted by statutory provisions. In the present context, the only provisions brought to our notice and on which some semblance of reliance was placed by the petitioners are Arts. 16 and 311 of the Constitution or

in the given circumstances the statutory law or service rules governing the parties. Indeed it deserves recalling that so far as the State is concerned, the pleasure doctrine has been expressly noticed and incorporated in the Constitution by Art. 310 itself. The relevant part whereof is as follows:—

"310. Tenure of office of persons serving the Union or a State.

(1) Except as expressly provided by this Constitution, every person who is a member of a defence service or of a civil service of the Union or of an all-India service or holds any post connected with defence or any civil post under the Union, holds office during the pleasure of the President, and every person who is a member of a civil service of a State or holds any civil post under a State holds office during the pleasure of the Governor of the State.

(2) xx xx xx xx xx."

It is by now well settled however, that the pleasure doctrine inherited from the concepts of British jurisprudence has been subjected to sizeable fetters by virtue of Art. 311, as also Art. 16. An examination of these provisions together, however makes it plain that elementary right of the employer to appoint and terminate the services of the employee, or to use the picturesque and powerful terminology of American jurisprudence, labelled as the right to "hire and fire." an employee, can be cut down only by specific legal provisions. Admittedly in the present context of a simple termination of services in accordance with the contract of employment clearly specifying that these may be dispensed with any time without giving any notice, no question of Art. 311 being attracted arises. Indeed Mr. Chopra, learned counsel for the petitioners, fairly conceded that this Article had no application to the present case. Similarly it is plain that the service of the petitioners not being governed by any statute or service rules, none of these interposed to bar the right of termination of the petitioners' services in accordance with their letters of appointment.

17. In view of the non-applicability of both Art. 311 and any other statutory provision, the learned counsel for the petitioners was forced to clutch at a straw by arguing that Article 16 was attracted in their case and there was hostile discrimination involved in dispensing with their services and employing other ad hoc employees instead.

18. We are unable to agree. It is elementary that Art. 14 or 16 are attracted only when equals are treated unequally or to put it in reverse unequals are treated equally. We are unable to see how the petitioners can claim any hostile discrimination qua some unspecified persons, who are not even parties to this petition and who in some eventuality may later come to hold the posts, which they are being asked to vacate. The equality clause can interpose only in the context of specific persons or a specific class. It is thus patent that in the present context Art. 16 could not even remotely be invoked.

19. Assuming entirely for the sake of argument that the proposed incumbents were specified and determined even then we are unable to see that Art. 16 would be attracted. An ad hoc employee with an existing service record cannot be deemed in the eye of law as identically equivalent to an aspirant for the post which he is likely to vacate. The two do not form the same class, one of them being employed with his service record, whilst the other is as yet unemployed and his work and conduct is yet to be assessed in future. The two, therefore, stand on entirely different footing, far from being in an identical class. There is thus a clear differentia existing betwixt them. Consequently, Art. 16 can have no application even on this assumption either.

20. For the detailed reasons aforesaid we hold that the observations made in Krishna Devi v. Punjab State. (C. W. P. No. 2268 of 1977, decided on 9-12-1977 (Punj)) do not lay down the law correctly and would accordingly overrule the same.

21. Having been repelled on all the legal fronts, Mr. R. K. Chopra, learned counsel on behalf of the petitioners has however, chosen to beat a tactical retreat. He stated that in view of the creation of some additional posts in the department the case of the petitioners was under the favourable consideration of the respondent-State and it was likely that the orders of termination passed against them may not be implemen-

ted or might, in fact, be withdrawn. On these premises at the last stage the learned counsel for the petitioners sought permission to withdraw the writ petition. In the peculiar situation and in order not to prejudice the case of the petitioners for re-consideration by the respondent-State, we, as a special case, are inclined to agree with this prayer.

22. Civil Miscellaneous No. 1000 of 1978 is accordingly allowed and the petitioners are permitted to withdraw the case. There will be no order as to costs.

P. C. JAIN J.:— I agree.

S. C. MITAL J.:— I agree.

Order accordingly

AIR 1979 PUNJAB AND HARYANA 154

S. P. GOYAL J.

Sunder Lal and another, Petitioners v. Mst. Dulari and others, Respondents.

Civil Revn. No. 240 of 1974, D/- 30-11-1978.*

(A) Evidence Act (1 of 1872), S. 114 — Non-production of material witnesses — Adverse presumption may be drawn.

The suit for ejectment was filed by the landlord on the ground of arrears of rent. Tenant produced several receipts alleged to be bearing thumb impressions of the mother of the landlord. Tenant, to prove these receipts, gave his own statement and also produced the marginal witness of these receipts. The landlord got an opportunity to lead rebutted evidence but did not choose to produce either his mother who was alleged to have received the rent or the writer of the receipt. Held that this failure to examine material witnesses raised a strong presumption regarding the genuineness of the recepits. The fact that the receipts were got attested sometime after their execution alone, would not be sufficient to hold that the receipts were not genuine. (Para 2)

Anno: AIR Manual (3rd Edn.) Evidence Act, S. 114. N. 47.

(B) East Punjab Urban Rent Restriction Act (3 of 1949), S. 13 (2) (i) — Payment of arrears — Excess amount paid as rent by tenant can be adjusted towards any other amount due from him.

The excess amount paid by the tenant can be adjusted towards any other amount due from him.

Where the tenant had already paid more rent than what was due on the date of the eviction application, held that the said extra sum with the landlord could be adjusted in payment of the house tax due and he would not be liable to eviction on the ground that the house tax is not paid. (1964) 66 Pun LR 755 and AIR 1974 Punj and Har 104, Rel. on. (Para 3)

(C) East Punjab Urban Rent Restriction Act (3 of 1949), S. 13 (2) (i) — First date of hearing — Date on which case is heard after due service, is first date of hearing.

The words due service in the context of the Proviso to S. 13 (2) (i) mean service along with the copy of the application and any hearing after this. Where no summons was issued to tenant and the case was adjourned to subsequent date to effect service upon him, the date of first hearing would be the date on which the case was put up, after completion of service, before the Rent Controller and the amount tendered on that date would be a tender made on the first date of hearing. AIR 1965 Punj 175 and (1959) 61 Punj LR 77, Rel. on; AIR 1977 Punj and Har 262 (FB), Disting. (Para 3)

Cases Referred: Chronological Paras

AIR 1977 Punj and Har 262: 79 Pun LR 144 (FB) 3
AIR 1974 Punj and Har 104: 1973 Ren CJ 698 2
(1968) Civil Revn. No. 27 of 1967, D/- 12-12-1968 (Punj & Har) Qimat Rai v. Harbans Lal 2
AIR 1965 Punj 175: 67 Pun LR 45 3
AIR 1964 SC 244: 1964 (1) Cri LJ 146 3
(1964) 66 Pun LR 755 2, 3
(1959) 61 Pun LR 77 3
(1958) Civil Revn No. 567 of 1957, 25-8-1958 (Punj) Kundan Lal v. Beni Prasad 2
AIR 1931 Cal 763 3

P. S. Jain, with V. M. Jain, for Petitioners; Hari Mittal, for Respondents.

ORDER:— The only question which survives for determination in this revision petition against the order of the Appellate Authority, Hissar, dated Feb. 2, 1974, is as to whether there was any

*(Against order of Salig Ram Seth, Appellate Authority under Rent Restriction Act, Hissar, D/- 2-2-1974.)

arrear of rent due from the petitioners which they failed to tender on the first date of the hearing and were, therefore, on that account liable to ejectment from the shop in dispute.

The respondents in the application filed for ejectment claimed that the rent and the house tax was due from petitioner No. 1 since July 1, 1968. In the written statement filed by the petitioner, they claimed that the rent had been paid up to the end of Dec. 1970 and that they were not liable to pay any house-tax. The petition was filed on January 9, 1971. So, the rent due would be only up to December 31, 1970. The petitioners along with their written statement filed several receipts alleged to be bearing the thumb impression of Durgi Devi, mother of the respondents. It was also pleaded by them that they had taken the property on lease, in fact, from Durgi Devi and the rent note had been executed in favour of her daughters at her asking and that it was Durgi Devi who had been realizing the rent from them. The Rent Controller, after recording evidence of the parties, found that the two receipts, Exhibits D. W. 2/1 and D. W.. 2/2 which were only proved in evidence by the tenants were genuine receipts but ordered the eviction of the petitioners on the ground that Durgi Devi had no right to receive the rent and the payment made to her could not be taken as payment of the rent to the respondents. On appeal, the Appellate Authority held that the tenants had failed to prove the genuineness of receipts, Exhibit D. W. 2/1 and D. W. 2/2, and, therefore, held that the tenants have neither paid nor tendered any rent due on the first date of hearing. Consequently the order of the Rent Controller was upheld and the appeal dismissed which led to the filing of the present petition by the tenants.

2. Mr. P. S. Jain, the learned counsel for the petitioners, has challenged the finding of the Appellate Authority on the ground that neither Durgi Devi who received the rent nor Megh Raj, writer of the receipts, who is admittedly the elder brother of the husband of one of the respondents, has been produced in rebuttal by the respondents. which raises a strong presumption regarding the genuineness of these receipts. The contention of the learned counsel appears to be well merited. These receipts had been produced along with the written statement and one of the respondents who appeared in the witness box admitted that Megh Raj used to receive the rent on their behalf. The petitioners, to prove these receipts, gave their own statements and also produced the marginal witness of these receipts, Sheo Dutt. The landlord got an opportunity to lead rebuttal evidence but did not choose to produce either Megh Raj or Durgi Devi to deny the genuineness of these receipts. The Appellate Authority rejected these receipts because according to its finding, the attestation by Sheo Dutt was made sometime after the receipts had been written. This finding is based on the sole ground that the ink with which the witness attested is different than the one with which the main receipt was written. On this ground alone, the Appellate Authority was not justified in drawing an inference that the receipts were got attested sometime after their execution. Moreover, this fact alone would not be sufficient to hold that the receipts were not genuine and did not bear the thumb impression of Durgi Devi. I have, therefore, no hesitation in reversing the finding of the lower Appellate Court and in holding that the rent had been paid by the tenant at the rate of Rs. 60/- per month till the end of December 1970 and the respondents had made a wrong averment that the rent was due from July 1, 1968. However, this finding is not enough to reverse the judgment of the Appellate Authority because according to the rent note the petitioners were liable to pay the house tax also apart from Rs. 60/- per month on account of rent. In the written statement, they denied their liability to pay the house tax and as such the question of its payment or tender did not arise. The house tax having been neither paid nor tendered on the first date of hearing, they would be liable to ejectment. The learned counsel for the petitioners, to overcome this situation, urged that there being no determined amount of the house tax, the tenants were not in a position to tender the same. In support of his contention the learned counsel relied on two unreported decisions of this Court in Civil Revn. No. 567 of 1957 (Kundan Lal v.

Beni Parshad) decided on August 25, 1958 and Civil Revn. No. 27 of 1967 (Qimat Rai v. Harbans Lal) decided on Dec. 12, 1968 (Punj). In Kundan Lal's case (supra) there was a dispute with regard to the rate of rent and with regard to the actual amount received by the landlord. It was in those circumstances that Mehar Singh, J. (as he then was) observed as under:—

"If the only thing that a tenant knows is that some arrears are due but he does not know the exact amount due or he does not know the rate of rent and cannot work out the exact amount it is physically impossible for him to comply with the statutory provisions and to make payment of all the arrears of rent due with interest and costs of the application on the first date of hearing of the application."

It is, therefore, obvious that in that case the tenant could not calculate the arrears due and it was for this reason that the learned Judge held that it was not possible for the tenant to comply with the statutory provisions. In the second case of Qimat Rai (supra), the landlord admitted during the course of his statement that he had received the amount of Rs. 300/- prior to the date of the filing of the application which he had not accounted for towards the payment of the rent. On these facts it was held that the tenant could not know as to what was the exact arrears due from him and was, therefore, not in a position to comply with the statutory provisions. In the present case, the petitioners have themselves produced certificate, Exhibit D. W. 1/1 which relates to the year 1970-71. In this document the amount of tax due is entered as Rs. 36/- and it is well known that with respect to every year such document is prepared and the house tax due is entered therein. So, it was not difficult for the tenants to find out as to what was the house tax due for each year. None of the two decisions, therefore, is of any help to the petitioners. It was then contended by the learned counsel for the petitioners that they had paid on March 31, 1971, an amount of Rs. 180/- towards the rent of three months from January to March, 1971. As the rent due on the date of the application was only up to the end of December 1970, the tenants were not under obligation to pay this amount and the same may be adjusted towards the payment of the house tax. In support of this contention, reliance was placed on Khushi Ram v. Shanti Rani (1964) 66 Pun LR 755 and Jaswant Rai v. Devidas 1973 Ren C. J. 698: (AIR 1974 Punj and Har 104). In both these decisions it was held that if the tenant had already paid more rent than what was due on the date of the eviction application, the said extra sum with the landlord could be adjusted in payment of interest and costs and he would not be liable to eviction on the ground that the interest tendered was less than the actual due.

3. The learned counsel for the respondents refuted this contention of the learned counsel on two grounds, namely, that the first date of hearing in this case was March 8, 1971 when the tenant Sunder Lal appeared before the Rent Controller in response to the summons issued to him and, therefore, the amount tendered on March 31, 1971 cannot be said to have been tendered on the first date of hearing and that the amount which was specifically described to be the rent for the months of January to March 1971 could not be adjusted towards the payment of the house tax because the landlord once having accepted this amount on account of the rent for the said months cannot now realize the rent of those months. So far as the second contention of the learned counsel is concerned, I cannot accept the same in view of the decision in Khushi Ram's case (supra) that the excess amount paid by the tenant can be adjusted towards any other amount due from him. For the first argument, the learned counsel relied on a Full Bench decision of this Court in Vinod Kumar v. Harbans Singh Azad, (1977) 79 Pun LR 144: (AIR 1977 Punj and Har 262). The point involved in the Full Bench case was as to whether the date on which the ex parte order is set aside would be the first date of hearing or not. This case, therefore, has no bearing on the facts of the present case. On the other hand, the case relied upon by the learned counsel for the petitioners in Jagat Ram v. Shanti Sarup, (1965) 67 Pun LR 45: (AIR 1965 Punj 175) which again is a Division Bench decision is complete answer to the contention of the learned counsel for the respondents. It was held

in this case that the words, 'due service' in the context of the proviso to S. 13 (2) (i) of the East Punjab Urban Rent Restriction Act must mean service along with the copy of the application and any hearing after this service would be the first date of hearing. In the present case, the record reveals that no summons has been issued to Sunder Lal tenant. The report of the Ahlmad on March 8, 1971 was also that the respondents have not been served. The summons available on the record which is one issued to petitioner No. 2, Jagdish Chander which bears the report that service has been effected by affixation of the summons on the shop in dispute. It, therefore, appears that Sunder Lal appeared in the Court because of the affixation of the summons for the service of Jagdish Chander and no summons was served upon him. The question of delivering a copy of the application to him, therefore, does not arise. The decisions relied upon by the learned counsel for the respondents in C. L. Kiernander v. Benimadhab Khettri, AIR 1931 Cal 763 and P. J. Ratnam v. D. Kanikaram, AIR 1964 SC 244 wherein it was held that when an official act is shown to have been done, the presumption arises that the same was done according to the prescribed procedure, are also of no help to the respondents because in the present case this presumption stands rebutted from the facts available on the record. Moreover, the service of one of the respondents had not been effected and the case was adjourned to March 31, 1971 to effect service upon him. In these circumstances, as held in Ram Nath v. Girdhari Lal etc. (1959) 61 Pun LR 77, the date March 8, 1971 could not be held to be the date of first hearing. Consequently, the first date of hearing in the present case was only March 31, 1971 when the case was put up after completion of service before the Rent Controller and the amount tendered on that date would be a tender made on the first date of hearing.

4. In view of the above discussion, this petition is allowed, the impugned order set aside and the application for ejectment dismissed. No costs.

Petition allowed.

AIR 1979 PUNJAB AND HARYANA 157

J. M. TANDON J.

Cantonment Board, Ferozepore, Appellant v. Inder Singh, Respondent.

Second Appeal No. 865 of 1968, D/- 22-11-1978.*

Cantonments Act (2 of 1924), S. 259 (1) — Recovery of ground rent or compensation for unauthorised occupation of Board's property — Coercive process under S. 259 not available.

Action for recovery of rent can be taken under S. 259 with respect to land and buildings provided such rent is claimable by the Board under the Act or the Rules framed thereunder. The rent or compensation sought to be recovered by the Board from the respondent for unauthorised occupation of its property is not under the Act. Even otherwise it is difficult to conceive that S. 259 will not apply for the recovery of the rent where the possession of the occupant is permissive but would apply for the recovery of rent or compensation from an unauthorised occupant. AIR 1966 SC 108, Foll. (Para 6)

The Board however could seek the remedy against the unauthorised occupant in the civil court if so advised, for the recovery of the rent. (Para 9)

Anno: AIR Manual (3rd Edn.), Cantonments Act S. 259 N. 1.

Cases Referred : Chronological Paras

AIR 1966 SC 108 : 1966 Cri LJ 93. 6

B. N. Aggarwal, for Appellant; H. L. Sarin, (K. G. Chaudhary with him), for Respondent.

JUDGMENT:— The Cantonment Board, Ferozepur Cantt. (hereinafter called the Board) having found that the respondent had made an encroachment on their property issued a notice to him under S. 187 of the Cantonments Act, 1924, (hereinafter called the Act), directing him to remove it. As the respondent did not remove the encroachment, another notice was given to him on Oct. 4, 1962, under S. 256 of the Act directing him to remove the encroachment within a week or it will be removed at his expense. On Oct. 12, 1962, the respondent filed a suit for

*From decree of Dial Ram Puri, Dist. J. Ferozepore, D/- 17-2-1968.

DW/DW/B806/79/VBB

permenent injunction against the Board claiming that he was the owner of the property on which he had allegedly encroached upon. His suit was dismissed on Oct. 31, 1963. His appeal also failed in 1966.

2. The Board then issued a demand notice to the respondent on Sept. 15, 1966. calling upon him to pay Rs. 8512/- as ground rent for unauthorised occupation. The defendant (sic) (respondent?) filed a suit for perpetual injunction praying that the Board be restrained from realising Rs. 8512/- or part thereof from him on the various grounds like the Board has no power to issue such a demand notice and it did not show how the amount had been assessed.

3. The Board contested the suit and the trial Court framed the following issues:—

1. Whether the demand notice in question dated Sept. 15, 1966, served by the defendant Board on the plaintiff is illegal, void, ultra vires, malicious, arbitrary and inoperative for the reason stated in paragraph No. 8 of the plaint?

2. Whether the suit is premature?

3. Whether the suit is not properly valued for purposes of Court-fee and jurisdiction?

4. Relief.

4. Issues Nos. 1 and 2 were found in favour of the respondent and he was granted the decree prayed for by the trial Court. The Board preferred an appeal which was dismissed by the District Judge on Feb. 17, 1968. It is against this order that the present regular second appeal is directed by the Board.

5. The learned counsel for the respondent conceded during arguments and rightly so that the Board can maintain a suit for the recovery of the amount against the respondent for the latter having remained in alleged unauthorised occupation of the Board's property. It has been so held by the trial Court and the first appellate Court. The dispute between the parties is about the right of the Board to effect recovery of the amount in dispute from the respondent by coercive process as prescribed in S. 259 of the Act. Sub-sec. (1) of S. 259 of the Act which deals with the method of recovery reads as under:—

"Method of recovery.— (1) Notwithstanding anything elsewhere contained in this Act, arrears of any tax, rent on land and buildings and any other money recoverable by a Board or a Military Estates Officer under this Act or the rules made thereunder may be recovered together with the cost of recovery either by suit or an application to a Magistrate having jurisdiction in the cantonment or in any place where the person from whom such tax, rent or money is recoverable may for the time being be residing, by the distress and sale of any moveable property of or standing timber or growing crops belonging to, such person which is within the limits of such Magistrate's jurisdiction, and shall, if payable by the owner of any property as such, be a charge on the property until paid."

6. The mode of recovery by making an application to the Magistrate under this section can be adopted where the amount sought to be recovered is arrears of any tax, rent on land and building or any other amount recoverable by the Board under the Act. It was held in Cantonment Board, Ambala v. Pyare Lal, AIR 1966 SC 108 that the provisions of S. 259 can be utilised for realisation of arrears of rent on land and buildings provided that such rent is recoverable by a Board under the Act or the Rules made thereunder. The word "recoverable" in the context obviously means "claimable" for S. 259 itself provides for the manner of recovery. Therefore, action for recovery can be taken under S. 259 with respect to land and buildings provided such rent is claimable by the Board under the Act or the Rules framed thereunder. The contention of the learned counsel for the appellant is that in the instant case the recoveries sought to be made from the respondent is not that of contractual rent but rent or compensation from the respondent having remained in unauthorised occupation of the Board's property. The ratio of the Supreme Court authority which pertains to the recovery of the rent cannot be made applicable to the present case. There is no merit in this contention. S. 259 of the Act does not apply

for the recovery of rent Act because it is not recoverable under the Act. Similarly. the rent or compensation sought to be recovered by the appellant from the respondent is not under the Act. Even otherwise it is difficult to conceive that S. 259 will not apply for the recovery of the rent where the possession of the occupant is permissive but would apply for the recovery of rent or compensation from an unauthorised occupant.

7. The learned counsel for the appellant has then contended that under S. 191 of the Act the Board can permit temporary occupation of any land vested in it for the purpose of depositing any building materials or making any temporary excavation therein or erection thereon on payment of fee. In this case, the respondent remained in an unauthorised occupation of the Board's property under the stay orders issued by the Courts in the previous suit filed by him which amounts to the permission of the Board under S. 191 for which the respondent is liable to pay fee. The recovery of amount from the respondent would thus be under S. 191 and covered by S. 259. This contention is without force. The unauthorised occupation by the respondent sustained under the stay orders of the Court would not be turned (sic) permissive in terms of S. 191 of the Act.

8. The last contention of the learned counsel for the appellant is that the suit filed by the appellant (sic) (respondent?) is liable to be dismissed on the ground that it was premature. The appellant issued a notice to the respondent on Sept. 15, 1966, calling upon him to pay Rs. 8512/- as ground rent for his unauthorised occupation within 10 days and no further steps had been taken when the present suit was filed. In the absence of exercise of option by the Board to make recovery from the respondent by coercive process the suit filed by the appellant (sic) (respondent?) for perpetual injunction was premature and liable to be dismissed on this ground. I see no force in this contention. The trial Court held that the appellant could seek remedy against the respondent in the civil Court if so advised.. The appellant did not feel satisfied and filed appeal asserting their right to make recovery by coercive process under S. 259 of the Act. The same right has been asserted in this second appeal. It being the case the appellant cannot justifiably raise the plea of prematurity.

9. The respondent had prayed for a perpetual injunction restraining the Board from realising Rs. 8512/- or any part thereof from him on account of land rent for the unauthorised period of occupation. The trial Court granted the decree prayed for in spite of holding that the Board could seek remedy in the civil Court if so advised. The District Judge in appeal also held likewise but dismissed the appeal of the Board upholding the decree of the trial Court. The decree of the trial Court as upheld in appeal by the learned District Judge debars the Board from realising Rs. 8512/- from the respondent which means either by filing a civil suit or by adopting coercive process. It was neither the intention of the trial Court nor of the appellate Court to restrain the Board from effecting recovery of Rs. 8512/- or any part thereof from the respondent by filing a civil suit against him. It being the case, the decree granted to the respondent by the trial Court and upheld in appeal by the learned District Judge requires modification. The decrees of the lower Courts are accordingly modified to the extent that the Board is restrained from realising Rs. 8512/- or any part thereof from the respondent on account of land rent for the unauthorised period of his occupation by coercive process provided in S. 259 of the Act. The appellant shall otherwise be competent to maintain a suit for the recovery of the amount from the respondent. The parties are left to bear their own costs.

Appeal dismissed.

AIR 1979 PUNJAB AND HARYANA 160

M. R. SHARMA J.

Kishori Lal, Petitioner v. Beant Singh, Respondent.

Civil Revn. No. 2137 of 1978, D/- 9-11-1978*

East Punjab Urban Rent Restriction Act (3 of 1949), S. 13 (2) (ii) (a) — Subletting by the tenant prior to the enforcement of the Act — S. 13 (2) (ii) (a) attracted.

Even if subletting was made by the tenant prior to the date when the Act was brought in force in the Union Territory of Chandigarh, the act of the tenant was against the provisions of and falls within the mischief of S. 13 (2) (ii) (a) of the Act as it violated the implied contract of tenancy that tenant shall not sublet the premises without the express consent of the landlord. Moreover, subletting necessarily implies the continued occupation of the premises by the sub-tenant. It is a continuous wrong committed by the tenant against his landlord. Consequently the day on which the Act came into force in this territory the tenant would be deemed to have committed this wrong on that date also. 1970 Ren. C. R. 4 (Punj), Distinguished. (Para 3)

Cases Referred : Chronological Paras

1970 Ren CR 4 (Punj) 4

Baldev Kapoor, for Petitioner.

ORDER:— The respondent-landlord filed a petition under S. 13 of the East Punjab Urban Rent Restriction Act, as applicable to Chandigarh, against the petitioner claiming his eviction on grounds, inter alia, of personal necessity subletting and change of user of the premises. These pleas did not prevail with the learned Rent Controller. The respondent-landlord went in appeal before the learned Appellate Authority who held that the petitioner had, in fact sublet the premises in question within the meaning of S. 13 (2) (ii) (a) of the Act and that the landlord did need the premises in dispute for his personal necessity.

2. Mr. Kapoor learned counsel for the petitioner, has submitted that some part of the premises had been sublet in favour of one Chander Parkash much earlier than the date on which the Act was enforced in Chandigarh and for that reason the ejectment order against the petitioner should not have been passed. S. 13 (2) (ii) of the East Punjab Urban Rent Restriction Act reads as under:—

"13 (2) (ii) that the tenant has after the commencement of this Act without the written consent of the landlord—

(a) transferred his right under the lease or sublet the entire building or rented land or any portion thereof, or

(b) used the building or rented land for a purpose other than that for which it was leased."

3. The language of the section does to some extent advance the contention raised by the learned counsel but the learned Appellate Authority, after considering the evidence of Mrs. Joginder Kaur AW 2, the earlier landowner, and the other evidence produced by the respondent, has come to the conclusion that the subletting was without the permission of respondent-landlord. It is settled law that there are two principal covenants of contract of tenancy, they are (1) that the tenant shall not deny the title of the landlord, and (2) that he shall not sublet the premises without the express consent of the landlord. In the face of these two implied covenants even if the subletting had been made prior to the date when the Act was brought in force in the Union Territory of Chandigarh, the act of the petitioner was against the provisions of law. Subletting necessarily implies the continued occupation of the premises by the sub-tenant. In other words subletting is a continuous wrong committed by the tenant against his landlord. Consequently, the day on which the Act came into force in this territory, the tenant-petitioner would be deemed to have committed this wrong on that date also. It is not the case of the petitioner that he at any time up till today obtained the written consent of the respondent-landlord. In the circumstances, the learned Appellate authority was rightly advised in holding that the wrong of subletting committed by the petitioner fell within the Mischief of S. 13 (2) (ii) (a) of the Act which entailed the consequence of

*(Against order of S. S. Kalha, Appellate Authority, Chandigarh D/-23-8-1978.)

an order of eviction being passed against him.

4. Mr. Kapoor has placed reliance upon a Single Bench judgment in case J. N. Aggarwal v. Chaman Lal, 1970 Ren CR 4 (Punj), for the proposition that change of user and subletting in order to be held as wrong falling within the meaning of S. 13 (2) (ii) of the East Punjab Urban Rent Restriction Act should have been indulged in by the tenant after coming into force of the Act. That case is distinguishable because the question relating to the implied covenants of a tenancy discussed above was not brought to the notice of the learned Judge.

5. On the second point, Mr. Kapoor, learned counsel for the petitioner, has urged that the learned Appellate Authority has not decided the question of the personal necessity of the respondent on the basis of well known principles. It is argued by him that in support of his contention the respondent-landlord had filed a notice Exhibit A. 1 alleged to have been served upon him by his landlord in August 1974 and since he himself applied for the eviction of the petitioner in July, 1974, the learned Appellate Authority should have held that the notice dated August 22, 1974, was a self invited notice, in order to bolster the plea of the respondent-landlord regarding his personal necessity. I am not impressed with this submission. If a landlord really wants the premises to be vacated by the tenant he, in normal course, approaches him with an oral request and takes the trouble of serving a written notice only when the oral request goes unheeded. It might be that when the respondent was verbally asked by his landlord to vacate the premises, he was impelled to file the present application for ejectment. In this situation, the notice dated August 22, 1974 cannot necessarily be termed as one which was self-invited. The other ground urged by Mr. Kapoor is that the landlord of the respondent, after serving the notice on him, did not take any proceedings for getting him ejected. From this circumstance, the learned counsel wants me to infer that the notice dated August 22, 1974 was, in substance, sham notice. I cannot accept this argument either. Once the landlord of the respondent came to know that the latter had filed ejectment application for getting his own house vacated he could have formed an opinion that as soon as the respondent succeeded in his case, he would vacate the house taken on rent by him. Consequently, the mere inaction on the part of the landlord of the respondent does not necessarily prove that he entered into a conspiracy with the respondent with the sole object of seeing that the petitioner should be evicted from the house of the respondent.

6. It was then argued by the learned counsel for the petitioner that for bolstering up his claim the respondent-landlord stated before the learned Appellate Authority that he had in all six relations, even though two of such relations mentioned by him were the son and daughter respectively of his sister There is no bar against a person to allow a part of his house to his nephew and niece (sic). In any event, if the premises vacated by the petitioner are not occupied by the landlord himself the law makes a provision for the tenant to apply for re-entry into the premises.

7. No other point was raised before me. This petition is, therefore, dismissed in limine.

Petition dismissed.

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SURINDER SINGH, J.

Surain Singh, Petitioner v. Swami Dhian Santosh Anandpuri and another, Respondents.

Civil Revn. No. 1277 of 1977, D/- 12-10-1978.*

Civil P. C. (5 of 1908), O. 6 R. 17 — Written Statement — Amendment of at appellate stage — Can be allowed.

The law is well settled that an amendment which goes to the root of the matter and which requires necessary adjudication for proper assessment of the matter, may be allowed at any stage of the proceedings. An appeal being a continuation of the original proceedings an amendment can be allowed even during pendency of appeal.

(Para 2)

*(Against Order of M. L. Singla, Sr. Sub. J. with enhanced appellate powers, Amritsar, D/- 13-6-1977.)

LV/AW/F403/78/RRP/DVT

Anno: AIR Comm. C. P. C. (9th Edn') O. 6 R. 17 N. 4.

Rajeshwar Kumar Gupta, for Petitioner; Munishwar Puri, for Respondents.

ORDER:— This is a Revision Petition against the order of the senior Subordinate Judge, Amritsar, passed during the pendency of an appeal filed by the petitioner against the judgment and decree of the Subordinate Judge First Class, Ajnala, by which the suit filed by respondent Swami Dhian Santosh Anandpuri for possession of the property in dispute, was decreed. The impugned order was passed on an application under Order VI, Rule 17, Code of Civil Procedure, filed by the petitioner praying for the amendment of the written statement, at the appellate stage. By means of the said application the petitioner had prayed that in his written statement he may be allowed to plead that the suit was barred by limitation. The objection is based upon the fact that on the death of the original holder, i. e., Swami Durga Puri Mutation No. 360 dated August 31, 1964 was sanctioned in favour of Sher Puri respondent No. 2. who was also a co-defendant with the petitioner. The application which was resisted by the plaintiff-respondent was considered by the lower appellate Court and it was held that the question of adverse possession did not arise and it was for the defendants to show that they had remained in adverse possession of the property for more than twelve years.

2. The learned counsel for the petitioner has rightly contended that the lower appellate Court lost sight of the fact that Surain Singh petitioner is a tenant in the property in dispute and the question of the Defendant being in adverse possession of the property could not have arisen. It is further submitted that in such situation it was imperative for the Courts below to decide as to whether the suit, which was described to be one for possession, was actually filed within limitation or not. The learned counsel has also submitted that in case necessary amendment is allowed, it would cause no delay in the disposal of the matter as the defendants would not lead any other evidence except the production of some documents. There is no gainsaying that the prayer for amendment had been made at a belated stage, i. e., during the pendency of the appeal before the lower appellate Court, but the law is well settled that an amendment which goes to the root of the matter and which requires necessary adjudication for proper assessment of the matter, may be allowed at any stage of the proceedings and an appeal is certainly a continuation of the original proceedings. In these circumstances, the amendment as prayed for is allowed to the extent that an additional issue is framed in this case to the following effect:—

Additional Issue:—

Whether the suit is beyond limitation? (OPD).

3. The impugned order of the lower appellate Court is set aside. The case shall now go back to the lower appellate Court to consider the appeal along with the additional issue as framed above, after allowing both the parties to produce any documentary evidence in support of their contentions, subject, of course, to admissibility of these documents. No other evidence for this purpose shall be allowed to be produced.

4. The parties, through their counsel have been directed to appear before the lower appellate Court on Nov. 2, 1978.

5. There shall be no order as to costs of this revision petition.

Revision allowed.

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M. R. SHARMA, J.

Balbir Kaur, Appellant v. Dhir Dass, Respondent.

F. A. F. O. No. 95-M of 1977, D/- 2-11-1978.*

(A) Hindu Marriage Act (25 of 1955), S. 13 (1) (ia) (as amended by Act 68 of 1976) — Cruelty — Meaning — Indicates not only physical harm but also mental agony.

The term 'cruelty' as understood in matrimonial disputes does not merely convey the idea of physical harm which one spouse may receive from the other; it admits in its ambit and scope such acts which might even cause mental

*(From order of Gurpartap Singh Chahal, Addl. Dist. J. Barnala, D/- 30-9-1977).

agony to the aggrieved party. What acts do cause such an agony depends upon the facts and circumstances of each case. While determining them, the Court has to take into consideration the status of the parties, customs and traditions by which they are governed as also the public opinion which prevails in the locality. (Para 8)

Where even though the wife had not been given any physical beating, the denial of medical treatment to her, on the day she arrived at the house of her husband, the husband turning her out from the house that very day and later on levelling false allegations against her father that she was being kept in illegal detention at his house are the circumstances, when cumulatively considered, clearly go to establish that husband had treated the wife with legal cruelty. (Para 8)

(B) Hindu Marriage Act (25 of 1955), S. 13 (1) (ib) (as amended by Act 68 of 1976) — Desertion — Husband not maintaining wife — Husband would be deemed to have deserted his wife

The husband did not take any steps for maintaining the wife or for making arrangements for her to live with him or to undo the effect of cruelty meted out to the wife.

Held that he would be deemed to have deserted the wife and as such, wife was entitled to a decree of divorce under S. 13 (1) (ib). Though the husband took out warrant under S. 97 of Cr. P. C. and pursuant to that warrant the wife was made to spend one or two nights in the house of the husband, that did not mean that the earlier desertion of the wife by the husband had been wiped out. (Para 9)

Harbans Singh, for Appellant; Ashok Bhan with Bipin Kaushal, for Respondent.

JUDGMENT:— Balbir Kaur appellant was married to the respondent in March 1971. She claims that on the same day her doli was taken to the house of the respondent when about an hour thereafter she felt some pain in the abdomen. She was accompanied by her maternal uncle Hardial Singh A.W. 4, her brother Jagser Singh and Chhoti Nain when it was suggested to the respondent and his parents that she should be provided with some medical treatment. Their request was not acceded to. On the other hand, she was asked to leave the house which she did and reached her father's house in the evening. She put in a petition on 24-2-1977 for divorce under S. 13 (1) (ib) of the Hindu Marriage Act, 1955 (hereinafter called the Act) on the ground that the respondent had deserted her for a continuous period of not less than two years immediately preceding the presentation of the petition for divorce. These allegations were denied in the written statement filed by the respondent who averred therein that he was and continues to be willing to keep the petitioner (now appellant) in his house as his wife. He also set up the plea that the petitioner herself withdrew from his company without any reasonable and probable cause and that in 1976 he had to take out a warrant under S. 97, Criminal Procedure Code, to get her recovered from illegal detention. On the pleas raised by the parties, the learned trial Judge framed the following issues :—

1. Whether the respondent had deserted the petitioner for a continuous period of more than two years immediately preceding the presentation of the petition?

2. Whether petition is not properly presented and if so to what effect?

On issue No. 1 the learned trial Judge disbelieved the story put forth by the petitioner that she had to leave the house of the respondent after about an hour of her arrival there. He also held that since the respondent took steps to get the petitioner recovered by taking out a warrant under S. 97, Criminal Procedure Code, he had been ready and willing to keep the petitioner in his own house, as his wife. On these findings, issue No. 1 was decided against the appellant. Issue No. 2 was not pressed and decided against the respondent. In view of the aforementioned findings, the learned trial Judge dismissed the petition filed by the appellant.

2. In this appeal, I have gone through the evidence with the help of the learned counsel. In support of her case, the appellant appeared as PW 1 and stated that she was married to the respondent about six years prior to the date on which she appeared as a witness in the Court. On that very day, her doli was taken to the house of the respondent. There she got an attack of acute pain in the abdomen. Her brother Jagser Singh, her maternal uncle Hardial Singh A.W. 4 and Chhoti Nain had accompanied her. The respondent told them that she would not get any medical treatment

and that they should take her away. She was brought back to her parental home under these circumstances. In cross-examination, she admitted that the marriage of her sister was solemnised one day prior to her marriage and she denied having remained ill prior to her marriage. She also stated that the respondent's father had taken a written Ex. A1 from her father to the effect that the relations between the parties had come to an end and that both the parties were at liberty to perform another marriage.

3. Atma Dass A. W. 2 is the father of the appellant. He has substantially corroborated her statement. He also denied the suggestion made to him in cross-examination that prior to her marriage the appellant had been suffering from some disease. Even though he stated that he got the appellant treated by Medical Practitioners yet he could not give the names of the Doctors who had prescribed medicines for her. He also deposed about the arrangement incorporated in Ex. A. 1 whereby the parents of both the spouses had put an end to the relationship between the parties regardless of the fact whether that arrangement was legally tenable or not. Dan Singh A. W. 3 is an attesting witness of the document marked as Ex. A.1. The last witness produced by the appellant is her maternal uncle Hardial Singh A.W. 4 who has substantially corroborated her statement on all the material points.

4. As against this evidence, the respondent appeared as his own witness and stated that the appellant lived with him at his house in village Lapra for about one year. Thereafter he became chela of one Mahant Lal Dass of village Daun Kalan. She stayed with him there also. On July 2, 1976, she was taken away from his house by her father in his absence. Thereafter, he brought a panchayat to the house of the appellant's father, which included amongst others Sh. Ram Singh R. W. 2 and the Panchayat requested the father of the appellant to send the latter along with them so that she may live with the respondent but he did not accede to this request. He further stated that he put in an application in the court of the learned Judicial Magistrate First Class, Patiala, and got warrants under S. 97, Cr. P. C., in the execution of which the appellant was produced before the learned Magistrate before whom she stated that she wanted to continue living in the house of her father. He then filed a civil suit for injunction seeking an order of restraint against the father of the appellant and her to the effect that she may not be given away in marriage. In cross-examination, he admitted that he never sent any money order to the appellant nor did he send her any registered letter. He also denied the suggestion that he obtained the warrants in order to pressurise and insult the appellant. It was further accepted by him that he did not collect any panchayat from village Lapra for requesting the appellant and her father that she be sent to his village to live with him. Ram Singh R. W. 2 was a co-villager of the respondent and he supported him on the point that the latter had taken a Panchayat to the village of the father of the appellant which had unsuccessfully requested him (the father of the appellant) to send the appellant with the respondent. This is the entire oral evidence led in the case.

5. The document marked Ex. A 1 purpots to have been signed by Bhagwan Dass, father of the respondent. It is an arrangement arrived at between him and Atma Dass A. W. 2, father of the appellant, to put an end to the legal status of the parties. The respondent produced copy of the application dated July 6, 1976, for the issuance of a warrant under S. 97, Cr. P. C., presented by him to the learned Judicial Magistrate Ist Class. In this application, it has been specifically mentioned that the appellant was being kept in illegal custody in the house of her own father. Ex. R. 2 is the order dated July 15, 1976, passed by the learned Judicial Magistrate pursuant to which the warrant under S. 97, Cr. P. C. had been issued. Ex. R. 3 is the copy of the statement dated July 15, 1976, made by the appellant before the learned Magistrate wherein she indicated a desire to continue living with her father. In this statement even though the appellant had levelled a charge of desertion against the respondent, yet she did not mention anything about the cruelty alleged to have been meted out to her by him.

6. The reasons which prevailed with the learned trial Court for non-suiting the appellant have been indicated earlier. The first reason given was that Atma Dass A. W. 2, father of the appellant, was unable to give the names of the Doctors who had treated the appellant and for that reason the story put forth by the appellant that when she fell

sick within about an hour of her arrival in the house of the respondent she was denied medical treatment and turned out of the house by him. The parties were present before me yesterday and are present even today. They and their parents appear to be illiterate, simple village folk and in this situation it is very difficult to expect that Atma Dass A. W.2 could remember the names of the Doctors who administered medicines to the appellant about five or six years earlier. The second ground given by the learned trial Judge about disbelieving the story is that the appellant was present in the house of the respondent along with her uncle Hardial Singh, A. W. 4, her brother Jagser Singh and Chhoti Nain and as such the respondent could not have possibly retained the dowry and turned the appellant out of his house. In the course of arguments, Mr. Harbans Singh has raised a point that Atma Dass A. W.2 had alleged that the dowry had been retained by the respondent and that part of the statement made by the witness had not been challenged in cross-examination. It was also brought to my notice that in the document marked as Ex. A. 1 it had been mentioned that "the parties had nothing to give or take anything from each other". From this evidence the learned counsel for the appellant wanted me to infer that the dowry given by the father of the girl had been retained by the respondent when he turned her out of his house. But during the discussions which I had with the appellant in the presence of the learned counsel for the respondent it was revealed that the father of the appellant did not give any ornaments in dowry. The few ornaments which the appellant was wearing at that time had been presented to her by the respondent's family and these ornaments were retained at the time when she was asked to leave the house of the respondent. In other words, both the grounds taken up by the learned trial Judge for disbelieving the story put forth by the appellant do not appear to be tenable. It cannot be disputed that Atma Dass A. W. 2 had willingly given the appellant away in marriage and was satisfied in sending his son and his brother as also a barber woman along with the bride. If he had any evil intentions, he would have taken good care that those who accompanied the girl should go well prepared to come back with the ornaments worn by her.

7. The learned trial Judge appears to have been greatly impressed by the fact that the respondent had established his keenness to keep the appellant as his wife in his own house by taking out a warrant under S. 97, Cr. P. C., for getting her relieved from alleged illegal detention. This ground which weighed with the learned trial Judge is equally tenuous as shall be shown hereinafter.

8. If the story put forth by the appellant is accepted which I have done that she was denied medical treatment when she developed abdominal pain on her first arrival at her husband's house and that she was not only denied medical treatment but also turned out of the house, this incident must have left a permanent scar in the mind of the appellant. As a young bride, she was not expecting this type of treatment immediately on her first arrival in the house of her husband. It has also been admitted by the respondent that at least from 1971 to 1973 he did not remit any money to her by money order. If his statement is carefully read, it shows that he and his father started taking panchayats to the house of the father of the appellant only after the latter had made a statement before the learned Judicial Magistrate that she was willingly living in the house of her own father. What emerges from this evidence is that not only was the appellant inhumanly treated on the very 1st day of her marriage but she was also continued to be neglected by her husband at least for two years. The latter added insult to injury by making an application to the Court of the learned Judicial Magistrate which contained an express allegation that she was being kept in illegal detention in the house of her own father. In modern times even illiterate and rustic girls do not tolerate such false allegations being levelled against their own parents. In this case it is more so because the parents of the appellant had given her shelter when she had been turned out of the house by her husband. The term 'cruelty' as understood in matrimonial disputes does not merely convey the idea of physical harm which one spouse may receive from the other. It admits in its ambit and scope such acts which might even cause mental agony to the aggrieved party. What acts do cause such an agony depends upon the facts and circumstances of each case. While determining them, the Court has to take into consi-

deration the status of the parties, the customs and traditions by which they are governed as also the public opinion which prevails in the locality. As I said earlier, even though the appellant had not been given any physical beating, the denial of medical treatment to her on the day she arrived at the house of her husband, the husband turning her out from the house that very day and later on levelling false allegations against her father that she was being kept in illegal detention at his house are the circumstances which when cumulatively considered clearly go to establish that the respondent had treated the appellant with legal cruelty. In this situation, even if the respondent had taken a panchayat to the house of the father of the appellant with a view to bringing her back, she was well within her rights to decline to go with him.

9. It is the case of the appellant that right from 1971 onwards the respondent did not take any steps for maintaining her or for making arrangements for her to live with him. Of course during this period, the respondent did take out a warrant under S. 97, Cr. P. C., but even if pursuant to that warrant the appellant was made to spend one or two nights in the house of the respondent, that does not mean that the earlier desertion of the petitioner by the respondent had been wiped out. The application for divorce was filed by the appellant on Feb. 24, 1977, and there is preponderance of evidence that for the last more than two years the respondent did not take any effective steps to undo the effect of cruelty meted out to the appellant during this period. He would be deemed to have deserted the appellant for a period of more than two years before the date of the presentation of this petition. In the circumstances I hold that the appellant has been able to make out a case for the grant of a decree of divorce under S. 13 (1) (ib) of the Act, which I hereby grant in her favour. She will also have her costs throughout.

Appeal allowed.

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FULL BENCH

S. S. SANDHAWALIA, C. J.,
P. C. JAIN, B. S. DHILLON,
GURNAM SINGH AND
HARBANS LAL, JJ.*

Gurdwara Sahib Padshahi Daswin Tittarsar, Appellant v. Mahant Kesar Singh Chela Tirath Singh of Gurdwara Sahib Tittarsar, Respondent.

First Appeal No. 165 of 1966, D/- 19-1-1979.**

Sikh Gurdwaras Act (Punjab Act 8 of 1925), Section 87 (1) (a) and (b) — "The Committee of the Gurdwara or Gurdwaras whose gross annual income does not exceed three thousand rupees" and "Committee of Gurdwara or Gurdwaras whose annual monetary income exceeds three thousand rupees" — Meaning of — Prospective income not to be considered.

(Per majority; Harbans Lal J. Contra): Notified Sikh Gurdwara as an institution is different from the building of the Gurdwara which is in the form of brick and mortar. A particular claimant may claim the building of the Gurdwara itself as his property or as property of some other institution in the claim petition under S. 5 or 10 of the Act. Provisions of Part III of the Act would become applicable to the notified Sikh Gurdwara much before the disputes raised under S. 5 or 10 of the Act regarding the property attached to the Gurdwara are adjudicated upon by the Tribunal. The words "gross income" or "annual monetary income" would mean "coming in, arrival etc." as given in Oxford Dictionary. Anything which has not yet come in or arrived cannot be termed as income. It may be termed as speculated income or estimated income. A contingent right to receive money cannot be described as "income". The moment the

*(Note:—In this case, the Judges of the Full Bench differ in their views. The majority view is taken by S. S. Sandhawalia C. J. and P. C. Jain, B. S. Dhillon and Gurnam Singh JJ. and the minority, by Harbans Lal J. The judgments in the case are, however, printed in the order in which they are given in the certified copy. The first judgment is not, therefore necessarily the judgment expressing the majority view.—Ed.)

**(Case referred by S. P. Goyal J., D/- 7-3-1977).

provisions of Part III of the Act are made applicable to Sikh Gurdwara the stage is arrived for the constitution of the Committees keeping in view the provisions of Ss. 86 and 87 (1) (a) & (b) of the Act. It is at that stage that the Board has to see whether a Committee should be nominated or elected one. For coming to that conclusion the Board has to take into consideration the gross annual income of the Gurdwara or Gurdwaras. The income which actually is to fall in the hands of the Committee who has to administer the Gurdwara in accordance with the provisions of Part III can be the only basis for seeing whether the income of the Gurdwara exceeds three thousand rupees annually or not. The income from the property which has not passed hands along with the institution and regarding which the suit for possession or other litigation has yet to be fought cannot be taken into consideration for the purposes of S. 87 (1) (a) & (b) of the Act for the simple reason that in that case the income which has not actually accrued will only be an estimated income which can be expected to have accrued or may accrue in future. Such an estimate is bound to be different in different situation.. As and when the income of the Committee exceeds a sum of Rs. 3000/- annually, the said committee, in due course, shall have to be elected one. But the election from its very inception when there is absolutely no income but there is likelihood of the income accruing at a subsequent date is not in keeping with the spirit of the provisions of the Act. R. F. A. No. 374 of 1965, D/- 28-10-1975 (DB) (Punj), Approved. (Paras 31, 32, 33, 36, 37, 39)

Cases Referred : Chronological Paras

(1977) R. F. A. No. 125 of 1966, D/- 8-2-1977 (Punj & Har), Shiromani Gurdwara Parbandhak Committee v. Committee of Management of Gurdwara Sahib Patshahi Naumi 18

(1977) R. F. A. No. 127 of 1966, D/- 3-2-1977 (Punj & Har), Shiromani Gurdwara Parbandhak Committee v. Jagar Singh 18

(1977) R. F. A. No. 128 of 1966, D/- 23-2-1977 (Punj & Har), Shiromani Gurdwara Parbandhak Committee v. Amar Singh 18

(1975) R. F. A. No. 374 of 1965, D/- 28-10-1975 (Punj & Har), Jalaur Singh v. Shiromani Gurdwara Parbandhak Committee 2, 13, 18, 19, 33, 41

ILR (1968) 2 Punj & Har 499 (FB) 30

AIR 1967 Cal 185 12

AIR 1963 SC 1180 11

AIR 1961 SC 1549 : 1961 (2) Cri LJ 720 10

1891 AC 531 : 61 LJQB 265, Commr. for Special Purposes v. Pemsel 12

(1846) 6 Moo PC 1 : 4 Moo Ind App 179, Crawford v. Spooner 12

Narinder Singh, for Appellant; D. S. Chahal, for Respondent.

HARBANS LAL, J.:— The sole question which calls for consideration by the Full Bench in the present appeal is the scope and ambit of S. 87 (1) (a) and (b) of the Sikh Gurdwaras Act, 1925 (hereinafter called the Act), which is reproducd below:

"87 (1) Every Committee shall consist of five members out of which one at least shall be a person belonging to the scheduled castes and shall be constituted as follows:—

(a) The Board shall nominate the members, with their written consent, of the committee of the Gurdwara or Gurdwaras, whose gross annual income does not exceed three thousand rupees, who shall be residents of the district in which the Gurdwara or one of the Gurdwaras to be managed by the Committee is situated:

Provided that the Board may, if it so decides, instead of nominating the members, manage the affairs of any such Gurdwara itself in accordance with the provisions of the Act.

(b) The Committee of Gurdwara or Gurdwaras, whose annual monetary income exceeds Rupees 3,000 shall consist of four elected members and one member nominated by the Board who shall be resident of the district in which the Gurdwara or one of the Gurdwaras to be managed by the Committee is situated.

If in the election, the required number of members is not elected, the Board may nominate such number of persons as have not been elected so as to complete the Committee for such a Gurdwara or Gurdwaras; provided that the person or persons so nominated shall be the resident or residents of the district in which the said Gurdwara or Gurdwaras are situated."

2. Before embarking upon the interpretation of this provision, the facts and the background of the case may, briefly, be narrated. A suit under S. 28 of the Act, for the possession of the Gurdwara Sahib Padshahi Daswin (hereinafter call-

ed the Gurdwara) and agricultural land specified in the plaint, was filed by a Committee of management on behalf of the Gurdwara. According to the averments in the plaint, the Gurdwara was a notified Sikh Gurdwara under the Act and a Committee of management for the same had been nominated and notified in the Government Gazette dated April 12 1963. The said Committee by a resolution dated May 6, 1963, authorised its President and the Vice-President, Bharpur Singh and Bhura Singh, respectively, to institute the suit. This suit was contested by Mahant Kesar Singh, defendent (now respondent), and a number of contentions regarding the limitation, valuation for the purpose of Court fee and the jurisdiction etc. were raised, which are not relevant for the purpose of the present controversy. The relevant contention was that the plaintiff Committee was not entitled to sue. This formed the basis of issue No. 5. On this issue, evidence was led by both the sides. The District Judge, Bhatinda, who tried the suit, arrived at the conclusion that the Committee of management through which the suit had been filed, had been constituted not only for the Gurdwara, but for two Gurdwaras, namely, the Gurdwara, in question, and the Gurdwara Naumi Padshahi Maisar Khana and that the annual gross income of the two Gurdwaras having the same Committee of management was far in excess of Rupees 3,000/-. Consequently, it was held that the constitution of the Committee was invalid inasmuch as the same had been nominated under sub-clause (a) to subsection (1) to S. 87 of the Act, whereas it ought to have been elected-cum-nominated as provided under sub-cl. (b) to subsection (1) to S. 87. In view of this finding, it was held that the plaintiff Committee had no locus standi to file the suit and the same was dismissed. This was challenged through appeal vide Regular First Appeal No. 165 of 1966. Goyal, J., vide his order dated March 7, 1977, agreed with the finding and the interpretation of the relevant provisions of the Act by the learned District Judge and was of the opinion that the decision in R. F. A. No. 374 of 1965 (Jalaur Singh v. Shiromani Gurdwara Parbandhak Committee, Amritsar) decided on Oct. 28, 1975 (Punj), interpreting S. 87 (1) (a) of the Act to the following effect, required reconsideration by a larger Bench:

"This apart, it is patent that S. 87 (1) (a) visualises an income accruing to or coming into the hands of the institution as such. It was appellants' own case that in fact they were in possession of and entitled as a matter of right to the properties attached to the Gurdwara and obviously they had never tendered any income accruing from the said property to the Institution or the Managing Committee thereof. Consequently, it is patent that on the pleadings of the parties, the Gurdwara as such and its Managing Committe were receiving no income whatsoever from the properties for the possession whereof they had instituted the present suit. This fact finds further support from the virtually unchallenged averments in the resolution Exhibit P. 3 which mentioned that Mahants were in possession of the properties attached to the Gurdwara mentioned in the list and the Shiromani Parbandhak Committee was not receiving any income from them. It is thus evident that in the particular case the Income to the Gurdwara being virtually "non-existent, the respondent Committee was perfectly entitled to constitute itself as the Managing Committee thereof under Section 87 (1) of the Act."

3. The appeal was then referred to the Division Bench comprising of Gurnam Singh, J., and myself. After hearing the learned counsel on both sides, vide our order dated July 19, 1977, we were of the view that the matter, in controversy, was important enough to be considered by a still larger Bench. It was in these circumstances that the case has been referred to the Full Bench.

4. At this stage, a brief perusal of the scheme of the Act so far as it is relevant for the purpose of the question involved appears to be necessary. Under S. 3 (2) of the Act, on the receipt of a list of rights, titles or interests in immoveable property, situated in Punjab, inclusive of the Gurdwara as specified in Sch. I to the Act, under sub-section (1), by the State, a notification is published to the effect that the Sikh Gurdwara to which these properties relate is a notified Sikh Gurdwara. Such a notification is conclusive relating to the Gurdwara being a Sikh Gurdwara. Under S. 5 (1), any person is entitled to claim the properties in the said notification as his own except the right, title or interest in the Gurdwara itself, within a specified period. In case no such claim was made, the notification published under Sec. 5 (3) by the State Government is conclusive to the

effect that any such claim to the properties of the particular Gurdwara had not been preferred. Under S. 7 (1) any fifty or more Sikh worshippers of a Gurdwara of the age of 21 years or more, are entitled to make a petition to the State Government within the specified period with the prayer that a particular Gurdwara be declared a Sikh Gurdwara. On receipt of the petition, the Government is required to publish a notification under S. 7 (3) relating to the said Gurdwara and also the right, title or interest in immoveable property, attached to the said Gurdwara. On the publication of such a notification, any hereditary office-holder or any 20 or more worshippers of the Gurdwara, of 21 years of age or more, are entitled to make a claim, that such a Gurdwara was not a Sikh Gurdwara, within a specified time. If no such petition is made within the time, the State Government is required to publish a notification under Sec. 9 declaring the Gurdwara concerned to be a Sikh Gurdwara. Regarding the right, title or interest in the properties relating to the Gurdwara, a petition can be forwarded by any person under S. 10 (1) within the prescribed time, giving the requisite details and the basis of the claim. If no such claim is forwarded, the State Government shall publish a notification to this effect under S. 10 (3), and the said notification shall operate as conclusive proof to the effect that no such claim had been preferred. If any claim is preferred with regard to the Gurdwara or the properties thereof, by the persons entitled to do so, the same is to be decided by the Sikh Gurdwaras Tribunal, constituted under Chap. III of the Act, and after the decision by the Tribunal, a suit for possession can be filed before the Tribunal for possession of the Gurdwara and its properties either by the Committee of the Gurdwara concerned or the person concerned under S. 25-A, in whose favour the Tribunal had decided the matter in controversy. In case, no such claim is preferred under S. 7 and the notifications under Ss. 5 (3) and 10 (3) are published, the Committee of the Gurdwara concerned as constituted in accordance with the other provisions of the Act, has the right to file a suit under Section 28 on behalf of the Gurdwara for possession of any property or proprietary title in accordance with the notification.

5. It is evident from the preamble of the Act, that one of the main purposes for bringing the Act on the statute book was "to provide for the better administration of certain Sikh Gurdwaras." Whereas in some provisions, as contained in Chap. II and in Sections from 3 to 10 therein, machinery has been provided to get the Gurdwaras in the State declared as notified Sikh Gurdwaras and the properties relating thereto as belonging to the said institutions, Ss. 39, 40 and 41 in Chap. III deal specifically with the questions relating to the control of such Sikh Gurdwaras. According to S. 40, there has to be a Board and a Committee of Management for every notified Sikh Gurdwara. The Board is to comprise of elected and co-opted members and has to be constituted in accordance with the provisions contained in Ss. 43 to 69. The powers and duties of the Board are contained in Ss. 125 to 132 in Chap. X. A perusal of Section 125 makes it clear that the Board is to exercise overall supervisory powers over all Committees of Management constituted for the management and administration of various Sikh notified Gurdwaras. The powers and duties of Committees of Management are provided in Chap. XI in Ss. 133 to 140. Ss. 85 to 105 in Ch. VIII deal with the constitution and composition of Committees of Management. In S. 85 (1) (i) to (xii), there is a reference to a number of Gurdwaras of historical importance and their management has been vested directly in the Board and to carry out this duty; the Board is to act as the Committee of Management for all these Gurdwaras. For the purpose of management of other notified Sikh Gurdwaras, it is specifically provided under S. 86 that a Committee shall be constituted for each notified Sikh Gurdwara or any two or more such Gurdwaras. Under S. 88, it has been specifically and expressly provided that the Committees of Management will be constituted after a particular Gurdwara or Gurdwaras have been declared to be Sikh Gurdwaras under the provisions of the Act. Sub-s. (1) to S. 88 is reproduced below:

"The Committee shall be constituted as soon as may be after the constitution of the Board, provided that no Committee shall be constituted for any Gurdwara under the provisions of this Act before it has been declared to be a Sikh Gurdwara under the provisions of this Act or the provisions of Part III have been applied to it under the provisions of Section 38."

From its perusal, it is clear that the stage for constituting a Committee of

Management pertaining to any Sikh Gurdwara is reached only after the said Gurdwara has been declared to be a notified Sikh Gurdwara under Ss. 3, 5 and 10 of Act, and not before. Under Sec. 87, the constitution and composition of such Committees is specifically provided. A close perusal of the various sub-clauses of this provision which have been reproduced in the earlier part of this judgment makes it abundantly clear that each Committee of Management will comprise of five members; one of whom will be a member of the scheduled caste. Where the "gross annual income of a particular Gurdwara or Gurdwaras of which the Committee is constituted, does not exceed Rs. 3,000/-, the Committee thereof shall comprise of only nominated members and the power of nomination has been vested in the Board. In the case of a Gurdwara or a number of Gurdwaras, which are clubbed together for the purpose of constituting a Committee with annual income exceeding Rs. 3,000/-, the Committee of Management has to be a predominantly elected body inasmuch as four out of the five members will be elected in accordance with the other provisions of the Act and the power of nomination by the Board is restricted to only one member. Even in those extreme cases where for one reason or the other the members cannot be elected, and the Board has been given the power to nominate them, the nominated members have been given the right to function only so long as the members have not been elected. Another significant condition attached to the composition of the Committees is that all the members whether nominated or elected, as the case may be must be residents of the district in which the Gurdwara or one of the Gurdwaras is situated. Thus, the intention of the legislature has been left in no doubt that a Committee of Management relating to a Gurdwara or a number of Gurdwaras must be an elected body whose financial position is such that the income of such institutions is more than Rs. 3,000/- annually. The Anxiety of the Legislature clearly appears to be that the management of the Gurdwaras with an annual income beyond a certain limit must be with the elected representatives of the people of the district in which the Gurdwara or the Gurdwaras are situated in order to inspire more confidence amongst the worshippers of the institution. The Board was given the right of nominating a Committee only in respect of minor Gurdwaras with a limited income and in which cases it was not thought desirable to take resort to election of the members of the Committee.

6. The Committee so constituted were invested with the corporate character under Section 94-A and could sue or be sued in their corporate names.

7. As discussed above, the necessity for constituting a Committee of Management of any Gurdwara or a number of Gurdwaras arose when those institutions had been declared to be notified Sikh Gurdwaras either as a result of the decision of the Tribunal or consequent to the notification by the Government under sub-sec. (3) to S. 5 or under sub-sec. (3) to S. 10. Obviously, before that stage was reached, such Gurdwaras and the properties attached to them were not under the supervision or control of the Board or any other institution under the provisions of the Act. The management of each Gurdwara must be either with a Mahant or some other office-holder whether hereditary or otherwise. A Committee of Management constituted under S. 87 becomes entitled to possession of the Gurdwara and its properties only after the declaration of a Gurdwara or Gurdwaras as notified Sikh Gurdwaras. That is why the power was vested in such Committees to institute suits for possession of the properties of such Gurdwaras under S. 25-A before the Tribunal and under S. 28 in the Civil Court.

8. In the present case, we are concerned with the powers and rights of the Committee under S. 28, which is reproduced below:

"28 (1) When a notification has been published under the provisions of sub-sec. (3) of S. 5 or of sub-sec. (3) of Section 10, the Committee of the gurdwara concerned may bring a suit on behalf of the gurdwara for the possession of any property a proprietary title in which has been specified in such notification, provided that the gurdwara concerned is entitled to immediate possession of the property in question, and is not in possession thereof at the date of the publication of such notification.

(2) The suit shall be instituted in the principal Court of original jurisdiction in which the property in question is situated within a period of ninety days from the date of the publication of such notification, or from the date of the

constitution of the committee, whichever is later, and if a suit is not instituted within that period, no subsequent suit on behalf of the gurdwara for the possession of the property shall be instituted in any Court except on the ground of the dispossession of the gurdwara after the date of the publication of such notification."

Its perusal shows that for the purpose of limitation for filing the suits under this provision, two termini have been provided. A suit can be instituted either within 90 days from the date of the publication of a notification declaring the Gurdwara to be a Sikh Gurdwara or within 90 days from the date of the constitution of the Committee, whichever is later. As the suit under S. 28 is one for possession, it is clear that the Committee of Management will not be in possession of the property of the Gurdwara concerned before the filing of the suit.

9. The emphatic contention of the learned counsel for the appellant is that the Committee of Management is required to be an elected body as envisaged under sub-cl. (b) to sub-sec. (1) to Section 87, only in those cases where the income of the property relating to such Gurdwara or Gurdwaras annually exceeding Rs. 3,000/- actually accrued to such a Committee of Management and till the time the Committee began getting the income of such an institution, the same was to be a nominated body as envisaged under sub-cl. (a) to sub-s. (1) to S. 87. In support of this proposition, reliance was placed on the decision in Jalaur Singh's case (supra), the relevant part of which has been reproduced in the earlier part of this judgment. If this interpretation were to be accepted, the result will be that the Committee of Management in case of any notified Sikh Gurdwara or Gurdwaras must be exclusively and entirely nominated body before the suit under S. 28 or S. 25-A, as the case may be, was filed and such a nominated body is to continue to function till the time the suit for possession was decreed and the Committee in execution of the same came into actual possession of the property of such Gurdwara or Gurdwaras and their income was deposited in the coffers of the Committee. This conclusion is sought to be buttressed by an argument that before the filing of the suit, the management of the property is in the hands of the Mahant or any other person who may be appropriating the income of the institution to himself and may not be either maintaining any account books therefor or may not show the income in the account books even if they are maintained and it will not be possible or practicable for the Board to arrive at a correct decision as to whether the income of the Gurdwara or the Gurdwaras was in excess of the minimum limit as fixed in sub-cls. (a) and (b) of S. 87 (1). Undoubtedly, the power of constituting a Committee of Management whether by nomination or election is vested in the Board or the Government on the recommendation of the Board. It can also not be denied that before a Committee of Management is constituted, the properties of the institution will not be under the control and management of the Board and as such, maintenance of accounts and the income of the properties will be exclusively under the control of any person in charge of the institution or the property, but this fact alone cannot be pressed into service to side track or to ignore the clear and express mandate of the legislature as embodied in sub-cls. (a) and (b) of Section 87 (1). It is for the Board to employ agencies under its control to make an estimate of the income of the properties of any Gurdwara concerned and bona fide arrive at a result whether its annual income was in excess of Rs. 3,000/- or not. Even if the income of a particular institution is being misused and misappropriated by any person in charge of its management, assessment of income of the same even if it has to be approximate, is not an impossible act. So far as the agricultural lands are concerned, rough estimate of the income can be made from the Gurdwaras and the other revenue record in which the estimates of the crops grown on the same and their value is duly entered. As far as the other things in the Gurdwara are concerned, a visit to the village where the institution is situated and any genuine enquiry will provide necessary data to arrive at an approximate idea of the income even if an exact amount cannot be worked out. Even if the estimate of the income as arrived at by the Board of a particular Gurdwara or Gurdwaras, is challenged before the Court, the latter will exercise its judicial discretion in assessing the evidence on the record and come to a finding if the conclusion arrived at by the Board regarding the income of a Gurdwara or Gur-

dwaras was correct or not. I have no doubt in my mind that where the assessment of the income of an institution has a marginal effect, keeping in view the minimum limit of Rs. 3,000/- as fixed in S. 87, the conclusion arrived at by the Board is bound to be given due weight by the Court concerned. But to say that in view of some real or imaginary difficulties which may be experienced in assessing the income of the institution concerned, sub-cls. (a) and (b) of S. 87 (1) should be construed in such a manner that the result is that sub-cl. (b) which provides for the constitution of the elected body of management is rendered nugatory or non-existent, will be contrary to the well settled and established principles of interpretation of statutes.

10. In the Collector of Customs, Baroda v. Digvijaysinhji Spinning and Weaving Mills Ltd., Jamnagar, AIR 1961 SC 1549, Subba Rao, J. speaking for the Court, laid down two rules of construction of statutes as follows (at p. 1551) :

"There are two well established rules of construction namey, (1) where the words of a statute are in themselves precise and unambiguous no more is necessary than to expound those words in their natural and ordinary sense, the words themselves in such case best declaring the intention of the legislature and (2) where alternative constructions are equally open that alternative is to be chosen which will be consistent with the smooth working of the system which the statute purports to be regulating, and that alternative is to be rejected which will introduce uncertainty, friction or confusion into the working of the system."

11. In Firm Hansraj Nathuram v. Firm Lalji Raja and Sons, AIR 1963 SC 1180, where S. 43 of the Civil P. C. was required to be interpreted, it was held (at p. 1181),—

"The argument was that in the present case the expression "in a Part B State" should be read as if the expression was "in a Part A State.". This again is not permissible for us. Sec. 43 has to be interpreted as it is and a Court cannot read it as if its language was different from what it actually is. It is not permissible for this Court to amend the law as suggested."

12. In Harendra Nath Chatterjee v. Sailendra Krishna Shah, AIR 1967 Cal 185, it was held that it was not permissible to the Court to interpret the provisions of a statute on the assumption that the legislature was not aware of what it said or that the legislature made a mistake. It was further held (at page 188)—

"The legislature is a proverbial good writer in its own field, no matter that such august body is subjected to periodic criticism. And who, in diction, is above criticism? At all events, it is not competent for the Court to proceed on the assumption that the legislature knows not what it says, or that it has made a mistake as in Commr. for Special Purposes v. Pemsel, (1891) AC 531, 549; per Lord Halsbury. On the contrary, the Court must proceed on the footing that the legislature intended what it has said: Crawford v. Spooner, (1846) 6 Moo PC 1 : 4 Moo Ind App 179. Therefore, when the legislature says including, it means just that: what is to be included."

13. A close perusal of the above decisions makes it imperative that the Court must interpret the plain language of any provision of a statute giving the words their natural and normal meaning and in our anxiety to fathom the real intention of the legislature, should not import words into a section or a provision. According to the decision in Jalaur Singh's case (in R. F. A. No. 374 of 1965, D/- 28-10-1975) (Punj) (supra), S. 87 (1) (a) visualised "income accruing to or coming into the hands of the institution as such." This interpretation cannot be possible unless the words "accruing or coming into the hands of the Committee" after the words "gross annual income" are added both in sub-cls. (a) and (b) of S. 87 (1), and the provision is made to read as under:

"87 (1) xxx xxx xxx
xxx xxx xxx

(a) .....whose gross annual income accruing to or coming into the hands of the Committee does not exceed Rupees 3,000/-....."

(b) .....whose annual monetary income accruing to or coming into the hands of the Committee exceeds Rupees 3,000/-....."

14. Resort to such a step will be in clear violation of the accepted principles of interpretation of statutes. Besides it is also an accepted rule of interpretation that no two provisions can be interpreted in such a manner that the result is that one of the provisions is ren-

dered non-existent. If the interpretation, as suggested by the learned counsel for the appellant is adopted, undoubtedly sub-cl. (b) to Sec. 87 (1) will become, absolutely non-existent and this the court is not competent to do.

15. The Committee of Management for any Gurdwara or Gurdwaras being out of possession of the institution and its properties, the suits under S. 28 before the Courts and the petitions under Section 25-A before the Tribunal for possession of the properties of the Gurdwaras consequently must be filed only by nominated Committees of Management and the expression "Committee of Management" in these two provisions will have to be read as nominated Committees of Management.

16. The constitution of nominated Committees for all Gurdwaras is also likely to lead to malpractices and resort to undesirable methods. It will be these nominated Committees which will be in charge of the management and income of the properties of the Gurdwaras under them. It will be their vested interest to show income of such properties less than Rs. 3,000/- per year so that they may not be replaced by elected Committees. Thus, the very basic purpose in enacting sub-cl. (b) to S. 87 (1) will be thwarted and defeated in actual practice.

17. Income of the properties of the Gurdwaras as visualised in sub-cls. (a) and (b) of S. 87 (1) had to accrue to the institution irrespective of the mode and method of its management. It will be illogical to argue that so long the Committee of Management, as provided under the Act, is not constituted and the same does not get into possession of the properties of a particular Gurdwara the profits and income of such a Gurdwara cannot be deemed to accrue to the institution. Whether the income of a particular Gurdwara or the property goes into the pocket of A or B or Z, does not make any change in the situation. In law it must be held to accrue to the institution concerned. The only difference after the constitution of the Committee is that the income is at the disposal of the Committee for disbursement and utilisation which was at the disposal of some other person or body of persons prior to the constitution of the Committee.

18. In Jalaur Singh's case (in R.F.A. No. 374 of 1965, D/- 28-10-1975) (Punj) (supra), the suit under S. 28 had been filed on behalf of the Board as the same constituted itself as the Managing Committee of the Gurdwara concerned. The suit was decreed in favour of the Board which was challenged in appeal by the Mahant and some other persons. The contention that the income of the land attached to the Gurdwara was likely to be in excess of Rs. 3,000/- per year was raised for the first time in appeal and it was held,—

"It has first to be noticed that no such point in terms was raised before the trial Court nor any issue claimed thereon. The matter was entirely one of evidence firstly on the point whether annual income from the properties attached to the Gurdwara was necessarily more than Rs. 3,000/- only. No evidence worth the name on the point was led. Again, in the grounds of appeal no such point has been raised on behalf of the appellants and this was even conceded to be so by Mr. Naginder Singh."

It was after arriving at this conclusion on facts, that the learned Division Bench interpreted S. 87 (1) (a) in terms, as reproduced in the earlier part of this judgment. From a close perusal of this judgment relating to this aspect of the matter it appears that no argument was addressed on the interpretation of S. 87, nor was the learned Division Bench called upon to deal with the matter exhaustively. Reliance by the learned counsel for the appellant on R.F.A. No. 127 of 1966 (Shiromani Gurdwara Parbandhak Committee, Amritsar v. Jagar Singh), decided on Feb. 3, 1977 (Punj & Har); R.F.A. No. 125 of 1966 (Shiromani Gurdwara Parbandhak Committee, Amritsar v. Committee of Management of Gurdwara Sahib Patshahi Naumi), decided on Feb. 8, 1977 (Punj & Har) and R. F. A. No. 128 of 1966 (Shiromani Gurdwara Parbandhak Committee, Amritsar v. Amar Singh) decided on Feb. 23, 1977 (Punj & Har) by O. Chinnappa Reddy J. (as he then was) does not advance the case of the appellant in any manner, as in all these three cases, the learned Judge deciding the appeals held only that he was bound by the decision of the Division Bench in Jalaur Singh's case (supra), and the learned Judge did not apply his mind to the scope and ambit of S. 87 independently.

19. In view of the above discussion, in my considered opinion, S. 87 was not interpreted correctly in Jalaur Singh's case (supra). In order to implement the

intention of the legislature, both the Cls. (a) and (b) of S. 87 (1) must be made to operate to the fullest extent. This object can be achieved only if it is mandatory on the Board to come to a definite finding regarding the income of the properties of a particular Gurdwara before it undertakes to constitute a Committee of Management for the first time. Keeping in view the gross annual income of the institutions, the Committee of Management to be set up will have to be either a nominated body or an elected body according to either of the cls. (a) and (b) of S. 87 (1). Unless a Committee of Management is properly constituted and set up in this manner, the same cannot be treated as a body corporate so as to be competent to sue or be sued in its corporate name as provided under Section 94-A.

20. Before the enforcement of the Act in 1925, there was complete absence of any law pertaining to the management and administration of Gurdwaras in the State. With the dominant purpose to improve the administration of Gurdwaras and to prevent malpractices in their management, two bodies were set up; the Board and the Committees of Management for various Gurdwaras. Under Sec. 43, the composition of the Board prescribed is such that the overwhelming majority of its members are to comprise of the elected elements to be elected by the "Sikhs" in the entire State as defined in S. 2 (9). The Gurdwaras of historical importance and having all State character, as referred to in Sec. 85, are to be administered, managed and supervised by the Board itself in its capacity as the Committee of Management. All other Gurdwaras, which come within the operation of the Act, are to be managed by separate Committees of Management though there can be one such Committee for more than one Gurdwara. Only those Gurdwaras which have not been able to establish their importance inasmuch as the income from the offerings by the worshippers and the properties attached to the institution does not exceed Rs. 3,000/- annually or in other words, Rs. 250/- per month, are left to the management of nominated Committees. Otherwise, all other Gurdwaras are intended to be left to the management and administration of Committees with the predominance of elected elements. That is why, purposely and intentionally the legislature prescribed the limited financial limit for the nominated Committees at a very low level. The very fact that the State Legislature has not thought it fit to raise this limit from the meagre annual income of Rs. 3,000/- despite the considerable rise in the income of each Gurdwara from the lands, properties and the offerings shows that its intention continues to be that the management of the Gurdwaras in order to inspire confidence of the worshippers must be in the hands of the elected bodies and not nominated ones. While interpreting the scope of sub-cls. (a) and (b) of S. 87 (1), it is the duty of the Court to adopt such interpretation which will further and advance the purpose and scheme of the Act and not defeat the same. This can be done only if the provisions of S. 87 are interpreted as discussed above.

21. As the appeal was referred to this Bench only regarding the interpretation of S. 87 (1) (a) and (b), and no arguments were addressed on either side relating to any other question arising in this appeal, it will not be proper for me to express any opinion on the same which will be obviously decided by the Division Bench deciding the appeal on merits.

B. S. DHILLON, J.:— 22. The question for consideration has been rightly posed by my learned brother Harbans Lal, J. and it is not necessary for me to re-state the same. The facts giving rise to this reference have also been vividly stated in the separate judgment prepared by my learned brother Harbans Lal, J. and there is no necessity to make mention of the same in my judgment.

23. With a view to correctly appreciate the scope and ambit of S. 87 (1) (a) and (b) of the Sikh Gurdwaras Act, 1925 (hereinafter called the Act), the scheme of the Act has to be kept in view. The object of the Act was to provide for the better administration of Sikh Gurdwaras and for enquiries into matter an settlement of disputes connected therewith. Section 3 of the Act provides that any person specified therein could forward to the State Government, within the limitation prescribed, a list of all rights, titles or interests in the immovable properties situated in Punjab inclusive of the Gurdwara etc. which he claims to belong, within his knowledge, to the Gurdwara specified in Sch. I attached to the Act. Where no such list concerning any Gurdwara mentioned in Sch. I was forwarded, such Gurdwara was to be excluded from Sch. I. In view of the pro-

visions of S. 5 of the Act any person claiming a right, title or interest in any property included in the consolidated list as submitted under S. 3 of the Act has the right to make claim about the same. Under S. 7 of the Act fifty or more Sikh worshippers of a Gurdwara could file a petition with the State Government praying for declaring the Gurdwara mentioned therein to be a Sikh Gurdwara. Under S. 8 of the Act any hereditary office-holder or any twenty or more worshippers of the Gurdwara could make a petition claiming that the Gurdwara in question is not a Sikh Gurdwara. Under S. 10 of the Act any person may lay claim to a right, title or interest in any property claimed to be that of the Gurdwara under S. 8 of the Act.

24. Under S. 12 of the Act, Sikh Gurdwaras Tribunal has been constituted to decide all the disputes which may arise under Ss. 5, 6, 8, 10 and 11 of the Act.

25. Part II, Chapter IV of the Act, which contains S. 38, the only section enacted under this part, makes a provision of the application of the provisions of Part III to Gurdwaras found to be Sikh Gurdwaras by the Courts other than a Tribunal under the provisions of the Act. It empowers the Civil Court to decide regarding the prayer for any of the reliefs specified in S. 92 of the Civil P. C. and for making applicable the provisions of Part III of the Act to a Gurdwara which was not either declared as a Sikh Gurdwara under S. 3 or under S. 8 of the Sikh Gurdwaras Act.

26. Part III of the Act which starts from Chap. V, deals with the control of the Sikh Gurdwaras. S. 40 of the Act provides that for the purposes of this Act there shall be constituted a Board and for every Notified Sikh Gurdwara a committee of management and there shall also be constituted from time to time a Judicial Commission in the manner hereinafter provided.

27. After the dispute regarding the claims to the property under Sec. 5 or S. 10 of the Act has been adjudicated upon by the Sikh Gurdwara Tribunal, the Tribunal has the power under Section 25-A of the Act to put the party in possession of the property in whose favour a finding in the claims petition filed under S. 5 or 10 of the Act has been returned. Under S. 28 of the Act, suit for possession on behalf of the Gurdwara can be brought by the Committee after a notification is published under sub-sec. (3) of S. 5 or of sub-sec. (3) of S. 10 of the Act.

28. From what has been stated above, the machinery provided in the Act postulates three ways by which Sikh Gurdwara can be brought within the ambit of the control as mentioned in Part III of the Act. Firstly, a number of Gurdwaras have been included in the schedule attached to the Act as provided under S. 3 of the Act. Secondly, Gurdwaras declared to be as such on the basis of the claim petition filed under S. 7 of the Act and thirdly, Gurdwaras regarding which the adjudication has to be made under S. 38 of the Act. The disputes regarding the property raised under Ss. 5 and 10 of the Act have also to be adjudicated upon by the Sikh Gurdwaras Tribunal. After the dispute regarding property had been adjudicated upon, the Tribunal has power to put in possession the party entitled to the property under S. 25-A (1) of the Act and the Committee of the notified Sikh Gurdwara can approach the Civil Court for getting the possession of the property declared to be that of Sikh Gurdwara under S. 28 of the Act.

29. It may be useful to clarify here that word 'Gurdwara' used in Sec. 87 of the Act has got a meaning given to it under the Act i.e. the notified Sikh Gurdwara. Notified Sikh Gurdwara has been defined in sub-cl. (12) of S. 2 of the Act in the following words:—

"'Notified Sikh Gurdwara' means any Gurdwara declared by notification by the State Government under the provisions of this Act to be a Sikh Gurdwara."

30. A Full Bench decision in Lachman Dass Ishar Dass v. State of Punjab, ILR (1968) 2 Punj & Har 499, further clarified that the word "Gurdwara" used in some of the provisions of the Act has reference to the "institution" comprising the "purpose" or "ideal" which owns all the property of the Gurdwara and not in the mundane sense implying the mass of earth, and the brick and mortar thereon, which is the physical place of worship in which Guru Granth Sahib may be installed.

31. From what has been stated above, it would be seen that notified Sikh Gurdwara as an institution is different from the building of the Gurdwara which is in the form of brick and mortar. A particular claimant may claim the building of the Gurdwara itself as his property or as property of some other insti-

tution in the claim petition under Section 5 or 10 of the Act.

32. After an institution is declared as notified Sikh Gurdwara, provisions of the Act contained in Part III of the Act applies to the Gurdwara with effect from the date of the publication of the notification. This is so clear from the provisions if S. 3 sub-sec. (4), Sec. 9 (2) and sub-sec. (2) of S. 38 of the Act. After the institution in question is declared to be a notified Sikh Gurdwara it may happen that in a given case that whole of the property attached to the said institution may pass hands to the management to be constituted under the provisions of Part III of the Act. In another situation no part of the property attached to the institution may pass hands and the person in possession of the property may continue to be in possession claiming interest in the property or even if their claims have been negatived by the Tribunal still they continue to be in possession as trespassers. In third exigency part of the property may be available immediately when the institution is declared as notified Sikh Gurdwara to be managed in accordance with the provisions of Part III and part of the property may still remain with the other claimants or trespassers. As is clear from the provisions of S. 85 of the Act, the Board itself has been declared to be the Committee of management for the Gurdwaras mentioned in the said section. For every notified Sikh Gurdwara other than a Gurdwara specified in S. 85 of the Act a Committee shall be constituted after it has been declared to be a Sikh Gurdwara under the provisions of this Act or after the provisions of Part III have been made applicable to it under the provisions of S. 38 of the Act. It is at that stage that the provisions of S. 87 of the Act would come into play. It has not to be lost sight of that the provisions of Part III of the Act would become applicable to the notified Sikh Gurdwara much before the disputes raised under Ss. 5 or 10 of the Act regarding the property attached to the Gurdwara are adjudicated upon by the Tribunal. As I have already pointed out in case where along with the declaration of the notified Sikh Gurdwara the property belonged to the Gurdwara also passes hands in that case the institution along with the property shall have to be managed and it will be bounden duty of the Board or the Committee as the case may be to administer in accordance with the provisions of Part III. After the provisions of Part III are made applicable a stage is reached when the Board has to consider the question of constituting a Committee in accordance with the provisions of Section 87 (1) (a) and (b) of the Act.

33. For interpreting the provisions of S. 87 (1) (a) and (b) of the Act the crucial words which require interpretation are "the Committee of the Gurdwara or Gurdwaras, whose gross annual income does not exceed three thousand rupees", and the words "Committee of Gurdwara or Gurdwaras, whose annual monetary income exceeds three thousand rupees." Word "Gurdwara" as I have already elaborated would mean comprising "purpose" or "ideals" which owns all the property of the Gurdwara and not in the mundane sense implying the mass of earth and the brick mortar thereon, which is the physical place of worship in which Guru Granth Sahib may be installed. As regards the words "gross income" or "annual monetary income" the same would mean "coming in, arrival etc." as given in Oxford Dictionary. Anything which has not yet come in or arrived cannot be termed as income. It may be termed as speculated income or estimated income. Income may also be defined as something derived from profit, labour, skill, ingenuity or sound judgment or from two or more of them in combination. A contingent right to receive money cannot be described as "income". The income would also mean money coming in from property and is not to be measured by an Expert's opinion regarding an amount which property ought to bring as a rent. It would thus be seen that the moment the provisions of Part III of the Act are made applicable to Sikh Gurdwara the stage is arrived for the constitution of the Committee keeping in view the provisions of Ss. 86 and 87 (1) (a) and (b) of the Act. It is at that stage that the Board has to see whether a Committee should be nominated or elected one. For coming to that conclusion the Board has to take into consideration the gross annual income of the Gurdwara or Gurdwaras. The income which actually is to fall in the hands of the Committee who has to administer the Gurdwara in accordance with the provisions of Part III can be the only basis for seeing whether the income of the Gurdwara exceeds three

thousand rupees annually or not. The income from the property which has not passed hands along with the institution and regarding which the suit for possession or other litigation has yet to be fought cannot be taken into consideration for the purposes of Section 87 (1) (a) and (b) of the Act for the simple reason that in that case the income which has not actually accrued will only be an estimated income which can be expected to have accrued or may accrue in future. Such an estimate is bound to be different in different situations. The claim of the Gurdwara for receiving the rent of a particular property which is not in possession of the Gurdwara may be defeated in the Court of law. Moreover, the same property being managed efficiently may bring more income than if the same is not managed so efficiently. In that case it would be merely a guess work if one has to assess income from such a property which is not in the hands of the institution. The said estimate cannot be termed as income in true sense of the word. In view of the provisions of Section 88 of the Act, the Committees have to be constituted as soon as may be after the constitution of the Board and the same has not to be constituted before the provisions of this Act in Part III have been made applicable to the institution. If the contention of the learned counsel for the respondent is accepted that the income has to be calculated from all the property to which the Gurdwara may have a claim that will frustrate the very purpose of the Act. Firstly, this conclusion is not warranted from the wording of the provisions of S. 87 (1) (a) and (b) of the Act in which the word "income" has been used in its ordinary sense. As in that case the estimate will not be that of the income of the Gurdwara but will be regarding the estimated income of the Gurdwaras which may or may not accrue at a subsequent period. Secondly, the relevant point of time for applying the determining test of provisions of S. 87 (1) (a) and (b) of the Act will be when the provisions of Part III are made applicable and the Committee of the Gurdwara shall have to be constituted on the basis of speculated income if the interpretation as put forth by the learned counsel for the respondent is accepted at that juncture even though the same may not be the income. Thirdly, as observed, the estimate of the income may differ as property efficiently managed may bring larger income. The legislature never intended that the basis on which the Board has to form its opinion should be so flickering that different consequences may follow in different situations. An interpretation, which results in anomalies, is to be avoided. As a consequence, it cannot be successfully argued that if the interpretation as put forth in Jalaur Singh's case (in R.F.A. No. 374 of 1965, D/- 28-10-1975) (Punj & Har) (supra) is taken to be correct, the provisions of S. 87 (1) (a) and (b) of the Act, will become redundant.

34. Moreover, it is not correct to presume that the property pertaining to all notified Sikh Gurdwaras was yet to be recovered from third persons by way of suits for possession. Judicial notice can be taken that the property concerning many notified Sikh Gurdwaras was voluntarily left possession of by the persons in possession and the same passed into the hands of the Board and the Committees immediately when the provisions of Part III of the Act became applicable. Reference in this connection may be made to the Book captioned "Struggle for Reform in Sikh Shrines" published by the Sikh Itihas Research Board which gives the authentic account of the glimpses of the historical background relating to administration of the Sikh Gurdwaras, written by Professor Ruchi Ram Sahni, a well-known historian of late 19th and early 20th century. At pages 252 and 253 of the said book Professor Sahni writes as follows :—

"In the prevailing condition of uncertainty and general uneasiness, the newly formed society for the management of the Gurdwaras, which had by this time provided itself with a constitution and a somewhat pompous name, had now begun to take into its own possession and control such of the Gurdwaras as they could without much difficulty. In the circumstances of the time it is not surprising that while the Shirmoni Gurdwara Parbandhak Committee (written briefly S.G.P.C) or the more religious minded or the more prudent Mahants realising that their personal interest or the interest of the shrines in their charge lay in their seeking the protection of the Committee that has been formed specially for the purpose of managing and maintaining the Gurdwaras on lines consistent with the teachings of the Gurus and the wishes of the community, had

voluntarily placed the Gurdwaras under the control of S.G.P.C., some other Mahants, on the other hand, believed that their own interests could be better served by continuing to manage the Gurdwaras on the lines on which they had hitherto been doing, namely, with the support and guidance of the local officials. It is not improbable that in some cases, at least some Akalis may have actually taken forcible possession of Gurdwaras. x x x x x x x

x x x x x x x x

x x x x x x x

Some of these places after proper inquiry were handed back to their rightful owners under the instructions of the S. G. P.C. A few of these places were not Gurdwaras at all, but simply Dharamsalas built by religious-minded Hindus who had faith in the teachings of the Gurus and where the Granth Sahib was read regularly for the spiritual benefit of all the men and women living in the neighbourhood."

35. It would thus be seen that it is not correct to contend that in all cases visualised under the Act the Gurdwaras and the property attached to them could not be available to be put under the supervision and control of the Board or the Committee as the case may be. There are numerous cases where the Mahants or other office-holders voluntarily relinquished the properties attached to the Gurdwaras to be managed by the authorities under the provisions of Part III of the Act. There may be stray cases where after the claims regarding the properties had been adjudicated by the Tribunal that the Committee has to seek the aid of the provisions of Sec. 28 of the Act to get the possession of the same. From what has been stated above, it is, therefore, obvious that there are cases where the income of the Gurdwara may be beyond three thousand rupees annually and in that case a Committee shall have to be elected in accordance with the provisions of the Act. Any property which is not immediately available to the Committee for management pertaining to a Gurdwara cannot be held to be yielding any income to the Gurdwara, especially when the same is out of the hands of the management which has to manage the said property. As already observed the income from such a property may or may not be expected to be arrived at some subsequent date but that cannot form the basis on which the Board may come to the conclusion whether the Committee should be nominated one or elected one.

36. It also cannot be disputed that it is imperative that the Court must interpret the plain language of the Statute giving words there natural and normal meaning and anxiety to fathom real intention of the legislature should not import words into section or provisions. If the provisions of S. 87 (1) (a) and (b) of the Act are construed in the manner so as to include the prospective or estimated income in that case it may not be possible unless the words "estimated or prospective" after the words "gross annual income" are added in before the subcls. (a) and (b) of S. 87 (1) of the Act and the provisions in that case would be made to read as under:—

"87 (1) * * * *

* * * *

(a) .....whose gross annual estimated or prospective income accruing to or coming into the hands of the Committee does not exceed Rs. 3,000/-....."

(b) .....whose annual monetary estimated or prospective income accruing to or coming into the hands of the Committee exceeds Rs. 3,000/- ....."

37. It would thus be seen that keeping in view the plain language of the provisions of S. 87 (1) (a) and (b) of the Act, it is not possible for us to add the above mentioned words when the said provision can be construed in its plain language.

38. As already observed, it is idle to contend that in no case there will be elected committee. The property attached to most of the Gurdwaras did pass hands along with the institution and, therefore, such a conclusion is not possible.

39. It is no doubt true that the intention of the legislature in enacting the provision of S. 87 (1) (a) and (b) of the Act is that the Gurdwaras which have the annual income of more than Rupees 3000/- should be managed by elected Committees. But at the same time it cannot be ignored that the Committees have to be constituted for managing the Gurdwaras and the properties attached to the Gurdwaras. In a case where there is no property which may come into the hands of the Committee when nominated and the Committee has yet to get the property in possession after a prolonged

litigation which may bring some income at some later date, it would not be in keeping with the spirit of the Act to get the detailed process of election initiated even when there is not a single Paisa of income to the Gurdwara which the Committee is supposed to manage. As and when the income of the Committee exceeds a sum of Rs. 3000/- annually, the said committee, in due course, shall have to be elected one. But the election from its very inception when there is absolutely no income but there is likelihood of the income accruing at a subsequent date is not in keeping with the spirit of the provisions of the Act.

40. It cannot also be disputed that while interpreting the scope of cls. (a) and (b) of S. 87 (1) of the Act it is the duty of the Court to adopt such interpretation which will further advance the purpose and the scheme of the Act and not defeat the same. This can only be done if the interpretation which has been put forth by me is given to the said provisions because the main purpose for getting an elected body into a Committee of management of the Gurdwara is that where the income exceeds Rs. 3000/- annually the democratic committee shall manage the same but in case where the annual income is less than Rs. 3000/-, it would be futile to enter into a long drawn process of election which also entails expenditure with which ultimately the Committee is to be burdened.

41. From what has been discussed above, in my considered view, the view taken in Jalaur Singh's case (in R.F.A. No. 374 of 1965, D/- 28-10-1975) (Punj & Har) wherein it was observed that Section 87 (1) (a) of the Act visualises an income accruing or coming into the hands of the institution as such, has to be taken into consideration while interpreting the provisions of S. 87 (1) (a) & (b) of the Act is correct.

42. In view of what has been stated above, with apologies to my learned brother Harbans Lal J., I have not been able to persuade myself to agree with him regarding the interpretation of Section 87 (1) (a) and (b) of the Act, as in my considered opinion that interpretation will not only violate the plain language used by the legislature but will not further and advance the scope and the object of the Act.

43. The question of law having been settled, the appeal may now be listed before the Division Bench for disposal on merits.

S. S. SANDHAWALIA, C. J.:— 44. I have the privilege of perusing the lucid and elaborate judgments recorded by my learned brethren Dhillon and Harbans Lal, JJ. With respect to Harbans Lal, J. I entirely agree with the view expressed by Dhillon, J. and have nothing to add.

P. C. JAIN, J.:— 45. I too agree with the view explained by brother Dhillon J. and have nothing to add.

GURNAM SINGH, J.:— I also agree with my Lord Dhillon J.

Order accordingly.

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FULL BENCH
S. S. SANDHAWALIA, C. J.,
HARBANS LAL AND
S. P. GOYAL, JJ.

State of Punjab, Appellant v. Ajit Singh and others, Respondents.

Letters Patent Appeal No. 104 of 1975 D/- 12-2-1979* against C. W. P. No. 3198 of 1972, D/- 4-12-1974.

(A) Arbitration Act (10 of 1940), Ss. 13, 29 — Power of arbitrator to award interest — Can grant future interest — Principle under S. 34, C. P. C., applicable — AIR 1960 Punj 623 and 1975 Pun LJ 6 Overruled. Civil Writ Petn. No. 3198 of 1972, D/- 4-12-1974 (Punj & Har), Reversed.

The principle underlying S. 34, C.P.C. is applicable in case of proceedings before an arbitrator. It is manifest from the bare language of S. 34, C. P. C. as also by the application of the principles lying thereunder that an arbitrator is expressly warranted and authorised to grant future interest on the amount awarded upto the date of its realisation. Thus an arbitrator in a reference under Ss. 55 and 56 of the Punjab Co-operative Societies Act, 1961, has jurisdiction to grant future interest on the amount awarded till the date of its realisation. AIR 1960 Punj 623 and 1975 Pun LJ 6

*(Case referred to a Full Bench by S. S. Sandhawalia C. J. and S. S. Dewan J., on 25-7-1978).

Overruled. Civil Writ Petn. No. 3198 of 1972, D/- 4-12-1974 (Punj & Har), Reversed. 1975 Pun LJ 42, Approved. Case law discussed. (Paras 13, 14, 15)

Anno: AIR Manual (4th Edn.), Arbitration Act, S. 13, N. 5; S. 29, N. 2; AIR Comm. C. P. C. (9th Edn.), S. 34, N. 1.

(B) Civil P. C. (5 of 1908), S. 34, O. 7, R. 7 — Power to grant future interest — Discretionary — Not dependent on pleading of parties — Cannot be refused on ground that party entitled had not expressly claimed it. AIR 1921 Lah 125 and (1966) 70 Cal WN 363 and AIR 1967 SC 155, Rel. on.

(Paras 16, 17, 19)

Anno: AIR Comm. C. P. C. (9th Edition), S. 34, N. 3; O. 7, R. 7, N. 1.

Cases Referred : Chronological	Paras
1975 Pun LJ 6	2, 8, 15
1975 Pun LJ 42	9
AIR 1967 SC 155 : 1967 All LJ 239	19
AIR 1967 SC 1030 : 1967 All LJ 360	7, 11
AIR 1967 SC 1032 : 1967 All LJ 419	7, 12
(1966) 70 Cal WN 363	18
AIR 1961 SC 908	6
AIR 1960 SC 307	5
AIR 1960 Punj 623	8, 15
AIR 1955 SC 468	4, 6
AIR 1921 Lah 125	17

I. S. Tiwana, Addl. Advocate General (Punj), for Appellant; S. C. Sibal, for Respondents.

S. S. SANDHAWALIA, C. J.:— Whether an arbitrator in a reference under Sections 55 and 56 of the Punjab Cooperative Societies Act, 1961, has jurisdiction to grant future interest on the amount awarded till the date of its realisation is the solitary, though meaningful, question which falls for determination in this reference to a Full Bench.

2. The facts are of no great significance and it suffices to mention that Ajit Singh and others, respondents, had brought the writ petition (giving rise to to the present Letters Patent Appeal) to challenge the arbitration award rendered by the Arbitrator on a dispute being referred to him under the Act, as also the appellate and the revisional orders upholding the same. The learned single Judge gave substantial relief to the petitioners and in particular held that the grant of future interest at the rate of six percent, by the arbitrator, till the principal amount was recovered was without jurisdiction and set aside the same. In doing so he placed reliance on a Division Bench judgment of this Court in Amar Kumar v. State of Punjab, 1975 Pun LJ 6. The writ petition was partly allowed and it is the common case that a Letters Patent Appeal preferred by the respondents—Ajit Singh and others, against this very judgment was dismissed in limine. The present appeal has been preferred by the State of Punjab and the learned counsel for the parties are agreed that the solitary challenge herein is directed against the setting aside of the future interest by the learned single Judge, which had been earlier granted by the Arbitrator and upheld in appeal and revision.

3. Though it appears to me that the issue is now concluded in favour of the appellant-State by a binding precedent of the final Court, it nevertheless becomes necessary to notice the divergence of views earlier prevailing in the Supreme Court as also within this Court itself.

4. Adverting first to the decision of the final Court it is worth recalling that in Thawardas Pherumal v. Union of India, AIR 1955 SC 468 Bose J., speaking for the Bench of three learned Judges observed as follows (at p. 478):—

"31. It was suggested that at least interest from the date of "suit" could be awarded on the analogy of S. 34 of the Civil Procedure Code, 1908. But S. 34 does not apply, because an arbitrator is not a "court" within the meaning of the Code nor does the Code apply to arbitrators, and, but for S. 34, even a Court would not have the power to give interest after the suit. This was, therefore, also righly struck out from the award."

5. However, later in Nachiappa Chettiar v. Subramaniam Chettiar, AIR 1960 SC 307, the Bench considered the aforesaid observations and observed that it would be open to doubt whether these were intended to lay down any such broad and unqualified proposition that in no case can the arbitrator award interest.

6. Again in Satinder Singh v. Umrao Singh, AIR 1961 SC 908 the observations in Thawardas Pherumal's case (AIR 1955 SC 468) (supra) were considered afresh and these were explained to be findings on the peculiar facts of that case and the Court proceeded to grant future interest at four per cent per annum from the date when respondent No. 2 took possession of the claimant's land to the date on which it deposited or paid the amount of compensation to them.

7. However, it is the two subsequent decisions in Firm Madanlal Roshan Lal Mahajan v. Hukumchand Mills Ltd., Indore, AIR 1967 SC 1030 and Union of India v. Bungo Steel Furniture Private Ltd., AIR 1967 SC 1032, which now appear to conclusively settle the issue.

8. In this Court a Division Bench in State of Punjab v. Surinder Nath Goel, AIR 1960 Punj 623, had taken the view that neither the provisions of S. 34 of the Code of Civil Procedure, nor its principles were attracted in the context of award of future interest by the arbitrator and the latter had no implied power to do so. Again an identical view was expressed by a Division Bench in Amar Kumar v. State of Punjab, 1975 Punj LJ 6 in the particular context of an arbitrator appointed under the Punjab Co-operative Societies Act and it was held that he had no power to award future interest.

9. However, a discordant note was struck by the learned single Judge in Mathra Dass v. State of Punjab, 1975 Pun LJ 42, wherein even after noticing the earlier two judgments they were nevertheless not followed on the ground that they ran counter to the subsequent observations of the final Court.

10. It was the aforesaid conflict of precedents which has been duly noticed in the referring order and which evidently necessitated the constitution of this Full Bench.

11. As I have said earlier the point seems to me so well covered by the final Court that it would be both wasteful and inapt to attempt any examination thereof on principle. In Firm Madan Lal Roshan Lal Mahajan's case (AIR 1967 SC 1030) (supra) their Lordships have reviewed the earlier case law and observed as follows (at p. 1032):—

"In the present case, all the disputes in the suit were referred to the arbitrator for his decision. One of the disputes in the suit was whether the respondent was entitled to pendente lite interest. The arbitrator could decide the dispute and he could award pendente lite interest just as a Court could do so under S. 34 of the Code of Civil Procedure. Though, in terms, S. 34 of the Code of Civil Procedure, does not apply to arbitrations, it was an implied term of the reference in the suit that the arbitrator would decide the dispute according to law and would give such relief with regard to pendente lite interest as the Court could give if it decided the dispute. This power of the arbitrator was not fettered either by the arbitration agreement or by the Arbitration Act, 1940. The contention that in an arbitration in a suit the arbitrator had no power to award pendente lite interest must be rejected."

12. Following closely on the heels of this judgment, even a more categoric enunciation of law was made in Union of India v. Bungo Steel Furniture's case (AIR 1967 SC 1032) and it was observed as under (at p. 1035):—

"In the present case, all the disputes in the suit, including the question of interest, were referred to the arbitrator for his decision. In our opinion, the arbitrator had jurisdiction, in the present case, to grant interest on the amount of the award from the date of the award till the date of the decree granted by Mallick J. The reason is that it is an implied term of the reference that the arbitrator will decide the dispute according to existing law and give such relief with regard to interest as a Court could give if it decided the dispute. Though, in terms, Section 34 of the Code of Civil Procedure does not apply to arbitration proceedings, the principle of that section will be applied by the arbitrator for awarding interest in cases where a Court of Law in a suit having jurisdiction of the subject-matter covered by S. 34 could grant a decree for interest."

13. Now, there seems to be no manner of doubt that in the light of the aforesaid unequivocal enunciation of law if not the provisions, in any case the principle underlying S. 34 of the Code of Civil Procedure is at once and equally attracted in the case of proceedings before an arbitrator. Once this is so, it is plain that one has only to turn to the provisions of that section to seek an answer of the question whether the arbitrator was entitled to award future interest or not. Provisions of Sec. 34 as amended now are plain and unequivocal. Section 34 (1) of the Code of Civil Procedure is in the following terms:

"34. INTEREST— (1) Where and in so far as a decree is for the payment of money, the Court may, in the decree, order interest at such rate as the Court deems reasonable to be paid on the principal sum adjudged, from the date of the suit to the date of the decree, in addition to any interest adjudged on such principal sum for any period prior to institution of the suit, with further inter-

est at such rate not exceeding six per cent per annum as the Court deems reasonable on such principal sum, from the date of the decree to the date of payment, or to such earlier date as the Court thinks fit."

14. It would thus be manifest from the bare language of the aforesaid provisions as also by the application of the principles lying thereunder that an arbitrator is expressly warranted and authorised to grant future interest on the amount awarded up to the date of its realisation.

15. On the aforesaid finding it is plain that the Division Bench judgments in the State of Punjab v. Surrinder Nath Goel, AIR 1960 Punj 623, and Amar Kumar v. State of Punjab, 1975 Punj LJ 6 can no longer hold the field in view of the categoric observations of their Lordships of the Supreme Court. Both these judgments are, therefore, hereby overruled.

16. It, however, becomes necessary to notice a specious argument, which was still raised on behalf of the respondents to the effect that even conceding the power to the arbitrator to grant future interest, nevertheless it cannot be awarded unless it was expressly and in terms claimed and pleaded on behalf of the party. It was contended that where such a claim or plea has not been taken, the arbitrator would still be powerless to grant future interest however well merited the claim may be. I am unable to agree. The language of Sec. 34 does not leave any manner of doubt that here primarily the power has been vested in the discretion of the Court itself. Therefore, it cannot be easily fettered on the technical plea that in so many words the claim for future interest was not made, by the party entitled thereto. However, it is unnecessary to dilate on this aspect of the matter either, because this also appears to be equally concluded in favour of the appellant by precedent.

17. The issue is capable of being viewed from two angles, both under Sec. 34 of the Code of Civil Procedure as also under Order VII, R. 7 thereof. It has been authoritatively held that the nature of the power exercisable under Sec. 34 is a discretion vested in the Court itself and not in any way dependent on the pleadings of the parties. The Division Bench in Rup Ram v. Harphul, AIR 1921 Lah 125, has observed in no uncertain terms:

"In our opinion the question of awarding interest has been made discretionary by the Legislature, though, no doubt, that discretion has to be exercised judicially. Mr. Manohar Lal for the respondent contended that this discretion has been correctly exercised having regard to the provisions of Order VII, R. 7, Civil Procedure Code, which lays down that it shall not be necessary to ask for general or other relief which may always be given as the Court may think just to the same extent as if it had been asked for. This, of course, is subject to the limitation that this "other relief" is not inconsistent with relief claimed in the plaint. The granting of interest not specifically asked for in a suit for money can scarcely be regarded as an inconsistent relief and therefore it would seem that the District Judge in this case had discretion to award interest subsequent to the institution of the suit."

18. More or less the same view has been expressed by a Division Bench of the Calcutta High Court in (1966) 70 Cal WN 363 (Balai Lal Pal v. State of West Bengal).

19. Even more categoric findings appear in Gopalakrishna Pillai v. Meenakshi Ayal, AIR 1967 SC 155. There it has been held that future mesne profits even if not claimed by the parties can well be awarded by the Court. It is also noticed therein that the claim for mesne profits is not a cause of action available to the litigant at the earlier stage, and therefore, hardly any question of pleading and claiming the same would arise. This reasoning of the final Court appears to me as equally applicable, even with greater force, to the grant of future interest under Sec. 34 as well. The ancillary argument on behalf of the respondents, therefore, merits only rejection.

20. In the light of the aforesaid discussion I am constrained to allow this Letters Patent Appeal and modify the judgment of the learned Single Judge to the effect that the arbitrator was entitled to award future interest. To this limited extent, the grant of interest on the computed amount of award is restored and the judgment of the learned Single Judge on this point is set aside. There will be no order as to costs.

HARBANS LAL, J.:— I agree.

S. P. GOYAL, J.:— I agree.

Appeal allowed.

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S. S. SANDHAWALIA, C. J. AND HARBANS LAL, J.

M. L. Nohria, Petitioner v. The General Insurance Corporation of India, Bombay and others, Respondents.

Civil Writ No. 3389 of 1978, D/- 26-2-1979.

Constitution of India, Arts. 12, 226 — State — Whether National Insurance Company is a State. (General Insurance Business (Nationalisation) Act (57 of 1972), Ss. 3, 16).

An ordinary Company registered under the Companies Act is neither 'a State' nor 'a statutory corporation' for the purposes of Art. 226. Since the National Insurance Company Limited, and the other zonal insurance companies have not at all been created by the 1972 Act, they are not the creatures of the statute, but merely a continuation on amalgamation of the original companies, at best in a marginally altered garb. Their essential character as corporate bodies registered under and goverened by the Companies Act, 1956 is, therefore, nowhere altered or impaired. Section 16 of the General Insurance Business (Nationalisation) Act is an enabling provision which empowers the Central Government to frame schemes for the merger of one Indian Insurance Company with any other Indian Insurance Company or for the amalgamation of two or more Indian Insurance Companies. Even under the Indian Companies Act it is possible for the companies to amalgamate and merge in each other. If two companies registered under the Companies Act merge together, the amalgamated company does not in any way lose its original corporate character. In fact the only legal result that ensues is that the amalgamated company loses its identity, whilst the company in which it is amalgamated retains its original character. Merely because the process of merger is absolutely voluntary or is a consequence of a scheme framed under Sec. 16 (2), does not go to the root of the matter or abrogate the very character of the amalgamated company. The merger of a number of companies under the Companies Act would not make the resultant company to be either a State under Art. 12 of the Constitution or a Statutory Corporation created by the statute itself. National Insurance Company has its own memorandum and articles of Association and its Board of Directors. At best if there is any control worth the name, it is again vested in the General Insurance Corporation of India which again is a company registered under the Companies Act. Therefore, so far as the National Insurance Company is concerned the exceptional and unusual degree of control, which may raise the inference of a corporate body being a very limb or part of the Government is plainly and squarely lacking. Hence the National Insurance Company Limited is neither a State for the purposes of Art. 12 nor a statutory Corporation amenable to the writ jurisdiction under Art. 226 of the Constitution. AIR 1975 SC 1331, AIR 1975 SC 1329, AIR 1969 SC 1306, AIR 1976 SC 888, Rel. on.; 1978 Lab IC 423 (Punj and Har), Dist. (Paras 5, 16, 28, 29, 31)

Anno.: AIR Comm. Constn. of India, Art. 12, Notes 1, 2; Art. 226, N. 26.

Cases Referred: Chronological Paras

AIR 1978 Delhi 262 : 1978 Lab IC 1588 23
(1978) 2 Lab LJ 368 (Ker) (FB) 22
1978 Lab IC 423 : (1977) 2 Serv LR 565 (Punj) 24, 26
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AIR 1975 SC 1329 : 1975 Lab IC 819 18, 19, 22
AIR 1975 SC 1331 : 1975 Lab IC 881 17, 18, 19, 29
AIR 1969 SC 1306 19

J. L. Gupta, for Petitioner; Soli J. Sorabjee, Addl. Solicitor General of India with Maharaj Baksh Singh (for Nos. 1, 2 and 3) and Harish Chander (for No. 3), for Respondents.

S. S. SANDHAWALIA, C. J.:— Whether the National Insurance Company Limited is "a State" for the purposes of Art. 12, or a statutory Corporation amenable to the writ jurisdiction under Article 226 of the Constitution of India, is the somewhat significant question which arises on the very threshold in this writ petition.

2. The issue being pristinely legal, the facts pale into relative insignificance. Suffice it to mention that the petitioner, who is the Branch Manager of the National Insurance Company Limited, claims to be aggrieved by his alleged supersession by officers junior to him and, therefore, invokes Art. 16 of the Constitution in his aid. Further a grievance is made about a marginal reduction in his basic salary, which has been label-

led as reduction in rank, for which the remedy is sought for in the writ jurisdiction under Art. 226 of the Constitution of India.

3. Apart from the merits, a significant preliminary objection to the very maintainability of the writ petition has been raised and strenuously pressed before us. It is claimed that on the admitted facts the National Insurance Company Limited, respondent No. 2, against whom alone, in essence, the relief is claimed, is not amenable to the writ jurisdiction at all. It is the categoric stand that respondent No. 2 neither falls within the ambit of the extended definition of the State under Article 12, nor is it a statutory body or a statutory Corporation against which a writ of the nature claimed on behalf of the petitioner could lie.

4. The matrix of facts on which the preliminary objection is sought to be raised is not in dispute and falls within a narrow compass. The National Insurance Company Limited was incorporated way-back in 1906 and carried on the business of general insurance. Undoubtedly it came within the ambit of a company registered under and governed by the Indian Companies Act, 1956, prior to the enactment of the General Insurance Business (Nationalisation) Act, 1972, (hereinafter referred to as 'the 1972 Act'). Therefore, for the purpose of the said Act, the National Insurance Company Limited was an Indian Insurance Company as defined in S. 3 (i) thereof.

5. Now the core of the argument on behalf of the respondents is this. Admittedly the National Insurance Company Limited prior to 1972 was a Company registered under and governed by the Indian Companies Act, 1956 and despite the enforcement of the 1972 Act, in essence, the same corporate existence and the essentiality of it being a Company under that statute continues unimpaired. It being settled law that an ordinary Company registered under the Companies Act is neither 'A State' nor 'a statutory corporation' for the purposes of Art. 226, an identical status is claimed on behalf of respondent No. 2 and the inevitable legal consequence is that no writ would lie against it either.

6. In order to appreciate the aforesaid contention a reference to the legislative history relevant thereto becomes inevitable. It is necessary to recall that the Life Insurance business within the country was nationalised much earlier and in its wake came the Life Insurance Act of the year 1956. However, at that stage the general insurance business was allowed to continue in Private hands, though it is also manifest that the Life Insurance Corporation itself also carried on a substantial general insurance business as well. On a policy decision having been taken by the Government to nationalise the general insurance business also, the General Insurance (Emergency Provisions) Ordinance, 1971 was enacted. This was later followed by an Act of Parliament being the General Insurance (Emergency Provisions) Act, 1971, which was passed with the avowed object of protecting the interests of the policy holders, pending the nationalisation of the general insurance business and to be expedient in public interest. Then followed the primary statute, which falls for consideration, namely the General Insurance Business (Nationalisation) Act of 1972.

7. The background and the broad scheme of nationalisation emanating from the aforesaid three statutory provisions seems to be that the shares in the existing Insurance Companies carrying on the general insurance business were automatically transferred to and vested in the Central Government on the appointed day. The statement of objects and reasons of the 1972 Act made it explicit that on the appointed day the shares in the existing insurance companies carrying on general insurance business would automatically stand transferred to and vested in the Central Government. The Act also provided for the framing of one or more schemes whereby the numerous Indian Insurance Companies would get merged in one another so that ultimately there would be only four Indian Insurance Companies so constituted as to promote competition between them in order to render effective service in the field of general insurance in all parts of India. It was expressly envisaged that a Government Company called the General Insurance Corporation of India would be expressly registered under the Companies Act, 1956, which would be entrusted with the task of supervising, controlling and carrying on the business of general insurance. On the formation of this Corporation (respondent No. 1 in the writ petition, which undoubtedly has been registered under the Companies Act, 1956) all shares of Indian Insurance Companies, which had earlier been vested in the Central Government, would

stand automatically transferred to the Corporation and the remaining Indian Insurance Companies would become subsidiaries to the said Corporation.

8. It is against the aforesaid legislative backdrop that Mr. Soli J. Sorabji, the learned Additional Solicitor General of India, appearing on behalf of respondent No. 2, has forcefully contended that this respondent undoubtedly was a Company under the Companies Act prior to 1972 and the enactment of 1972 has not brought any change in its essential corporate character, which remains the same. It was submitted that on the other hand the provisions of the 1972 Act are the clearest pointer to the fact that the earlier Corporate nature of the four Zonal Insurance Companies visualised by it and in particular that of the National Insurance Company Limited as a Company registered under the Companies Act still remains wholly unimpaired. Consequently it was argued that neither Article 12, nor Article 226 of the Constitution were attracted to the situation and no writ was competent. In the alternative the contention was that even if there has been some change in the Corporate character of the National Insurance Company Limited after 1972, it amounts to not more than this that it has emerged as a bigger amalgamated company in which various smaller companies have now merged, but nevertheless it still retains its Corporate character as a Company under the statute.

9. In elaborating the aforesaid contention, Mr. Soli J. Sorabji's primary reliance was on the provisions of the 1972 Act itself. Reference was first made to the defining Section 3 of the statute and in particular to Clauses (a), (c), (e) and (i) thereof and for facility of reference they may first be set down:

"3. DEFINITIONS—

In this Act, unless the context otherwise requires—

(a) "acquiring company" means any Indian Insurance Company and, where a scheme has been framed involving the merger of one Indian Insurance Company in another or the amalgamation of two or more such companies means the Indian insurance company in which any other company has been merged or the company which has been formed as a result of the amalgamation;

(b) "appointed day" means such day not being a day later than the 2nd day of January, 1973, as the Central Government may by notification appoint;

(c) "Companies Act" means the Companies Act, 1956;

(d) xx xx xx xx xx

"(e) "existing insurer" means every insurer the management of whose undertaking has vested in the Central Government under S. 3 of the General Insurance (Emergency Provisions) Act, 1971, and includes the undertaking of the Life Insurance Corporation in so far as it relates to the general insurance business carried on by it;

(f) to (h) xx xx xx xx

(i) "Indian insurance company" means an existing insurer having a share capital who is a company within the meaning of the Companies Act."

Reading the aforesaid Cls. (a), (e) and (i) together the counsel was plausibly able to contend that respondent No. 2, the National Insurance Company Limited, clearly came within the ambit of definition of an Indian insurance company. This stand indeed was not the subject-matter of any serious challenge on behalf of the petitioner at all. This being so it would be plain from Clause (i) that at the material time respondent No. 2 would be a company within the meaning of the Companies Act, 1956.

10. Proceeding further on the aforesaid firm premises the learned counsel for the respondents then adverted to and highlighted the provisions of Section 4 (1), by virtue whereof all the shares in the capital of every Indian insurance company, which would include within its ambit respondent No. 2, would stand transferred to and vested in the Central Government on the appointed day. It was, therefore, submitted plausibly that thereby the corporate identity of the Indian insurance company was not in any way destroyed and on the vesting as such, the Central Government became a vested shareholder of the Indian insurance company. It was further pointed out that even this situation was only an interim measure and it is the common stand that in accordance with the provisions of S. 10 of the 1972 Act, all the shares of the Indian insurance companies which had vested earlier in the Central Government, would thereafter stand automatically transferred to the General Insurance Corporation of India formed under S. 9. To make this situation self evident it is desirable to read the provisions of S. 10, which are as under:—

"10. Transfer to Corporation of shares vested in Central Government.— All the shares in the capital of every Indian insurance company which stand transferred to and vested in the Central Government by virtue of S. 4 (with the exception of the shares transferred to any person under sub-sec. (2) of that section) shall immediately after such vesting, stand transferred to and vested in the Corporation and every Indian insurance company shall forthwith give effect to such transfer of shares and rectify its register of members by including therein the Corporation as the holder of such shares."

It is manifest from the above that by virtue of this provision all the shares of the Indian insurance companies would stand transferred to and vested in the Corporation and the second thing highlighted is that this Corporation is again a Government company formed and incorporated under the relevant provisions of the Companies Act, 1956 by virtue of S. 9 of the 1972 Act. This being so, the end result is that not only respondent No. 2, the National Insurance Company Limited is itself a company formed under the Companies Act, but even subsequent to the 1972 Act its shares at best are now held by the holding company and it is, therefore, a subsidiary to the General Insurance Corporation of India, formed and registered under the Companies Act, 1956.

11. To buttress his contention that the 1972 Act and its preceding legislation were never intended to destroy the existing corporate character of the Indian insurance companies but in fact intended to retain the same, a reference was made to S. 19 (1) of the Act. This provides that functioning of the acquiring company (which undoubtedly respondent No. 2 is) was to be subject to the rules if any made by the Central Government and in accordance with the memorandum and articles of association. This was pointedly relied upon to sustain the stand that the original memorandum and articles of association were not only expressly saved, but a statutory mandate was laid that these would be followed in the companies, subject of course to statutory rules. On these premises the submission was that respondent No. 2, the National Insurance Company Limited far from having become a limb of the Government or a mere Department thereof, had on the contrary in pith and substance, retained and maintained its character of a Company under the Act and governed by its memorandum and articles of association.

11-A. In this very vein reference was made to S. 20 (1) which provides for the manner in which the balance of profit would be utilised and prescribed that after making necessary financial provisions incidental to the insurance business, every acquiring company shall distribute the balance of profits as dividend. This was again rightly highlighted as primary and incidental to a corporate character under the Companies Act.

12. Reference was then made to Section 21 which again envisaged the creation of a new Board of Directors for the Indian insurance companies and only as an interim measure provided that the management for some time would continue to vest in the custodian incharge of the management till the appointed day.

13. Lastly in this context counsel reverted back to the defining S. 3 of the Act and in particular to sub-section (g) thereof, which provides that the words and expressions used in this Act, but not defined herein or in the Insurance Act, but defined in the Companies Act would have the meaning respectively assigned to them under the Companies Act. It was pointed out that the word 'company' was not defined in the 1972 Act and, therefore, to ascertain the correct legal connotation of the word 'company' when used in the aforesaid Act, one would have to go back to the definitions in the Indian Companies Act, 1956. Reference therein was made to Sec. 2 (10) which lays down that a 'company' means a company as defined in S. 3 and a reference to the said Section would indicate that the word 'company' means a company formed and registered under the said Act, or an existing company as defined in Cl. (ii), which in turn lays down that existing company means a company formed and registered under any of the previous company laws which include all the predecessor statutes to the Indian Companies Act, 1956.

14. In the light of all the aforesaid definitions of the word 'Company', particular reference was made to S. 16 (2) of the Act, which is in the following terms:—

"16. Scheme of merger of companies, etc.

(1) xx xx xx xx

(2) In framing schemes under sub-section (1) the object of the Central Gov-

ernment shall be to ensure that ultimately there are only four companies (excluding the Corporation) in existence and that they are so situate as to render their combined services effective in all parts of India."

15. It was pointed out that even in the scheme for the merger of the companies, that has been given effect to, what was to emerge were only four companies. Admittedly respondent No. 2 the National Insurance Company Limited is one of these four companies envisaged by S. 16 (2) of the Act. The counsel then highlighted that even on the reading of the word 'company' in the aforequoted S. 16 (2) of the Act, with the relevant definitions, there would emerge four companies under the Indian Companies Act, 1956 which inevitably would be governed by its provisions.

16. Relying on the overall effect of the statutory provisions aforesaid and arguing on principle, the stand taken by Mr. Soli J. Sorabji was that since respondent No. 2, the National Insurance Company Limited, and the other zonal insurance companies have not at all been created by the 1972 Act. They are not the creatures of the statute, but merely a continuation on amalgamation of the original companies, at best in a marginally altered garb. Their essential character as corporate bodies registered under and governed by the Indian Companies Act, 1956 is, therefore, nowhere altered or impaired.

17. Having laid a solid foundation on the basis of principle and the governing statute, Mr. Soli J. Sorabji had then proceeded to place primary reliance on the leading judgment of Chief Justice Ray in Sukhdev Singh v. Bhagatram Sardar Singh Raghuvanshi, AIR 1975 SC 1331. Therein it has been said in no uncertain terms, in para 25 of the report as follows:—

"The source of the power for making rules and regulations in the case of Corporation created by a statute is the statute itself. A company incorporated under the Companies Act is not created by the Companies Act, but comes into existence in accordance with the provisions of the Act. It is not a statutory body because it is not created by the statute. It is a body created in accordance with the provisions of the statute."

18. The aforesaid observations are categoric, but the star argument is that the judgment in Sukhdev Singh's case (supra) and Sabhajit Tewary v. Union of India, AIR 1975 SC 1329 were rendered on the same day and by the same Bench of the five learned Judges. It was pointed out that while there was a discordant note of dissent by Alagiriswami J., in Sukhdev Singh's case the Bench was unanimous in Sabhajit Tewary's case in holding that the Council of Scientific and Industrial Research was not a statutory body and Chief Justice Ray speaking for the Bench observed in para. 4 as under:

"Extracting the features as aforesaid, it was contended that these would indicate that the Council of Scientific and Industrial Research was really an agency of the Government. This contention is unsound. The Society does not have a statutory character like the Oil and Natural Gas Commission, or the life Insurance Corporation or Industrial Finance Corporation. It is a society incorporated in accordance with the provisions of the Societies Registration Act."

and after referring to a number of earlier precedents it was concluded in para. 6 as under:—

"For these reasons we are of the opinion that the Council of Scientific and Industrial Research is not an authority within the meaning of Art. 12 of the Constitution. The writ petition is dismissed."

19. Having established on the basis of precedents that the National Insurance Company Limited, respondent No. 2, would not come within the ambit of statutory body as viewed authoritatively by their Lordships in Sukhdev Singh's case (AIR 1975 SC 1331), as also in Sabhajit Tewary's case (AIR 1975 SC 1329) Mr. Sorabji sought added support from the observations in Praga Tools Corpn. v. C. V. Imanual, AIR 1969 SC 1306 and in particular in its re-affirmance in the latest pronouncement in Executive Committee of Vaish Degree College, Shamli v. Lakshmi Narain, AIR 1976 SC 888. In Praga Tools Corporation's case Shelat J. speaking for the Bench had said (at p. 1310)—

"The company being a non-statutory body and one incorporated under the Companies Act there was neither a statutory nor a public duty imposed on it by a statute in respect of which enforcement could be sought by means of a mandamus, nor was there in its workmen any corresponding legal right for enforcement of any such statutory or

public duty. The High Court, therefore, was right in holding that no writ petition for a mandamus or an order in the nature of mandamus could lie against the company."

20. In reaffirming the aforesaid view, Fazal Ali J. in Executive Committee of Vaish Degree College's case while reversing the Full Bench judgment of the Allahabad High Court, observed as under (at pp. 892, 893):—

"It is, therefore, clear that there is a well marked distinction between a body which is created by the statute and a body which after having come into existence is governed in accordance with the provisions of the statute. In other words the position seems to be that the institution concerned must owe very existence to a statute which would be the fountainhead of its powers. The question in such cases to be asked is, if there is no statute would the institution have any legal existence. If the answer is in the negative then undoubtedly it is a statutory body, but if the institution has a separate existence of its own without any reference to the statute concerned but is merely governed by the statutory provisions, it cannot be said to be a statutory body. The High Court, in our opinion, was in error in holding that merely because the executive Committee followed certain statutory provisions of the University Act or the statute made thereunder, it must be deemed to be a statutory body.

21. Though the matter appears to me as concluded in favour of the respondents by the aforesaid judgments of the final court, reliance was placed on equally categoric statements of the law laid by the different High Courts. Pride of place herein must be given to the elaborate, exhaustive and illustrative judgment of the Division Bench of this Court reported in M/s. Lamba Industries v. Union of India, ILR (1977) 1 Punj and Har 580, wherein the issue was pointedly raised whether the State Trading Corporation of India, New Delhi, was amenable to the writ jurisdiction under Art. 226. After an exhaustive discussion on principle and reference to the case law, the preliminary objection was sustained and it was held that the State Trading Corporation of India, New Delhi being a company registered under the Companies Act was not a statutory Corporation, and, therefore, was beyond the pale of writ jurisdiction.

22. The Full Bench of the Kerala High Court in Gopala Pillai v. Kerala State Small Industries Corpn., (1978) 2 Lab LJ 368 has similarly held that the Kerala State Small Industries Corporation was neither a State nor amenable to the writ jurisdiction under Art. 226 despite the fact that all its shares were held by the Government. On an analysis of the case law on the point, it was observed:—

"This Court has to proceed on the basis that between a corporation created or established by a statute and a company registered under the Companies Act, there is a real distinction in view of the pronouncement of the Supreme Court in Sabhajit Tewary v. Union of India (1975-1 Lab LJ 374) : AIR 1975 SC 1329, para. 5 wherein it is stated :

xx xx xx xx "

23. Chief Justice Tatachari speaking for the Bench in Gurbaksh Singh v. Delhi State Industrial Development Corporation, AIR 1978 Delhi 262 has also held that the Delhi Industrial Development Corporation was not amenable to the writ jurisdiction for identical reasons.

24. Despite the aforesaid unbroken line of precedents it is necessary to advert to the Division Bench judgment of this Court in Lachhman Dass Aggarwal v. The Punjab National Bank, (1977) 2 Serv LR 565 : (1978 Lab IC 423) wherein it was held that the newly nationalised Punjab National Bank was a creature of the statute and therefore, falls within the term 'authority' under Art. 12 and was therefore, amenable to the writ jurisdiction under Art. 226. At first flush this judgment, which was relied upon by Mr. Jawahar Lal Gupta learned counsel for the petitioner, would appear to support his stand, but a close analysis thereof would indeed show that the position is wholly otherwise. Mr. Sorabji has pointed out a fundamental difference in the Banking Companies (Acquisition and Transfer of Undertakings) Act, 1970, to highlight his argument that thereby in fact the nationalised banks were created for the first time in sharp distinction to the earlier Banking Companies, which were acquired and taken over by the State. In fact the very title of the Act was highlighted to show that thereby plainly the existing banking companies were acquired and vested in the State along with all their assets and undertak-

ings. The position under the 1972 Act, however, was radically and manifestly different, where the existing Indian insurance companies were allowed to retain their corporate character and continue business except for the change that their shares were transitorily first transferred to the Central Government and thereafter were automatically vested in the Corporation, which again was a company registered under the Companies Act. Mr. Sorabji was at pains to point out that under the Banking Companies (Acquisition and Transfer of Undertakings) Act, 1970 the nationalised Punjab National Bank was created and was entirely a creature of the statute. Reliance was heavily placed in this connection on Ss. 2 (d), 3 (1) of the Banking Companies (Acquisition and Transfer of Undertakings) Act, 1970, (hereinafter referred to as 'the Banking Companies Act') which are in the following terms:—

"2. Definitions: In this Act, unless the context otherwise requires:—

xx xx xx xx

(d) "corresponding new bank", in relation to an existing bank, means the body corporate specified against such bank in column 2 of the First Schedule;"

xx xx xx xx

3. Establishment of corresponding new banks and business thereof.

(1) On the commencement of this Act, there shall be constituted such corresponding new banks as are specified in the First Schedule.

xx xx xx xx."

25. Reading the aforesaid two provisions together along with the first schedule, counsel for the respondent was on the firmest ground in contending that by these provisions an entirely new set of nationalised corporate banking bodies were created and constituted. These nationalised banks were distinct and separate entirely from the old and earlier banking companies registered under the Banking Companies Act.

26. Particular reference was also made to S. 3 (4) of the Banking Companies Act, which infused the corporate life into the corresponding new banks providing that this would be a body corporate with perpetual succession and a common seal, with power to acquire, hold and dispose of property. An overall perspective of the aforesaid provisions of the Banking Companies Act, 1970 therefore, leaves no manner of doubt that the corresponding nationalised banks were constituted and created by the statute whilst the old existing banking companies had ceased to exist and were acquired and taken over by the Government and had totally lost their identity. The significant thing herein is that whilst the earlier banking companies had the suffix of 'Limited' which indeed was essential for registration under the Banking Companies Act, the newly created nationalised banks scrupulously avoided the use thereof to highlight the difference betwixt them and the former banking companies. The whole scheme of the Banking Companies Act, 1970, therefore, is sharply and radically different from that envisaged later under the 1972 Act, where there is not even a hint of a similar provision or any change in the name of the companies or their nomenclature.

It is in the aforesaid context that Chinnappa Reddy J.'s sharp line of distinction between the Punjab National Bank Limited and the newly created nationalised Punjab National Bank is to be viewed. The learned Judge with his inimitable lucidity highlighting this subtle distinction had said that the nationalised bank indeed was the creature of the statute and, therefore, inevitably a statutory body, which would come within the known legal indicia thereof, it was observed:—

"Applying the principles laid down in Sukhdev Singh's case there can be no doubt that Punjab National Bank is an "authority" within the meaning of Article 12 of the Constitution. Punjab National Bank, as distinguished from the Punjab National Bank Limited, is not a company incorporated pursuant to the provisions of the Companies Act, but is a body created by the statute, namely, the Banking Companies (Acquisition and Transfer of Undertakings) Act, 1970."

It, therefore, emerges that Lachman Dass Aggarwal's case (1978 Lab IC 423) (Punj and Har) (supra) far from in any way aiding the case of the petitioner, in fact appears to be directly contradictory to the very stand taken by the counsel for the petitioner.

27. In fairness to Mr. Gupta it must be noticed that he placed heavy reliance on Section 16 of the Act, which provides for the scheme of merger of the companies. Counsel contended that this Section conferred a power on the Central Government to merge the insurance companies not necessarily of their own

volition but even involuntarily under its provisions. The core of the argument was that the obligatory merger under the scheme under S. 16 would create altogether a new company which by fiction should be deemed as the creature of the statute and not merely an amalgamated company. Reference was also made to Cl. (f) of S. 16 (1) of the Act, which refers to the continuance in service of the employees under the acquiring company, when the amalgamating company has ceased to exist by reason of the scheme.

28. I am unable to agree with the aforesaid contention. Sec. 16 is an enabling provision which empowers the Central Government to frame schemes for the merger of one Indian insurance company with any other Indian insurance company or for the amalgamation of two or more Indian insurance companies. Now this is not a matter of controversy that even under the Indian Companies Act it is possible for the companies to amalgamate and merge in each other. Nor is it in dispute that if two companies registered under the Companies Act merge together, the amalgamated company does not in any way loose its original corporate character. In fact the only legal result that ensues is that the amalgamated company looses its identity, whilst the company in which it is amalgamated retains its original character. Merely because the process of merger is absolutely voluntary or is a consequence of a scheme framed under S. 16 (2), does not to my mind go to the root of the matter or abrogate the very character of the amalgamated company. The merger of a number of companies under the Indian Companies Act would not make the resultant company to be either a State under Art. 12 or a Statutory Corporation created by the statute itself. The homely example was rightly given by Mr. Sorabji that if a number of small steel companies choose to amalgamate in the Tata Iron and Steel Co., the latter would not loose its character as a company and would neither become a State, nor a statutory body. It is, therefore, right to say that on the merger of a number of companies, whether voluntary or involuntary, would again result in a company and not a statutory body, which may come within the ambit of Art. 12. It is in this context that S. 16 (1) (f) on which reliance was placed is to be viewed. It merely refers to the amalgamating company which ceases to exist or looses its identity by being totally submerged with the amalgamated company. I am unable to see how the provisions of S. 16 can in any way aid or advance the cause of the petitioner.

29. In an attempt to counter the reliance on Sukhdev Singh's case (AIR 1975 SC 1331) on behalf of respondent No. 2, Mr. J. L. Gupta refers to the observations of Mr. Justice Mathew therein (In para. 96 of the report), wherein it is observed that a finding of state financial support plus an unusual degree of control over the management and policies might lead one to characterize an operation as State action. Even this observation made in a much larger context and in particular with regard to the nature of company does not appear to be of any aid to the petitioner. Mr. Gupta, could as a matter of fact point out nothing which would come within the ambit of such an unusual degree of control by the Government over the management and policies which can give rise to any such inference. It is not disputed that respondent No. 2 has its own memorandum and articles of association and its Board of Directors. At best if there is any control worth the name, it is again vested in the General Insurance Corporation of India which again is a company registered under the Companies Act. Therefore, so far as respondent No. 2 is concerned the exceptional and unusual degree of control, which may raise the inference of a corporate body being a very limb or part of the Government is plainly and squarely lacking here.

30. In passing it may be mentioned that Mr. J. L. Gupta had attempted to place reliance on the provisions of Section 7, which is primarily related to the transfer of services of ex-employees in certain cases. However, as Mr. Soli J. Sorabji was able to point out, this section deals primarily with the employees of existing insurer other than the Indian insurance companies and by and large has a reference to the foreign insurers operating in India. This section, therefore, had little or no relevance in the context of the Indian insurance companies with which alone we are dealing and the learned counsel for the petitioner had slipped in attempting to rely upon a provision which has least relevance with the issue.

31. To conclude it appears plain to me that the National Insurance Com-

pany Limited is neither a State for the purposes of Art. 12 nor a statutory Corporation amenable to the writ jurisdiction under Art. 226 of the Constitution of India. The preliminary objection forcefully raised on behalf of the respondents is hence upheld. The writ petition consequently must be dismissed.

In view of the slightly intricate issues arising, the parties are left to bear their own costs.

Petition dismissed.

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FULL BENCH

S. S. SANDHAWALIA, C. J., PREM CHAND JAIN AND S. S. DEWAN, JJ.

M/s. I. T. C. Ltd., Appellant v. M/s. Bhatia Brothers and others, Respondents.

Letters Patent Appeals Nos. 337 and 336 of 1977, D/- 29-1-1979.*

Letters Patent (P & H), Cl. 10 — Appeal against order of stay under O. 41, R. 5, C. P. C. — Maintainability.

Where the order under Letters Patent appeal was merely a stay order passed by a Single Judge under O. 41, R. 5 of C. P. C. on condition that respondent should furnish adequate security regarding the decretal amount and the said stay order involved no determination of any right affecting in any way the merits of the controversy, against such a stay order no letters patent appeal was competent. AIR 1978 Punj and Har 269, Foll. (Para 3)

Anno: AIR Manual (3rd Edn.), Letters Patent (P & H), Cl. 10 (See Letters Patent (Cal)), Cl. 15, N. 2; AIR Comm. C. P. C. (9th Edn.), O. 41, R. 5, N. 20.

Cases Referred: Chronological Paras

AIR 1978 Punj & Har 269 : 80 Pun LR 357 1, 3, 4, 5

Anand Swarup with P. P. Pandit, for Appellant; H. L. Sibal with R. C. Setia, for Respondents.

S. S. SANDHAWALIA, C. J.:— The very maintainability of these Letters Patent Appeals Nos. 337 and 336 of 1977 admitted to a hearing by the Full Bench on the 21st of Sep., 1977, stands concluded against the appellants by the Division Bench judgment of this Court in Faqir Chand v. The Financial Commr., Punjab, 80 Pun LR 357 : (AIR 1978 Punj & Har 269).

2. It is wholly unnecessary to advert to the facts in any great detail. It would suffice to mention that the respondents M/s. Bhatia Brothers and others preferred Regular First Appeal No. 907 of 1977 against the judgment and decree passed against them by the Senior Subordinate Judge, Ludhiana. Therein C. M. No. 983 C-I of 1977 was moved by them under Order 41, Rule 5, C. P. C. praying that during the pendency of the appeal in the High Court, the execution of the decree be stayed. The learned Single Judge by his order under appeal acceded to the prayer for stay on the condition that the respondents should furnish adequate security regarding the decretal amount to the satisfaction of the Executing Court within a period of one month. It was further directed that in case they fail to furnish the security, the stay order shall stand vacated.

3. It is manifest that the order under appeal is merely a stay order on terms and conditions specified therein and involves no determination of any right or liability which may ultimately affect the merits of the controversy. That being so, the matter is obviously covered by Faqir Chand's case (AIR 1978 Punj & Har 269) (supra), wherein it has been categorically held that against such a stay order no letters patent appeal is competent.

4. In passing it may be mentioned that no challenge or criticism was levelled against the ratio of Faqir Chand's case before us. Equally it deserves recalling that the judgment therein was rendered subsequent to the admission of the present appeals. Again it is the admitted position that the security has not been furnished by the judgment-debtors within the time prescribed and consequently the conditional stay granted by the order under appeal now stands vacated.

5. Following the decision in Faqir Chand's case (AIR 1978 Punj & Har 269) (supra), we dismiss these letters patent appeals whilst leaving the parties to bear their own costs.

Appeals dismissed.

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*(Against judgment of R. N. Mittal J. in C. M. No. 983-C-I of 1977 in R. F. A. No. 907 of 1977, D/- 17-8-1977)

EW/EW/C493/79/SSG

AIR 1979 PUNJAB AND HARYANA 192

J. M. TANDON, J.

Brij Lal and others, Petitioners v. Vijay Kumar and others, Respondents.

Civil Revn. No. 253 of 1978, D/- 1-2-1979.*

Civil P. C. (5 of 1908), O. 22, R. 4 (as amended in Punjab and Haryana) and R. 11 — Applicability of O. 22 to revision proceedings.

In the instant case the trial court ordered amendment of the plaint. The plaintiff went in revision from the order to the High Court which admitted the revision and stayed the suit. Two of the defendants died during the revision proceeding but their L. Rs. were not impleaded therein. The plaintiff applied in the trial court to implead them after his revision petition had been allowed. The question arose whether the suit had abated under O. 22, R. 4.

Held that the suit could not be taken as pending in the context of O. 22, R. 4, during the pendency of revision wherein the proceedings in the trial court had been stayed. The question of abatement of the suit, therefore, did not arise.

Order 22, Rule 4 has been amended by the High Court of Punjab and Haryana. The effect of the amendment is that the legal representatives of a deceased defendant have been made responsible for getting themselves impleaded as defendants.

In view of the amended O. 22, R. 4 it was the duty of the legal representatives of the deceased defendants to get themselves impleaded as defendants. The plea regarding the abatement of the suit could not succeed for this reason as well. (Para 6)

Anno: AIR Comm. Civil P. C. (9th Edn.), O. 22 (Gen), N. 2.

Cases Referred: Chronological	Paras
(1967) 69 Pun LR 454	4
AIR 1958 Pun 171	2, 3, 4
AIR 1951 Hyd 55	4

V. M. Jain, for Petitioner; Lakshman Sharma (for No. 1) and O. P. Goyal (for No. 11), for Respondents.

ORDER:— Vijay Kumar respondent No. 1 filed a suit in forma pauperis for possession of three sets of properties comprising agricultural land and two double storey shops alleging that they belonged to the joint Hindu family of which he and his father (Maman Chand) were members and the latter had made the alienations thereof without consideration and legal necessity and the same were not binding on him. On a preliminary objection raised, the trial court held vide order dated Nov. 10, 1972, that the suit was bad for multifariousness and all the causes of action joined in the single suit could not be conveniently tried. Vijay Kumar was directed to amend the plaint and to continue the suit only in respect of any one of the three sets of properties. Vijay Kumar preferred a revision against the order of the trial court which was admitted and the proceedings in the trial court were stayed. The revision was allowed on Feb. 24, 1977. The order of the trial court dated Oct. 10, 1972, was set aside and a direction was issued to proceed with the suit.

2. Ram Chander and Dalip Singh were impleaded as defendants Nos. 3 and 14 respectively in the suit. Ram Chander died on Nov. 20, 1974, and Dalip Singh on July 30, 1976. Their legal representatives were not impleaded in revisional proceedings. After the revision had been accepted and the file returned to the trial court with a direction to proceed with the suit, Vijay Kumar moved an application on July 26, 1977, for impleading their legal representatives in the suit. The proposed legal representatives of the deceased as also the remaining defendants opposed the application alleging that the suit had abated and it may be dismissed as such. The trial court vide Order dated Oct. 31, 1977, has held that the suit has not abated and for this reliance has been placed on Jowala Singh Prem Singh v. Malkan Nasirpur, AIR 1958 Pun 171. It has also been held that in view of the fact that more than one cause of action are being tried in the suit, the question of abatement of the suit in entirety does not arise. The legal representatives of the deceased defendants were accordingly ordered to be impleaded as defendants. It is against this order that the present revision is directed.

3. The contention of the learned counsel for the petitioners is that the ratio of Jowala Singh Prem Singh's case (supra), has been wrongly made applicable to the instant case. In Jowala Singh Prem Singh's case (supra), the suit of the plaintiffs was dismissed on the ground that the

*(To revise order of Krishan Kant Aggarwal, Sr. Sub J., Hissar, D/- 31-10-1977.)

Civil Court had no jurisdiction and their appeal to the District Judge also failed. The plaintiffs preferred a revision which was accepted by the High Court and the case was remanded to the trial court for disposal. One of the defendants died in the meantime. This fact was not brought to the notice of the High Court when the revision was argued. On remand it was contended before the trial court on behalf of the defendants that there had been an abatement of the revision petition. The trial court did not agree. It was held that there was no question of abatement in case of a revision. The son of the deceased defendant was allowed to be added as a defendant. The defendants preferred a revision against the order of the trial court. It was held that ordinarily the provisions of Order 22 govern the case of abatement during the pendency of the suit. This principle has been extended expressly by R. 11 of Order 22 to the case of appeals but there is no mention of its applicability to the revisions. This is a case in which the maxim inclusio unius est exclusio alterius should apply and by restricting the application of the rule of abatement expressly to suits and appeals, the intention of the legislature was to exclude from its purview cases arising from proceedings in revision.

4. The argument of the learned counsel for the petitioners is that in Jowala Singh Prem Singh's case (AIR 1958 Punj 171) (supra), the suit of the plaintiffs had been dismissed by the trial court and this order was upheld by the appellate court with the result that no suit was pending in the trial court or the appellate court during the pendency of the revision before the High Court. In the present case, the suit of Vijay Kumar was not dismissed by the trial court vide Order dated Nov. 10, 1972. He was directed to amend the plaint and to continue the suit only in respect of any one of the three sets of properties. The suit of Vijay Kumar was, therefore, pending during the pendency of the revision before the High Court against the order of the trial court dated Nov. 10, 1972. The distinction sought to be made by the learned counsel for the petitioners hardly advances their case. In Jowala Singh Prem Singh's case (supra), it has been found that the provisions of O. 22 govern the case of abatement during the pendency of the suit. The point for consideration is whether the suit of Vijay Kumar could be taken as pending during the period the revision was pending in the High Court and further proceedings in the trial court had been stayed. In Venkat Narsimhan Reddy v. Konda Reddy, AIR 1951 Hyd 55, a similar situation arose. It was held that the provisions of law contained in O. 22, Rr. 4 and 11 which require a substitution of legal representative of deceased party within a limited period of time, contemplate pending proceedings. Where the defendants in the suit go in revision against interlocutory orders in the suit, the suit cannot be said to be pending in the original court and, therefore, no question of substitution of legal representatives of the deceased would arise in the original court. Where, therefore, one of the applicants in revision dies during the pendency of the revision and his name is struck off and the revision allowed in respect of the remaining applicants, and the case sent back to the original Court for trial on merits, an application for substitution of the legal representatives of the deceased is maintainable in the original Court within reasonable time. In such a case, no question of limitation entailing abatement can arise. Venkat Narsimhan Reddy's case (supra), was followed in Keso Ram v. Gopal Singh, (1967) 69 Pun LR 454. In this case, the suit filed by the plaintiff for recovery of money on the basis of pronotes was stayed to enable the plaintiff money lender to obtain a licence under the Pepsu Money Lenders Act. During the period the suit was stayed, the sole defendant, the debtor died. The creditor obtained the requisite licence some time later, and made an application for restoration of the suit along with an application for impleading the legal representatives of the deceased debtor. It was held that O. 22 of the Civil P. C. contemplates an application in a pending proceeding. When no proceedings are pending, there is no point of making an application. The need for an application to implead the legal representatives of the defendant would arise when the suit could be revived.

5. In view of the ratio of the authorities cited above, it is evident that the suit of Vijay Kumar shall not be taken as pending in the context of O. 22, R. 4, Civil P. C. during the pendency of revision in the High Court against the order of the trial court dated Nov. 10, 1972, wherein the proceedings in the trial court had been stayed. The question of abatement of the suit, therefore, does not arise.

6. Order 22, Rule 4 of the Civil P. C. has been amended by this High Court vide Notification dated April 11, 1975. The effect of the amendment is that the legal representatives of a deceased defendant have been made responsible for getting themselves impleaded as defendants. The revision against the order of the trial court dated Nov. 10, 1972, was accepted on Feb. 24, 1977. The proceedings in the suit shall, therefore, be deemed to have been revived with effect from that date. In view of the amended Order 22, R. 4 it was the duty of the legal representatives of the deceased defendants Nos. 3 and 14 to get themselves impleaded as defendants. The plea of the petitioner regarding the abatement of the suit of Vijay Kumar cannot succeed for this reason as well.

In the result, the revision fails and is dismissed with no order as to costs.

Revision dismissed.

AIR 1979 PUNJAB & HARYANA 194

J. M. TANDON, J.

Mangat and another, Petitioners v. Surja, Respondent.

Civil Revn. No. 1880 of 1977, D/- 1-2-1979.*

Civil P. C. (5 of 1908), O. 22, R. 5 and S. 11 — Determination as to whether certain person is legal representative — Detailed decision not necessary — Decision is summary and not res judicata subsequently.

A legal representative is one who is to represent the estate of the deceased for the limited purpose of carrying on the suit and may not essentially be his heir. An enquiry in the matter of determination of a legal representative under O. 22 R. 5 is by and large summary. The order of determination under O. 22, R. 5 is not res judicata between the parties. (Para 15)

It is true that the Court is bound to determine whether any person is a legal representative or not but the word "determine" is not to be equated with "decide".

In the instant case, a person claiming to be the legal representative of the deceased plaintiff set up a registered adoption deed by the deceased in his favour. He also alleged to be the legatee under a will by deceased and held a substantial portion of the land of the deceased. The lower court found him to be the legal representative. It was held that, applying the above principles, there was nothing wrong in the finding arrived at without deciding in detail the validity of the adoption or the will. Case law referred. (Para 16)

Cases Referred: Chronological Paras

AIR 1976 Him Pra 74	14
AIR 1941 Lah 142	14
AIR 1937 Oudh 220 (FB)	14
AIR 1934 Lah 465	14

G. C. Mittal with Arun Jain, for Petitioners; H. L. Sarin, Sr. Advocate with K. G. Chaudhary, for Respondent.

ORDER:— Surja (now deceased) filed a suit against Mangat and his brother Hukum, petitioners for a declaration that the gift-deed dated June 17, 1969, alleged to have been executed by him in respect of agricultural land measuring 62 Kanals 16 Marlas in village Sandhir, Tahsil Karnal, in their favour is null and void and for a permanent injunction restraining them from interfering with his possession of the said land. The trial court decreed the suit in favour of Surja on March 13, 1974. Mangat and Hukum preferred an appeal which remained pending in the Court of District Judge, Karnal, who vide order dated Feb. 26, 1975, adjourned it sine die. On Aug. 1, 1975, the District Judge entrusted this appeal to the Additional District Judge, Karnal, directing that the appeal will be taken up for arguments in the transferee Court on Aug. 7, 1975. The Order dated Aug. 1, 1975, purported to have been passed in the presence of Shri B. P. Jain, counsel for the petitioners and Shri Chinta Mani, counsel for Surja. On Aug. 7, 1975, nobody appeared before the Additional District Judge, Karnal, on behalf of Surja. The Additional District Judge heard ex parte arguments of the petitioners and vide Order dated Aug. 18, 1975, accepted the appeal and dismissed the suit of Surja.

2. On Sep. 15, 1975, Ishwar Singh, respondent claiming to be the adopted son of Surja filed an application for rehearing of the appeal stating that Surja died on Aug. 29, 1975, and no intimation was received by him or his counsel that the appeal had been posted for arguments

*(To revise order of B. S. Yadav, Dist, J., Karnal, D/- 27-10-1977.)

for a particular date. Ishwar Singh is a minor. The application was filed on his behalf by his father Parsa. It was stated in the application that Parsa visited Karnal on Aug. 28, 1975, to make enquiries about the appeal from Sri Chinta Mani, Advocate, who informed him (Parsa) that no information had been received regarding the fixation of the appeal. On further enquiry, Parsa learnt that the appeal had been heard and decided ex parte. The absence of Surja in the appellate court on Aug. 18, 1975, was not intentional. It was accordingly prayed that the ex parte decree passed by the appellate court be set aside and the appeal be reheard.

3. Mangat and Hukum, petitioners contested the application of Iswar Singh. They denied that Ishwar Singh had locus standi to file the application because he was neither the adopted son of Surja nor was his legal representative. According to them, the counsel for the parties had been informed about the date of hearing of the appeal.

4. The learned District Judge framed the following issues:

1. Whether the application for setting aside the ex parte decree and for rehearing of the appeal on merits is within time?

2. Whether the applicant has locus standi to file this application?

3. Whether there are sufficient grounds for accepting the present application?

5. All the three issues have been decided in favour of Iswar Singh, respondent by Order dated Oct. 27, 1977. It is against this order that the present revision is directed.

6. The ex parte decree was passed by the appellate court on Aug. 18, 1975 and the application for rehearing of the appeal was submitted on Sep. 15, 1975. The application was, therefore, well within time. Issue No. 1 was not pressed before the learned District Judge. It has been rightly found against the petitioners.

7. Shri Chinta Mani, Advocate, appeared as a witness and he stated on oath that he was not informed about the date of hearing of the appeal in the Court of Additional District Judge, Karnal. In view of his categorical statement it is difficut to hold that he had been informed about the date of hearing or he absented intentionally. It appears that there crept some unintentional error when his presence was recorded at the time of the transfer of the appeal from the Court of District Judge, Karnal, to that of Additional District Judge on Aug. 1, 1975. The learned District Judge has rightly found issue No. 3 in favour of the respondent.

8. Surja owned more than 126 Kanals of land. He had allegedly gifted 62 Kanals 16 Marlas of land in favour of Hukum and Mangat. Surja being an old man, his land was cultivated by different persons on Batai. According to Khasara Gurdawari, Hukum was in possession of 31 Kanals 17 Marlas, including 23 Kanals 7 Marlas of the gifted land. Parsa, natural father of Iswar Singh, also cultivated some land of Surja on Batai. The learned District Judge, in these circumstances, has found that Ishwar Singh being a minor, his father Parsa himself must now be cultivating the land on behalf of his son Ishwar Singh, who is claiming to be the adopted son of Surja deceased.

9. Ishwar Singh applied for rehearing of the appeal as a legal representative of Surja deceased. In his application dated Sep. 15, 1975, he claimed himself to be the adopted son of Surja. He produced a copy of the adoption deed executed by Surja in his favour on Aug. 25, 1975, which was registered on Aug. 26, 1975. Ishwar Singh also put forth his claim as a legal representative of Surja deceased on the basis of a will executed in his favour by Surja on Aug. 27, 1975. The learned District Judge has held that Ishwar Singh is the legal representative of Surja deceased and has a locus standi to file application dated Sep. 15, 1975.

10. The contention of the learned counsel for the petitioners is that the approach of the learned District Judge is erroneous. It was necessary for the learned District Judge to have found if the adoption of Ishwar Singh by Surja was valid or not and further the will set up by him in his favour was valid or otherwise. The District Judge without having decided the points relating to the validity of the adoption of Ishwar Singh by Surja as also the alleged will made by him could not hold that Ishwar Singh was the legal representative of Surja deceased.

11. The learned District Judge after having found that there is reason for Iswar Singh to intermeddle with the estate of Surja deceased in view of the registered adoption deed in his favour as also the will dated Aug. 27, 1975, held him the legal representative of the de-

ceased without going into the question of validity of adoption or of the will in detail.

12. A "legal representative" is defined in Sec. 2, sub-section (11) of the Civil P. C. and it reads:

"'legal representative' means a person who in law represents the estate of a deceased person, and includes any person who intermeddles with the estate of the deceased and where a party sues or is sued in a representative character the person on whom the estate devolves on the death of the "party so suing or sued."

13. Rule 5 of Order 22, Civil Procedure Code, relates to the determination of question as to legal representative and it reads:—

"Where a question arises as to whether any person is or is not the legal representative of a deceased plaintiff or a deceased defendant, such question shall be determined by the Court."

14. The emphasis of the learned counsel for the petitioners is that it was incumbent upon the learned District Judge to decide whether Iswar Singh was the adopted son and or the legatee of Surja or not. In support of his contention, the learned counsel has drawn my attention to the word "shall" in O. 22, R. 5, reproduced above. I do not agree with this contention. It is true that the Court is bound to determine whether any person is a legal representative or not but the word "determine" is not to be equated with 'decide'. A determination under O. 22, R. 5 of the Civil P. C. is not res judicata. It was held in Chiragh Din v. Dilawar Khan, AIR 1934 Lah 465, that wherein a proceeding under O. 22, R. 5, a certain person is (or is not) held to be the legal representative of a deceased party the same question can be re-agitated in a separate suit and is not barred by the rule of res judicata. In Daulat Ram v. Mt. Meero, AIR 1941 Lah 142, it was found that a decision under O. 22, R. 5 shall be limited to the purpose of carrying on the suit and cannot have the effect of conferring any right to heirship or to property. In Zalim v. Tirlochan Prasad Singh, AIR 1937 Oudh 220 (FB), it was held that the determination of question whether a certain person is or is not the legal representative of a deceased party in a proceeding under O. 22, R. 5, Civil P. C. does not operate as res judicata so as to preclude the same question from being reagitated in a separate suit. In Suraj Mani v. Kishori Lal, AIR 1976 Him Pra 74, it was held that an order under O. 22, R. 5 involves a summary enquiry as to who should be substituted in place of the deceased party in a pending proceeding and such a decision does not operate as res judicata. It was also held that the definition of 'legal representative' in Sec. 2 (11) is very wide. It will include a person who seeks to represent the estate of a deceased person on the basis of a will said to be executed by the deceased in his favour. The estate will be sufficiently represented by such a person.

15. It is clear from the authorities cited above that a legal representative is one who is to represent the estate of the deceased for the limited purpose of carrying on the suit and may not essentially be his heir. An enquiry in the matter of determination of a legal representative under O. 22, R. 5 is by and large summary. The order of determination under O. 22, R. 5 is not res judicata between the parties.

16. The learned District Judge has found that Ishwar Singh is an intermeddler qua the estate of Surja deceased inasmuch as he is in possession of a substantial part of his land. He has further claimed to be the adopted son of the deceased on the basis of a registered adoption deed in his favour. He has set up a will allegedly executed by the deceased in his favour. In view of the principles enunciated above, the learned District Judge rightly found him to be the legal representative of the deceased. Under these circumstances, it was not necessary to go into details to decide the validity or otherwise of his adoption by the deceased as also of the will in his favour.

17. In view of the discussion above, the revision fails and is dismissed with no order as to costs.

Revision dismissed.

AIR 1979 PUNJAB AND HARYANA 196

M. R. SHARMA AND S. C. MITAL, JJ.

The Atam Nagar Co-operative House Bldg. Society Ltd., Ludhiana, Petitioner v. State of Punjab and others, Respondents.

Civil Writ Petn. No. 3577 of 1978, D/- 12-1-1979.

Evidence Act (1 of 1872), Sec. 115 — Estoppel against Corporation — Improve-

EW/FW/C487/79/NRK/WNG

ment Trust promising to give plots and concessions to a Society under certain scheme — Scheme required to be scrapped due to negligence of Trust — Another scheme formed — Society held entitled to plots.

The Improvement Trust of a City which had adopted two schemes for development, assured some persons who had approached for allotment of plots, that their request would be favourably considered if they formed a society. A society was formed accordingly. The land purchased by the society was to be exempt from the operation of the scheme. The Trust informed the society that plots would be delivered to the latter immediately the possession of the land was taken. Certain sum was asked to be deposited and was accordingly deposited by the society. The High Court quashed one of the schemes on the ground of delay of more than three years caused by the Trust. The other scheme which was applicable to the society had also to be scrapped on the same basis. When a new scheme of the same type was adopted by the Trust, it declined to honour its commitment to the society in respect of the plots on the ground that the previous scheme was scrapped.

Held that if the defence of the Trust was allowed, it would enable the Trust to benefit of its own negligence. The Court would have to give a complete go-by to the well-known maxim of law that 'equity feeds the grant of estoppel' which there is no reason to do. Whenever land is available for allotment as residential plots in an urban area, there is generally a large number of applicants claiming the plots but in a situation like this, the Trust cannot be allowed to ignore the claim of the earlier applicants in whose favour rights have come into existence on account of the operation of the principle of estoppel. (Para 7)

Kuldip Singh, for Petitioner; D. S. Boparai, Addl. Advocate General, Punjab, for the State; J. S. Narang, for Respondents Nos. 2 and 3.

M. R. SHARMA, J.:— This petition has been filed by the Atam Nagar Co-operative House Building Society Ltd., Ludhiana, (hereinafter referred to as the Society). The Improvement Trust, Ludhiana, adopted two schemes for the urban development. Some persons approached it for allotment of plots and the Chairman of the Trust gave them an assurance that if they formed a co-operative society their request would be favourably considered. Pursuant to that assurance, the petitioner-society had come into existence on Oct. 24, 1964. On the application of the society, the land purchased by this Society was exempted from the operation of the provisions of the scheme. This is apparent from the following letter written on 13-7-1969 by the Executive Officer, Town Improvement Trust, Ludhiana, to its Land Acquisition Officer:

"You are informed that the Trust vide its Resolution No. 23 which was passed unanimously on 2-7-1969 has agreed to exempt the land purchased by the Atam Nagar Co-op. House Building Society in Model Town Extension (V. Gill Nos. 1 and 2) details of which are indicated therein. A copy of the resolution is enclosed herewith."

2. On 5-11-1964 the Chairman of the Trust wrote to the Society that 200 residential plots shall be allotted to it, as soon as the possession of the land was taken. On 19-8-1966 the Chairman asked the Society to deposit a sum of Rupees 5,71,050.00 as the price of 90 plots allotted to it which was also done. Later on at the instance of some of the land-owners whose land was sought to be acquired, scheme No. 2 was quashed by this Court on the ground that a period of more than 3 years had intervened between the time when the Trust issued the earlier notification regarding its intention to acquire the land and the second notification relating to the actual acquisition. On the basis of the judgment the Trust scrapped scheme No. 1 also in which the petitioner-society had been promised the allotment of plots.

3. When a new scheme of the same type was adopted the Trust declined to honour its earlier commitments and to offer residential plots to the petitioner-society. The request made by the latter that the land purchased by it should be exempted from the operation of the scheme was also turned down. The Society has come up in the instant petition against the action of the Trust.

4. There are really two points to be determined in this petition. Firstly, whether the Trust can be directed to abide by its earlier commitments to allot residential plots to the petitioner-society or not, and secondly, whether the Trust can be directed to grant an exemption

in favour of the land purchased by the petitioner-society even when the earlier scheme has been scrapped and another one has been adopted in its place.

5. It is not disputed that the Society was formed on the assurance given by the Chairman of the Trust to some persons to the effect that in case they formed a co-operative society their request for allotment of plots would be favourably considered. Pursuant to that assurance, those persons along with some others did form the petitioner-Society. As many as 90 residential plots were in fact allotted to the Society pursuant to the assurance given by the Chairman, The amount advanced by the Society for the allotment of the additional plots continues to be lying with the Trust even though on an earlier occasion the Chairman had addressed a letter to the Society that it should withdraw the said amount. Now, if the Chairman had not given an assurance that the plots would be allotted if the applicants for plots form a co-operative society, they would perhaps have not acted on that assurance and would have made alternative arrangements for getting residential plots. By acting on the assurance given by the Chairman, they had materially changed their position to their advantage and in the circumstances the Trust would be estopped from going back on the solemn assurance given by it earlier.

6. Mr. Narang, the learned counsel for the respondent-Trust, has submitted that the assurance had been given in respect of Scheme No. 1 which was scrapped by the Trust because of the judgment rendered by this Court which related to scheme No. 2 and after the adoption of the new scheme the members of the Society could not be accommodated because there was a large number of applicants who were clamouring for getting plots. According to him, the assurance given by the Trust lapsed with the abandonment of the earlier scheme.

7. We are not impressed with the submission made by Mr. Narang. This Court intervened and quashed the scheme because the Trust itself had caused undue delay in executing the same inasmuch as it allowed a period of three years to elapse between the two notifications. In other words, the Trust has put forth a defence which if allowed would enable it to take benefit out of its own negligence. Even otherwise, the present scheme is almost a replica of the earlier scheme and has been adopted in order to overcome the technical objections brought to surface by a judgment of this Court. The land under the new schme continues to vest in the Trust as it did before. The precise argument on behalf of the Trust is that because of negligent working of the provisions of the Town and Improvement Trust Act, it could not allot the land to the petitioner-Society under the first scheme and even though the land continues to vest in it and it is competent to allot the plots under the new scheme, it should not be compelled to do so. If this argument is allowed to prevail, this Court would have to give a complete go-by to the well-known maxim of law that 'equity feeds the grant of estoppel' which we see no reason to do. Whenever land is available for allotment as residential plots in an urban area, there is generally a large number of applicants claiming the plots but in a situation like this, the Trust cannot be allowed to ignore the claim of the earlier applicants in whose favour rights have come into existence on account of the operation of the principle of estoppel.

8. For the aforementioned reasons, we allow this petition and direct the respondent-Trust to allot the plots to the petitioner-Society in accordance with the earlier undertaking given by its Chairman.

9. So far as the question of exemption is concerned, we might add that as noticed earlier the Trust had previously granted an exemption in favour of the land purchased by the members of the Society and because of the change of the scheme on account of technical reasons mentioned above, it does not look proper that the Trust should take a different decision now. In any event, the exemption has to be granted by the State Government and not by the Trust. In the circumstances, it would not be proper for us to issue any positive direction to the Trust regarding the grant of exemption. We, however, direct that the Trust should forward the case of the petitioner-Society to the State Government and it shall be open to the latter to decide whether the land purchased by the petitioner-Society should be exempted from the operation of the provisions of the scheme or not The petition stands disposed of accordingly with no order as to costs.

Order accordingly.

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J. M. TANDON J.

M/s. Tara Chand Saluja and Sons, Petitioner v. The State of Haryana and others, Respondents.

Civil Writ Petn. No. 4186 of 1978, D/- 11-4-1979.

Constitution of India, Arts. 226 (1) (a), (3) 19 (g) — Paraffin Wax (Supply, Distribution and Price Fixation) Order (1972), Cls. 8, 10 — Other remedy — Order refusing Paraffin Wax dealer's licence to petitioner in public interest — No infringement of right to carry on business — Petitioner not availing remedy of appeal under cl. 10 of the Order — Not entitled to invoke writ jurisdiction. (Paras 7, 11)

Anand Sarup Sr. Advocate with M. L. Bansal, for Petitioner; A. S. Nehra Addl. Advocate General Haryana, for Respondent Nos. 1 and 2.

ORDER:— Bharat Petroleum Corporation Limited, Bombay, is one of the selling agents of paraffin wax produced by the Assam Oil Company, Digboi, Assam. For this purpose the former appoints distributors/agents for different territories. In 1973 the petitioner-firm was appointed one such distributor/agent for the territories comprising the districts of Gurgaon, Rohtak, Sonepat and Mohindergarh. In March, 1975, the Director of Industries, Haryana, informed the petitioner that a licence to carry on the business of a dealer in paraffin wax was required under the Paraffin Wax (Supply, Distribution and Price Fixation) Order, 1972, (hereinafter the Order) and further advised it to apply for the same. The petitioner consequently applied for the grant of such a licence. The District Industries Officer, Faridabad, recommended the application of the petitioner. The State of Haryana decided to arrange distribution of paraffin wax henceforth entirely through Haryana State Small Industries and Export Corporation Limited (hereinafter the Corporation) and informed Bharat Petroleum accordingly. On August 18, 1978, a representative of the petitioner-firm went to the office of Delhi Division of Bharat Petroleum for the release of monthly quota. He was given a blank on account of the decision of the State Government communicated to them. The correspondence between the Bharat Petroleum and the State Government did not yield any favourable result for the petitioner and the latter consequently filed Civil Writ Petition No. 3570 of 1978 on August 23, 1978, challenging the decision of the Government regarding the distribution of paraffin wax exclusively through the Corporation. This petition was, however, withdrawn with permission to file a fresh petition on the same cause of action. The petitioner thereafter filed the present writ petition No. 4186 of 1978 on October 7, 1978.

2. The Joint Director of Industries, Haryana, vide his letter dated October 28, 1978 (p. 7) declined to grant licence to the petitioner to carry on the business of a dealer of paraffin wax on the ground that the State Government had decided, as a matter of policy, to entrust the work of distribution to the Corporation in the larger public interest as it has its depots all over the State to carry on the business of a dealer of paraffin wax and is already engaged in the work of distribution of other scarce raw material. The petitioner has challenged the order of the Joint Director of Industries declining to issue the licence to it as also the decision of the Government to effect distribution of paraffin wax through the Corporation being arbitrary, illegal and without jurisdiction.

3. The State of Haryana and the Director of Industries, in their joint written statement, have denied that the decision of the State Government to arrange for distribution of paraffin wax henceforth through the Corporation is illegal, arbitrary, without jurisdiction or the order of the Joint Director (P. 7) dated October 28, 1978, declining the licence to the petitioner under the Order is non est and void. It has further been averred that the order of joint Director of Industries (p. 7) is appealable under clause 10 of the Order and in the situation an alternative remedy of appeal being available to the petitioner, the writ petition is liable to fail as provided under clause (3) of Article 226 of the Constitution.

4. The Paraffin Wax (Supply, Distribution and Price Fixation) Order,

1972, came into force on February 4, 1972. Clause (7) of the order reads:—

"7. Dealers of paraffin wax to be licensed:— No person shall carry on the business of a dealer except under and in accordance with the terms and conditions of a valid licence granted to him under this Order."

"Dealer" has been defined in cl. (2) (b) and it reads:—

"2 (b) "dealer" means any person carrying on directly or otherwise the business of sale or storage for purposes of sale, of paraffin wax, whether wholesale or retail, or whether in conjunction with any other business or not, and includes his representative or agent."

5. Clause (7) read with cl. 2 (b) of the Order debars the petitioner to function as a distributor/agent of paraffin wax without holding a valid licence. The petitioner did apply for such a licence which was declined by the Joint Director of Industries (competent authority) vide order (p. 7) dated October 28, 1978.

6. Clause 10 of the Order provides for an appeal and it reads:—

"10. Appeal:—

Any person aggrieved by an Order made by the competent authority under clause 8 or under clause 9 may, within thirty days of the receipt of a copy of the order by him, prefer an appeal to the State Government and the State Government may, after giving the applicant an opportunity of being heard, confirm, reverse or modify such order."

The order of the Joint Director of Industries dated October 28, 1978 (p. 7) is thus appealable at the instance of the petitioner before the State Government.

7. The contention of the learned counsel for the petitioner is that as the licence has been declined to the petitioner on the basis of a decision of the State Government to entrust the work of distribution to the Corporation, it would be futile and illusory to file an appeal against it before the same authority. I am not impressed by this contention. The alternative remedy of an appeal against the order (p. 7) is available to the petitioner. The order (p. 7) does make a mention about the policy decision taken by the Government, but that should not debar the petitioner to file an effective appeal against the order (p. 7) and to attempt to convince the State Government to revise their decision. May be that some points that the petitioner may put forth were not taken into consideration by the State Government while taking the policy decision. The alternative remedy of appeal, therefore, cannot be stamped futile or illusory.

8. The learned counsel for the petitioner has drawn my attention to clause 8 of the Order, the relevant sub-clauses of which read:—

"8. Application for grant of licence:—

(1) Any person desiring to carry on the business of a dealer may make an application in duplicate for the grant of a licence to the competent authority in Form B appended to this Order together with a fee of rupees twenty-five.

(2) The competent authority may, after making such inquiry as it deems fit, either grant or refuse to grant the licence.

(3) Where the competent authority refuses to grant a licence, it shall record the reasons for so doing and a copy of the reasons so recorded shall be communicated to the applicant.

(4) to (6) .....

9. The learned counsel for the petitioner has laid stress on sub-clause (3) of clause 8 which makes it incumbent upon the competent authority to record reasons for refusing to grant a licence. The contention is that the order (p. 7) contains no reason for refusing to grant the licence and it is, therefore, no order in the eye of law. I see no merit in this contention.

10. It is doubtful if in the absence of any reason in order (p. 7) declining to issue the requisite licence to the petitioner it would be rendered no order in the eye of law. This apart the Joint Director of Industries has given reason in P-7 for declining to issue a licence to the petitioner. The reason given is the policy decision of the State Government to entrust the work of distribution to the Corporation in the larger public interest which has its depots all over

the State to carry on the business of paraffin wax and is already engaged in the work of distribution of other scarce raw material. It is not disputed and is a matter of common knowledge that paraffin wax is a scarce raw material.

11. The learned counsel for the petitioner has then argued that it is a fundamental right of the petitioner to carry on any business including that of paraffin wax. This fundamental right of the petitioner stands contravened by the refusal of the Joint Director of Industries to grant the requisite licence to it. This case is therefore covered by sub-clause (a) of Clause (1) of Article 226 and the availability of an alternative remedy cannot be taken as a bar to the maintainability of this writ. This contention is again without any force. Nobody, including the petitioner, has a fundamental right to secure the licence to carry on the business of the sale of paraffin wax. The Paraffin Wax (Supply, Distribution and Price Fixation) Order, 1972, places a restriction on this right. The Paraffin Wax Order which places a reasonable restriction is not unconstitutional. The non-issuance of a licence to the petitioner under the Order, therefore, does not contravene the fundamental right of the petitioner to carry on business.

12. The last contention of the learned counsel for the petitioner is that the order of the Joint Director of Industries (P. 7) is arbitrary and mala fide. The licence has been declined to the petitioner to enable to State Government to implement their policy decision to entrust the work of distribution of paraffin wax to the Corporation. I am not impressed by this contention as well. The Government have taken a policy decision in the larger public interest to entrust the work of distribution of scarce raw material like paraffin wax to the Corporation and a licence under the Order has also been issued to the Corporation. In this situation there can be no element of arbitrariness or mala fide on the part of the authorities in declining to issue the licence to the petitioner. In any case the mala fide or arbitrariness of Order (P. 7) would not render clause (3) of Art. 226 inoperative.

13. In view of discussion above the petitioner cannot maintain this writ petition because an alternative remedy of appeal against the order of the Joint Director of Industries (P. 7) is available to it.

14. In the result, the writ fails and is dismissed with costs.

Petition dismissed.

AIR 1979 PUNJAB & HARYANA 201

GOKAL CHAND MITAL, J.

Harbans Singh and others, Petitioners v. Chief Settlement Commissioner, Punjab and others, Respondents.

Civil Writ Petn. No. 1512 of 1967, D/- 6-4-1979.

Transfer of Property Act (4 of 1882), Ss. 8 and 55 (2) — Invalidation of title subsequent to transfer — Allotment of land by Government — All land sold in parts on different dates — Government subsequently finding allotment to be in excess — Retrieving of excess land by Government from last vendees held valid — Vendor can convey no better title than his.

(Para 6)

H. S. Wasu and L. S. Wasu, for Petitioners; Kartar Singh Raipuri and Sarjit Singh, for Respondents.

ORDER :—One Krishan Lal a displaced person was allotted an area of about 508 bighas of evacuee agricultural land in lieu of land left by him in Pakistan. In due course proprietary rights were conferred on him by the Managing Officer and he became full owner thereof. After the conferment of the proprietary rights, Krishan Lal, the original owner, sold his land by various sale deeds from 1957 to 1959 to different vendees. After Krishan Lal had sold the land transferred to him by the Rehabilitation Department to the vendees, it was found by the Rehabilitation Department that his allotment to the extent of 6.13½ standard acres, equal to about 54 bighas and 9 biswas, was in excess and in accordance with law the proprietary rights to the extent of the aforesaid area were cancelled by the Rehabilitation Department.. The order of cancellation is not in dispute.

2. As a consequence of the cancellation of the 54 bighas and 9 biswas from the allotment of Krishan Lal, this much area had to be retrieved by the Rehabilitation Department from the vendees as by that time the original owner had sold away the entire allotted area including the area which was found to be in excess.

3. The Rehabilitation Department retrieved the excess area from the last vendees of Krishan Lal who purchased the land from him in the sales made by him in the years 1958 and 1959. The persons who purchased from Krishan Lal in the year 1957 were saved.

4. The subsequent vendees were dissatisfied from the orders retrieving the area which was subject-matter of their sales and they failed before all the Rehabilitation Departmental authorities. The Rehabilitation authorities found that the only way to retrieve the excess allotment was that the excess land from the last vendees had to be taken and in this manner the last vendees were deprived of their land and the same was taken over by the Rehabilitation Department. This writ petition is directed against the action of the Rehabilitation Department retrieving the excess allotment of Krishan Lal from his vendees who were the last in point of time.

5. Shri H. S. Wasu, learned Counsel for the petitioners, has invited my attention to paras 24 and 25 of Tarlok Singh's Manual (pages 152 and 153) and has argued that allotment of evacuee property has to be made to the claimants serial-wise and they have to be allotted land according to seriatim numerical numbers of the Khasra and in this manner allotment was made to Krishan Lal claimant, from whom the petitioners purchased the land. If allotment of Krishan Lal is found in excess then the last khasra numbers in the numerical order have to be withdrawn from him and not on the basis of the last purchasers. According to the learned counsel, the khasra numbers which were sold to them by Krishan Lal are the earlier khasra numbers in the list of khasras which were allotted to Krishan Lal and those khasra numbers would be saved and the latter khasra numbers have to be retrieved from the allotment of Krishan Lal and if paras 24 and 25 of Tarlok Singh's Manual had been followed by the Rehabilitation Department then the land of the petitioners would have been saved and that of the other vendees would have been retrieved and according to the learned counsel this is the correct method of retrieving area from an allottee whose allotment is found to be in excess.

6. I am unable to agree with the contention of Mr. H. S. Wasu, the learned counsel appearing for the petitioners. The system of making allotment contained in paras 24 and 25 of Tarlok Singh's Manual would be a good guide at the time of allotment so that the Managing Officers or the Custodians who were given the authority to make allotments may not act arbitrarily while making allotments. So these paragraphs were only a good guide for the matter of making proper allotments in a serial order to the various claimants to avoid discrimination or favouritism or allotment in an irregular or haphazard manner. But these paras cannot be brought in aid on the facts of this case as shown above. The rule of law laid down in the Transfer of Property Act will have to be kept in view. Krishan Lal first sold part of his land allotted to him in the year 1957. To that extent his allotment has been held to be good. Thereafter he sold the remaining part, some in 1958 and some in 1959. At the time when he made subsequent sales in the years 1958 and 1959, if the order of cancellation is to stand, he had no title left in him to make transfers in the years 1958 and 1959 and as such no title will pass to the vendees. This is the settled law that a vendor can transfer rights possessed by him and he can convey title no better than his. If title of Krishan Lal, the original allottee, is found to be wanting, then he had no title in 1958 and 1959 when he transferred the land in dispute to the ptitioners who are his vendees. As such the petitioners will get no title to the property in dispute and no fault can be found with the transfer made by Krishan Lal in the year 1957 as at that time to the extent of the transfer made in that year he had title in the property. Therefore, the only conclusion in law would be, as rightly held by the authorities below,

that the earlier transfers have to be held to be good to the extent to which Krishan Lal had the title and the subsequent transfers will be held to be bad and will have to be ignored and to that extent the area which has to be retrieved will have to be taken back from the subsequent vendees. No other view is possible.

7. For the reasons recorded above, there is no merit in this petition which is dismissed with costs.

Writ petition dismissed

AIR 1979 PUNJAB & HARYANA 203

S. S. SANDHAWALIA C. J. AND HARBANS LAL J.

Brij Mohan Singh and another, Appellants v. State of Punjab and others, Respondents.

Letters Patent Appeal No. 390 of 1975 D/-15-2-1979.*

Motor Vehicles Act (4 of 1939), Section 110-CC (inserted by Act 56 of 1969) — Power to award interest on amount of compensation — Discretionary — Normal rule is to grant interest from date of claim application — Application filed prior to insertion of S. 110-CC — Not a ground for deviation from normal rule, F. A. O. No. 299 of 1971, D/- 21-3-1975 (Punj) & Har), Reversed. (Paras 8, 9, 11)

Cases Referred: Chronological Paras

1978 Acc CJ 352 (Orissa)	10
AIR 1978 Punj & Har 177 : 1978 Acc CJ 310	9
1976 Acc CJ 341 (Orissa)	9
1973 Acc CJ 539 (Ker)	9
AIR 1973 Mys 162 : 1973 Acc CJ 57	9

L. M. Suri, for Appellants; I. S. Tiwana, Addl. Advocate-General, for the State; R. S. Mongia, for Respondent No. 4.

S. S. SANDHAWALIA C. J.:— The nature and scope of the discretion vested in the Claims Tribunal by S. 110-CC of the Motor Vehicles Act, 1939, to award interest on the compensation allowed is the only meaningful issue which falls for determination in this appeal under Cl. 'X' of the Letters Patent.

2. The facts deserve notice only in so far as they are relevant to the issue aforesaid. Dewan Ranbir Singh, father of the appellants, whilst travelling in his car collided with a milk tanker on March 31, 1965 resulting in his death. The appellants and their mother Shrimati Dwarka Devi filed the claim application on May 5, 1965, seeking an award of Rs. 2,18,000/- as compensation for the death of Dewan Ranbir Singh. The State of Punjab and other respondents contested the claim made on behalf of the appellants and their mother, as also the claim made by the dependants of the driver of the car. The Tribunal held that the accident was due to the negligent driving of the milk tanker by its driver and assessed the compensation payable to Shrimati Dwarka Devi at a sum of Rs. 26,000/-. Further it was held that the two appellants were not in any way dependant upon the deceased and were, therefore, not entitled to any compensation. The Tribunal, under S. 110-CC of the Motor Vehicles Act, 1939 (hereinafter called 'the Act') further directed that interest at the rate of 6 per cent would be payable on the aforesaid amount from the date of the accident. A number of appeals, both by the claimants and the contesting respondents, were preferred against the award of the Tribunal, which were consolidated, heard together and disposed of by the learned single Judge by the judgment which is under appeal.

3. Before adverting to the findings arrived at by the learned single Judge, it deserves highlighting that Shrimati Dwarka Devi, the mother of the appellants had died on May 24, 1971, during the pendency of the claim before the Tribunal, wherein the award was announced on May 31, 1971. The learned single Judge relying on R. 6 O. XXII of the Civil P. C. held that as the death of Shrimati Dwarka Devi had taken place after the conclusion of arguments in the case, the proceedings did not abate. He further affirmed the findings of the Tribunal and held that both the appellants were not entitled to any compensation in their own right in view of the fact that on the material date they were not at all dependant on their deceased father Dewan Ranbir Singh and further that at the time of his death he was as old as 70 years of age. However, as regards the compensation of Rs. 26,000/- awarded to Shrimati Dwarka Devi the learned single Judge found the same unexceptionable and affirmed the findings of the Tribunal.

*(Against judgment of M. L. Verma, in F. A. O. No. 299 of 1971, D/- 21-3-1975).

4. Probably it is best to mention at this very stage that no meaningful challenge to the concurrent finding of the Tribunal and the learned single Judge with regard to the quantum of compensation could be raised by Mr. L. M. Suri, appearing for the appellants. It would be wasteful to tread the same ground again and affirming the said finding we uphold the same.

5. The real arena of the controversy is with regard to the date from which the interest at the rate of 6 per cent is to be given on the award. The Tribunal acted apparently under S. 110-C of the Act and directed that the claimants would be entitled to interest at the rate of 6 per cent from the date of the accident. The learned single Judge and in our view rightly, held that this was not warranted in view of the provisions of S. 110-C, but instead directed that the interest should run with effect from April 1, 1970. In arriving at this decision he was influenced by the fact that S. 110-CC was inserted in the Act by Central Act No. 56 of 1969, which came into force from March 2, 1970.

6. Mr. Suri on behalf of the appellants has forcefully contended that the cause of action truly accrues to the appellants from the date of the accident resulting in the death of the victim owing to the established negligence of the driver of the milk-tanker. It was submitted that once the quantum of compensation has been arrived at it must be held that the appellants became entitled to the same from the date of the death, but in view of the provisions of S. 110-CC the earliest date can be that of the making of the claim application and no reason has been given for deferring the running of interest beyond that date even.

7. As the argument must necessarily turn now on the express language of S. 110-CC of the Act, it is necessary to read the same:—

"110-CC. Award of interest where any claim is allowed:—

Where any Court or Claims Tribunal allows a claim for compensation made under this Chapter, such Court or Tribunal may direct that in addition to the amount of compensation, simple interest shall also be paid at such rate and from such date not earlier than the date of making the claim as it may specify in this behalf."

8. It is evident from the language of the aforesaid provision that a wide ranging discretion is now given to the Claims Tribunal, both as regards the rate of the interest as also the date from which it is to run. Issue, however, still arises with regard to the sound principle which should govern the exercise of this discretion. There is no serious dispute with the proposition that the cause of action in cases of this nature arises at once from the date of the accident itself. The claimants, therefore, obviously became entitled to the compensation with effect from that date. However, the legislature in its wisdom and perhaps rightly has provided for the earliest date for awarding the interest to be the making of the claim application. There appears to me no sound reason on principle which would ordinarily warrant the deferring of running the interest on the computed sum of the award beyond the said date. If it is once held that the entitlement of compensation arises onwards from the death or injury to the victim, then merely because the tardy process of law may sometimes inordinately delay the computation of the same, it should not rob the claimants from securing interest at least from the date of making the claim. Of course such a rule cannot be absolutely inflexible and invariable and special circumstances and reasons may exist which in a particular case disentitle the claimants to the grant of interest from the said date. Nor can one lose sight of the fact that the provision as it is framed does vest a modicum of discretion in the Tribunal. This can only be reasonably fettered by enunciating a sound principle for the exercise thereof. In a particular case if cogent reasons appear then to defer or even to deny the grant of interest may be sustainable, but in the total absence thereof it would hardly be justifiable.

9. Apart from principle, it appears to me the precedent is equally available in support of the above view. It perhaps deserves recalling that S. 110-CC of the Act was brought on the statute book on March 2, 1970. Even prior thereto, there was no paucity of precedent wherein the interest was awarded on the compensation with effect from the date of the accident or the date of claim. After the insertion of the present provision there appears to be again a plethora of precedent in which interest has been awarded from the date of the compensation ap-

plication. In Hanuman Dass v. Usha Rani 1978 Acc CJ 310: (AIR 1978 Punj & Har 177) it has been observed as follows (at p. 180 of AIR):—

"14. That the interest ought to be made payable on the compensation amount from the date of application, finds support from three decisions of three separate High Courts in K. G. Bhaskaran v. K. A. Thankamma, 1973 Acc CJ 539 (Ker) A Harsha V. Rai v. Dr. K. V. Karna, 1973 Acc CJ 57 : (AIR 1973 Mys 162), Sabitri Kumari Das v. State of Orissa, 1976 Acc CJ 341 (Orissa). I respectfully concur in the view that has been taken in the aforesaid decisions and hold that the claimant is entitled to interest on the amount of compensation from the date of application to the date of payment at the rate of 6% fixed by the Tribunal."

10. The same view was taken by the Orissa High Court in General Manager, Orissa Road Transport Co. Ltd. v. Urmila Panigrahi, 1978 Acc CJ 352.

11. In view of the aforesaid discussion it appears to me that the appellants were clearly entitled to the grant of interest on the computed amount of compensation from the date of the application, namely May 5, 1965 and there appears no ground at all for denying the same to them. I would accordingly modify the judgment of the learned single Judge to this extent whilst upholding the same on the quantum of compensation awarded.

12. With the aforesaid modification the appeal is dismissed, but the parties are left to bear their own costs.

HARBANS LAL, J.:— I agree.

Order accordingly.

AIR 1979 PUNJAB AND HARYANA 205

FULL BENCH

S. S. SANDHAWALIA, C. J., S. C. MITAL AND HARBANS LAL, JJ.

M/s. Jagan Nath & Sons and others, Petitioners v. Union of India and others, Respondents.

Civil Writ No. 6514 of 1975, D/- 5-2-1979.

Constitution of India, Art. 226 — Procedure — Rules of Court — Reason for hearing of petition by Full Bench no longer subsisting — Petition directed to be heard by Single Judge.

Where during the admission of a writ petition on 12-12-1975, a doubt about the correctness of judgment in AIR 1975 Punj & Har 324 necessitated the hearing of the petition by the Full Bench for deciding a question whether a pre-Emergency legislation could be subjected to challenge under Art. 19 of the Constitution even during continuance of Emergency and at the time of hearing of the petition the Emergency having been revoked the parties agreed that the applicability of the ratio of the aforesaid decision did not even remotely arise, the reason for hearing of the case by Full Bench no longer subsisted. The case was directed to be heard by Single Judge.

(Paras 2, 3)

Anno: AIR Comm. Constn. of India (2nd Edn.), Art. 226, N. 42 (A).

Cases Referred: Chronological Paras

AIR 1975 Punj & Har 324 1, 2

Bhal Singh Malik, for Petitioners; I. S. Tiwana, Addl. Advocate General, Punjab, for the State; Kuldip Singh, for Union of India.

S. S. SANDHAWALIA, C. J.:— A vacillating doubt expressed by the counsel regarding the correctness of the Division Bench judgment in Partap Singh Kadian v. State of Punjab, AIR 1975 Punj and Har 324 had necessitated the admission of this writ petition for a hearing by the Full Bench way back on the 12th of Dec., 1975.

2. In Partap Singh Kadian's case (supra) inter alia it has been authoritatively held that Art. 358 is prospective and applies to fresh legislation enacted by the State during the Emergency. However, it does not apply to pre-Emergency legislation, which therefore, could be subjected to a challenge under Article 19 of the Constitution of India even during the continuance of the Emergency. The proclamation of Emergency having now been revoked, learned counsel for the parties are rightly agreed that application of the ratio of Partap Singh Kadian's case (supra) does not now even remotely arise. This apart no criticism whatsoever to the reasoning, rationale and the view expressed in Partap Singh Kadian's case has been made at the Bar. Counsel are, therefore, agreed that the only reason for which the case was directed to be heard by a Full Bench no longer subsists.

3. We, therefore, direct that this writ petition be placed before a Single Bench for disposal on merits.

Order accordingly.

AIR 1979 PUNJAB AND HARYANA 206

S. C. MITAL, J.

Gurcharan Kaur, Appellant v. Ram Chand, Respondent.

F. A. F. O. No. 51-M of 1975, D/- 1-2-1979.*

(A) Hindu Marriage Act (25 of 1955), S. 11 (as amended by Act 58 of 1976) — Petition by wife claiming decree of nullity of marriage —Death of husband during pendency of appeal — Held, wife not entitled to get decree of nullity. (Para 6)

(B) Hindu Marriage Act (25 of 1955), Sec. 25 — Alimony — Grant of — Application by wife claiming decree of nullity of marriage — Dismissed — Petition for alimony not maintainable. AIR 1971 Punj and Har 141 (FB), Foll. (Para 7)

Cases Referred : Chronological Paras

AIR 1973 Punj & Har 442 6
AIR 1971 Punj & Har 141 (FB) 7

G. R. Majithia, for Appellant; Pawan Kumar Bansal, for Respondent.

JUDGMENT:— This appeal is directed against the judgment of the learned Additional District Judge, Faridkot, dimissing the petition filed under Ss. 11 and 25 of the Hindu Marriage Act by Gurcharan Kaur against her husband Ram Chand. In her petition, Gurcharan Kaur averred that her marriage with Ram Chand took place in the month of Maggar in the year 1972 at village Lopon. Thereafter, they lived as husband and wife but no issue was born. It was after the the marriage that she came to know that Ram Chand had two wives, namely, Nachhitar Kaur and Bhagwan Kaur living at the time of the marriage in question. As such, her marriage with Ram Chand be declared a nullity. Under Section 25 of the Act, Rs. 20,000/- were claimed as alimony.

2. In his written statement, Ram Chand opposed the petition and took up the plea that the marriage was not solemnized according to customary rites and the fact that he had two wives living was known to Gurcharan Kaur before the marriage.

3. The pleadings of the parties gave rise to the following issues:—

1. Whether the marriage between the parties was solemnised according to customary rites of the parties? If not, its effect? O. P. P.

2. Whether the petitioner is entitled to a decree for nullity of marriage as prayed? O. P. P.

3. To what amount, if any, is the petitioner entitled as alimony? O. P. P.

4. Relief.

The learned Additional District Judge decided all the issues against Gurcharan Kaur and dismissed the petition.

4. Learned counsel for Gurcharan Kaur first assailed the finding of the learned Additional District Judge on Issue No. 1. The contention raised was that the learned Additional District Jugde approached the case entirely from a wrong angle and thus arrived at an erroneous conclusion against Gurcharan Kaur to the effect that no marriage at all took place between the parties. Support to the contention was sought from the pleadings of the parties themselves. In Paragraph No. 1 of the petition, Gurcharan Kaur averred:

"That a marriage was solemnised between the parties after the commencement of the Hindu Marriage Act in the month of Maggar in the year 1972 at village Lopon. An affidavit to that effect is filed herewith."

Ram Chand in his written statement made an admission in the following way:

"That para No. 1 of the petition is correct although marriage took place but it was not solemnised according to customary rites, ceremonies of parties; Amar Singh, Udha Singh are witnesses to this effect."

Reference was then made to Paragraph No. 3 of the petition and written statement. Para. 3 of the petition reads:—

"That after the marriage the parties lived as husband and wife at village Mitwani and cohabited together as husband and wife at that village. No issue was born out of this wedlock."

In Para. 3 of the written statement, Ram Chand stated:—

"That para No. 3 of petition is correct."

Learned counsel for Gurcharan Kaur rightly urged that Ram Chand having clearly admitted the factum of marriage, the learned Additional District Judge gravely erred in holding that no marriage in fact took place. The only question to be decided under Issue No. 1 was whether the marriage between the parties was solemnised according to the customary

*(From decree of Mrs. Harminder Kaur Sandhu, Addl. Dist. J., Faridkot, D/- 23-4-1975).

rites of the parties. To prove this issue, Gurcharan Kaur examined A. W. 2 Mukhtiar Singh, Sarpanch of village Lopon who testified that the marriage of the parties took place in his presence. Anand Karaj ceremony was performed and four lawans were taken. With respect to the performance of the marriage, nothing could be brought out in his cross-examination to discredit this witness. The next important witness relied on by Gurcharan Kaur was A.W. 4 Babu Singh Granthi who testified about the Anand Karaj ceremony. He also deposed that four lawans were taken. The learned Additional District Judge erred in disbelieving this witness on the ground that he did not identify the respondent notwithstanding that the witness clearly stated, "the petitioner was married to the respondent Ram Chand 2½ years back at Lopon". For appreciating the evidence of this witness, the admitted fact that Gurcharan Kaur married Ram Chand is not to be lost sight of. The only controversy between the parties is with regard to its performance in accordance with customary rites. Besides the cross-examination of Babu Singh indicates that in the maintenance proceedings also, he appeared as a witness and stated that he performed the marriage of the parties but in that statement, the factum of the lawans was mentioned, but not their number. The omission of the number of lawans in the previous statement of the witness is hardly of any consequence. Then comes the sworn testimony of Gurcharan Kaur herself as A.W. 5 to the effect that her marriage was performed with Ram Chand according to Anand Karaj. Her father Arjan Singh appeared as A. W. 3 and testified to her marriage with Ram Chand. He stoutly denied the suggestion in the cross-examination that no marriage was performed between the parties. The learned Additional District Judge was in error in disbelieving Gurcharan Kaur because she omitted to give the details of the ceremonies, including the lawans. Similarly, there was error in disbelieving her father Arjan Singh. Mukhtiar Singh Sarpanch A.W. 2 and Babu Singh Granthi A.W. 4 having deposed that Anand Karaj ceremony was performed and four lawans were taken by the parties, it was not expected of each and every witness to repeat the same fact.

5. Ram Chand is his solitary witness who appeared in his defence and stated that Arjan Singh father of Gurcharan Kaur once met him in the bus of which he (Ram Chand) was the driver. On enquiry made by Arjan Singh he was told that Ram Chand had two wives but no child. Arjan Singh explained that he had a young daughter with a defective arm and if Ram Chand was willing to give her some land, he would consult his daughter. Some days later, Arjan Singh came to his house where his two wives were present and asked them if they had any objection for the third marriage of Ram Chand with Gurcharan Kaur. The two wives expressed their willingness. Thereafter, Arjan Singh suggested that he should give three killas of land to the petitioner and that he would not perform any ceremony of marriage as Ram Chand was aged 50 years. Ram Chand should come secretly to his house at night and take away Gurcharan Kaur. In pursuance of this agreement, Ram Chand gifted three killas of land to Gurcharan Kaur and one night he went and brought Gurcharan Kaur with him and she lived with him for about 2½ months. Thereafter, Gurcharan Kaur went away because of the disparity in their ages. Lastly, Ram Chand testified that no Anand Karaj ceremony was performed and in fact no marriage took place. In view of the admissions made by Ram Chand in his written statement, no value should have been attached to this worthless afterthought. That being so, the contention of the learned counsel for Gurcharan Kaur that the Additional District Judge made a wrong approach to the decision of Issue No. 1, cannot be said to be without merit. Accordingly, I reverse the decision and find that Gurcharan Kaur married Ram Chand in accordance with their customary rites.

6. So far as Issue No. 2 is concerned, the fact that two wives, namely, Nachhitar Kaur and Bhagwan Kaur of Ram Chand were living at the time of his marriage with Gurcharan Kaur is an admitted fact. It matters little whether Gurcharan Kaur acquired knowledge of this fact before or after her marriage with Ram Chand. The provision of Section 5 (i) read with S. 11 of the Act is that a marriage shall be null and void and may be so declared by a decree of nullity if either party has a spouse living at the time of the marriage. It deserves mention now that Ram Chand died during the pendency of this appeal. His two widows, namely, Nachhittar

Kaur and Bhagwan Kaur were impleaded as his legal representatives. Learned counsel for Gurcharan Kaur relied on a Bench decision of this Court in Smt. Tulsan Devi v. Smt. Krishni Devi, AIR 1973 Punj and Har 442 laying down that a petition under S. 11 was maintainable even on the death of one of the spouses. On the other hand, Mr. Pawan Kumar Bansal, counsel for the above-named widows pointed out that the ruling was of no avail to Gurcharan Kaur because of the amendment of S. 11 made by Act 68 of 1976. The amended section reads:—

"Any marriage solemnised after the commencement of this Act shall be null and void and may on a petition presented by either party thereto against the other party, be so declared by a decree of nullity if it contravenes any one of the conditions specified in cls. (i), (iv) & (v) of S. 5."

The underlined words "against the other party" were inserted by the Amending Act 68 of 1976. In order to further show that in consequence of the amendment, a petition under S. 11 could only be filed during the lifetime of the spouse, reference was made to the statement of objects and reasons, Cl. (v) whereof reads:—

"This clause seeks to amend Sec. 11 relating to void marriages so as to make it clear that the petition may be presented only during the lifetime of the spouse."

That being so, I find that the decision of the learned Additional District Judge on Issue No. 2 cannot be reversed by this Court. Henece, no decree of nullity can be passed in favour of Gurcharan Kaur.

7. As regards the claim of alimony under S. 25 of the Act, the plain reading of the section envisages a situation arising after the dissolution of marriage. It was clearly held in Durga Das v. Smt. Tara Rani, AIR 1971 Punj and Har 141 (FB) cited by learned counsel for Gurcharan Kaur that an alimony application under S. 25 (1) of the Hindu Marriage Act can be made after grant of a divorce decree. In view of the decision on Issue No. 2, Issue No. 3 cannot be decided in favour of Gurcharan Kaur.

8. In the result, the appeal fails and the same is hereby dismissed. No order as to costs.

Appeal dismissed.

AIR 1979 PUNJAB AND HARYANA 208

S. P. GOYAL, J.

Amarjit Singh and others, Petitioners v. Darshan Singh Mahoon and others, Respondents.

Civil Revn. No. 1761 of 1978, D/- 8-2-1979.*

Civil P. C. (5 of 1908), O. 1, R. 8 — Notice of suit — Suit on behalf of large section of certain faith — Notice by citation or proclamation is sufficient — Sub-r. (2) does not require that a notice has to be served personally on each person. (Para 2)

A. C. Jain, for Petitioners; Achhra Singh, for Respondents.

ORDER:— This is a revision petition against the order of the learned Sub-Judge 3rd Class, Amritsar, dated Aug. 22, 1978, granting permission to the plaintiff-respondents under O. 1, R. 8 of the Civil P. C. to sue in a representative capacity on behalf of Har Sangat, devotees of tenets laid down by Mahraj Puran Singh. In the suit, declaration is claimed regarding the properties, in dispute, acquired for religious purpose and belonging to Har Sangat whose membership consist of about 16,000 members spread all over the world.

2. The learned counsel for the petitioners has challenged the validity of the impugned order on the ground that unless the persons sought to be represented are ascertainable and a list of those persons is filed by the plaintiffs, it is not possible to comply with the provisions of sub-cl. (2) O. 1, R. 8 of the Civil P. C. and, therefore, no permission could be granted under the said order. The argument is wholly misconceived. Sub-cl. (2) does not require that a list of the persons sought to be represented has to be filed or that a notice has to be served personally on each person. When a suit is sought to be filed on behalf of a class or sect of certain faith, it is impossible to file such list and the notice envisaged in sub-cl. (2) has to be served by citation or proclamation.

3. It was next contended that there was no sect of the name of Har Sangat and unless a finding is recorded by the Court to this effect no permission could be granted under O. 1, R. 8

*(Against order of Gurdev Singh, Sub. J. 3rd Class, Amritsar, D/- 22-8-1978.)

of the Civil P. C. This objection cannot be taken at this stage and the same would be decided when the suit is tried on merits. If the Court found that there is no sect of the name of Har Sangat, the suit would be liable to dismissed, but while granting permission what is stated in the plaint is to be taken as correct. There is, thus, no merit in either of the two objections raised by the learned counsel for the petitioners.

4. This petition, consequently, must fail and is hereby dismissed. No costs.

Petition dismissed.

AIR 1979 PUNJAB & HARYANA 209

J. M. TANDON, J.

Balbir Singh and others, Petitioners v. State Board of Technical Education, Haryana at Chandigarh and others, Respondents.

Civil Writ No. 2255 of 1978, D/- 1-2-1979.

Constitution of India, Art. 226 — Administrative order — Interference in writ jurisdiction — Students detained from appearing at an examination — Plea that instructions issued by Director, Technical Education not followed while detaining the students — Held, instructions are administrative in nature — Contravention cannot be challenged in writ petition — (State Board of Technical Education Haryana Examination Rules, R. 4).

(Para 4)

Ajmer Singh, for Petitioners; A. S. Nehra, Addl. Advocate General Haryana, for Respondents.

ORDER:—Balbir Singh and Raj Dev Kamal (petitioners) are regular students of the Government Polytechnic, Hamirpur, (Himachal Pradesh) which they joined in 1975. The Government Polytechnic, Hamirpur, is affiliated with the State Board of Technical Education, Haryana. According to the petitioners, they were to appear in the final examination of sixth semester on May 25, 1978, but they were suddenly informed on May 20, 1978, by pasting a notice on the notice board by the Principal that they stood detained and will not be allowed to appear in the next Board Examination because they had failed to obtain the minimum pass marks in Sessional Examination (second term of session 1977-78). It was mentioned in the notice that the petitioners had been detained with the approval of the Rationalisation Committee of the State Board of Technical Education, Haryana. It is also the case of the petitioners that the Rationalisation Committee of the Board acts on the data/material supplied by the Principal of the Polytechnic, who in turn is supplied the marks obtained by the candidates in periodic tests taken by their teachers, according to the instructions issued by the Directorate of Technical Education, Himachal Pradesh, in the circular letter Annexure P. 2. T. N. Mahajan and R. P. Chandel respondents Nos. 3 and 4 are teachers in the Polytechnic. They were not happily disposed towards the petitioners. The instructions contained in the circular letter Annexure P. 2 were not properly complied with. The data supplied to the Rationalisation Committee was defective. The petitioners were required to obtain 50 per cent marks for being eligible to appear in the final examination. They were detained and were not allowed to appear in the final examination because Balbir Singh petitioner had obtained 46 marks out of 100 and Raj Dev Kamal 38 marks out of 100. The detention of the petitioners is illegal, mala fide and unjust because the instructions contained in the circular letter had not been complied with. The petitioners have accordingly filed the present writ praying that the order of their detention and not being allowed to appear in the Board's examination may be quashed.

2. The Principal, Government Polytechnic (respondent No. 2), T. N. Mahajan (respondent No. 3) and R. P. Chandel (respondent No. 4) have filed a joint written statement through respondent No. 2. The allegation of mala fide against respondents Nos. 3 and 4 have been denied. It is admitted that the petitioners were to appear in the sixth semester as regular candidates in May, 1978. The notice dated May 20, 1978, was issued detaining them after observing all formalities and not suddenly. The petitioners knew their performance regarding their sessional work which was intimated to them by their teachers from time to time. As per procedure prescribed in Annexure P. 2, such teacher awards sessional marks in a subject and hands over the same duly checked and signed to the Compilation Committee, which in turn submits the compiled sessional awards of all the subjects of a particular class duly checked and signed to the

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Principal for approval. The whole record is produced before the Rationalisation Committee of the State Board of Technical Education, Haryana, for final scrutiny and rationalisation. Under R. 4 of the State Board of Technical Education, Haryana, Examination Rules, it is necessary for a student to secure at least 50 per cent marks in sessional work for being eligible to appear in the examination. In the instant case, the compilation incharge had brought to the notice of the Principal in writing that the petitioners and another student had failed in sessional work R.C.C. Design and Drawing subjects. The Principal sent a letter to the Head of the Civil Engineering Department for rechecking the records of the failed students, including the petitioners. The Head of the Civil Engineering Department, after checking the record reported that the three students mentioned above were failing. The Principal issued notice to the failed students, including the petitioners, to appear before the Rationalisation Committee which visited the Polytechnic for rationalisation of sessional marks. The Rationalisation Committee checked the records of the petitioners and also interviewed them on May 12, 1978, at Government Polytechnic, Hamirpur. The Rationalisation Committee conveyed its decision in May 16, 1978, approving the action of the Principal regarding failure of the three students, including the petitioners, in the sessional work. It was on receipt of this decision that the petitioners were informed on May 20, 1978, by a notice about their detention. It has further been averred that the instructions Annexure P. 2 are broad guidelines for the teachers and are administrative in nature and no legal sanction is attached thereto. Three tests are required to be held in a semester as per decision of the State Board of Technical Education, Haryana. In the instant case, four tests in Section A and five tests in Section B of the class in the said subject were held during the semester with sufficient time gap. The tests could not be held during the months of February and March, 1978, due to strike by the students. There has been no violation of the instructions Annexure P 2.

3. Rule 4 of the State Board of Technical Education, Haryana, Examination Rules, deals with the eligibility for the examination and its relevant part reads:

"4. Eligibility for the examination:

The Examination shall be open to any student who:—

"(a) and (b) ....

(c) has secured at least 50 per cent marks in sessional work (home work, tutorial work, practical work and House examination/tests taken together) in each subject and in project work as laid down in the examination scheme.

(d) and (e) ...."

It is clear and is not disputed that it was necessary for the petitioners to have obtained 50 per cent marks in sessional work for being eligible to appear in the final examination of sixth semester on May 25, 1978. The petitioners did not secure 50 per cent marks in the Sessional work inasmuch as petitioner No. 1 obtained 46 per cent and petitioner No. 2 38 per cent marks in the Sessional work of R. C. C. Design and Drawing subjects.

4. The contention of the learned counsel for the petitioners is that the circular letter dated Nov. 29, 1976, Annexure P. 2, has been issued by the Directorate of Technical Education, Himachal Pradesh, which contains instructions about the method of teaching and holding of tests for adopting a uniform procedure for maintaining sessional awards of students. These instructions are meant to be followed by the College authorities. Instructions, Nos. 4 and 6 incorporated therein were not followed. The data supplied to the Rationalisation Committee constituted under R. 25 of the State Board of Technical Education, Haryana, Examination Rules was incomplete and defective which in turn vitiated its decision. The petitioners could not be detained by such decision of the Rationalisation Committee. There is hardly any merit in this contention. The Principal, Government Polytechnic (respondent No. 2) has averred in his written statement that the instructions contained in circular letter Annexure P. 2 were followed except that the tests could not be held during the months of February and March, 1978, due to the strike by the students. It is, therefore, difficult to hold that there has been substantial contravention of the instructions contained in circular letter Annexure P. 2 on the part of the Principal of the Government Polytechnic or his staff. This apart, the circular letter Annexure P. 2 has no legal sanctity which otherwise is administrative in nature and contains only guidelines. The contravention of any instructions contained therein would,

therefore, not vitiate the decision of the Rationalisation Committee.

5. The petitioners were not eligible to appear for final examination of the sixth semester because they obtained less than 50 per cent marks in sessional work. They would continue to be so ineligible till they secure 50 per cent marks in sessional work. The sessional marks awarded by the teachers of the petitioners were supplied to the Compilation Committee which in turn supplied the same to the Principal. The mark-sheets were checked and signed by the teachers. The compiled sessional awards were checked and signed by the Compilation Committee. The Principal who received the awards from the Compilation Committee forwarded it to the Rationalisation Committee of the State Board of Technical Education, Haryana for scrutiny and rationalisation. This Committee did the requisite scrutiny and also interviewed the petitioners. The failure of the petitioners to secure 50 per cent marks in sessional work of R.C.C. Design and Drawing subjects was affirmed. In this situation, there is hardly scope to hold that there has occurred any irregularity or defect in the matter of awarding marks to the petitioners in the sessional work.

6. In the result, the writ fails and is dismissed with costs.

Petition dismissed.

AIR 1979 PUNJAB & HARYANA 211

D. S. TEWATIA, J.

Amrik Singh, Petitioner v. Smt. Narinder Kaur, Respondent.

Civil Revn. No. 2098 of 1978, D/- 1-2-1979.*

Hindu Marriage Act (25 of 1955), Section 24 — Interim maintenance and litigation expenses — Court has jurisdiction to grant even after conclusion of main proceedings — Application under Sec. 24 remaining pending till conclusion of main proceeding, for no fault of wife — Interim maintenance and litigation expenses could not be denied on ground that the main proceedings had already concluded. (Paras 3, 4)

Cases Referred : Chronological Paras

AIR 1973 Punj 48 : 1972 Cur LJ 34 1, 3
(1965) 67 Pun LR 485 1
AIR 1963 Punj 249 1

*(Against order of Bhagwan Singh Sub J. 1st Class, Amritsar, D/- 12-10-1978.)

Sarwan Singh and Raj Kiran, for Petitioner; Rajeshwar Kumar Gupta, for Respondent.

ORDER :— This appeal is directed against the order dated the 12th October, 1978, of the Sub Judge 1st Class, Amritsar, whereby he granted maintenance to respondent wife at the rate of Rs. 150/- P.M. from the date of her application under S. 24 of the Hindu Marriage Act (hereinafter to be referred to as the Act) i.e. 27th Feb., 1978 to 25th Sept., 1978, on which date the proceedings under S. 10 of the Act concluded and also awarded Rs. 200/- as expenses of the proceedings. This order has been challenged on the ground that the maintenance under S. 24 of the Act and the expenses towards the proceedings could only be granted during the pendency of the proceedings and since the main proceedings concluded on 25th Sept., 1978, the trial Court had no jurisdiction to grant interim maintenance and litigation expenses thereafter. In support of the aforesaid submission reliance was placed on a single Bench decision of this Court in Nirmla Devi v. Ram Dass 1972 Cur LJ 34 : (AIR 1973 Punj 48). That was a case in which petition for restitution of conjugal rights was filed on 6th Oct., 1969 by the husband and the wife had been served with notice of that petition on 5th Dec., 1969. She filed an application on 14th Jan., 1970, for maintenance under S. 24 of the Act. Thereafter when the case was called on 19th Feb., 1970, the husband absented himself, which led to the dismissal of his petition with costs in default of appearance on the very day. Wife's counsel at that very time requested the Court to pass orders on the wife's petition under Sec. 24 of the Act. The Court observed that the proceedings having terminated there was no question of passing any order for interim maintenance and that the costs of the litigation, which had been allowed to the wife respondent by the trial Court, could be realised in execution proceedings by her. Suri J. after referring to two decisions reported in Smt. Hardev Kaur v. Panjrattan Singh (1965) 67 Pun LR 485 and Dr. Tarlochan Singh v. Smt. Mohinder Kaur, AIR 1963 Punj 249, held that the main proceedings having come to an end, it was open to the wife to pursue her normal remedies for having her monthly maintenance allowance granted on a more permanent basis.

2. In that case what weighed with Suri J. was the fact that the appellant in that case i.e. the wife had claimed interim maintenance from the date on which the notice of the main petition had been served on her which was not tenable. The appellant in that case could, if at all, be granted interim maintenance allowance for a period of a little over a month from 14th Jan., 1970 to 19th Feb., 1970.

3. The facts of Nirmla Devi's case (AIR 1973 Punj 48) (supra) are clearly distinguishable. In the present case the wife applied for interim maintenance and litigation expenses on 27th Feb., 1978. The trial Court did not pass any order thereon till 25th Sept., 1978, the date on which the main proceedings concluded and decided it only in October, 1978. For no fault of the wife, her petition under S. 24 of the Act remained pending for 6/7 months. If the view is that the provisions of S. 24 of the Act were intended by the legislature to enable the indigent spouse to secure wherewithal to defend the proceedings against oneself and to maintain oneself during the pendency of the proceedings, then it is incumbent upon the Courts to take an immediate decision upon the petition under S. 24 of the Act, otherwise the delay would defeat the very purpose. Otherwise in a case where the Court delays the decision on the application till the fag-end of the trial of the main case, right to maintenance and litigation expenses would be denied to the applicant on the specious argument that she had been able to prosecute the litigation for all that long period and had survived and so she was not entitled to favourable order on her application, for the litigation expenses and the interim maintenance under S. 24 of the Act was intended merely to meet the contingency of an indigent spouse not being able to prosecute the case and survive during the pendency of the proceedings which contingency would no longer exist when the proceedings had reached the stage of conclusion though not finally concluded.

4. I do not think that the interim maintenance and litigation expenses could be denied to the applicant on such a ground when the application had been filed during the pendency of the main proceedings and it is the court which delayed its decision thereon. If the relief could not be denied in the above situation then surely the applicant would not be denied the same relief even after the conclusion of the main petition.

5. It would also be not correct to say that such an order would be an ineffective order. The order in my opinion would be perfectly effective order as the same can be executed like a decree and the amount in question realised as such.

6. For the reasons stated above, I find no merit in this revision and the same is dismissed with costs.

Petition dismissed.

AIR 1979 PUNJAB & HARYANA 212

RAJENDRA NATH MITTAL J.

Kundan Singh and others, Appellants v. Fauja Singh and others, Respondents.

Second Appeal No. 1732 of 1968, D/- 6-4-1979.*

(A) Registration Act (16 of 1908), Section 17 (1) (c) and Sec. 17 (2) (xi) — Receipt reciting payment of whole mortgage money and purporting to extinguish mortgage — Registration, necessary. (Para 7)

(B) T. P. Act (4 of 1882), Section 92 — Subrogation — Unregistered receipt by mortgagee purporting to extinguish mortgage — Only payment of amount to mortgagee proved — Purchasers could not be deemed to have been subrogated to the rights of mortgagee. (Para 8)

Cases Referred: Chronological	Paras
AIR 1965 Punj 479	7
AIR 1964 Punj 141	7
AIR 1960 Punj 529 : 62 Pun LR 566	6, 8
AIR 1942 Pat 315	6, 8
AIR 1941 Lah 246	7
AIR 1940 Lah 68	7

B. R. Behl, with T. N. Bhalla, for Appellants; D. S. Kang, for Respondents.

JUDGMENT:— This is a Second Appeal by the plaintiffs against judgment and decree of the Additional District Judge, Amritsar, dated August 5, 1968, reversing the judgment of the trial Court, whereby suit of the plaintiffs had been decreed.

*Against judgment and decree of J. S. Chatha, Addl. Dist. J., Amritsar, D/- 5-8-1968.

2. Briefly, the facts are that Buhan Singh and Wadhawa Singh, were the owners of the property in dispute. Wadhawa Singh, it is alleged, was not heard of since the year 1900, and, therefore, he was presumed to be dead prior to 1907-1908. It is averred that consequently Bukan Singh became its sole owner thereafter. At that time the property stood mortgaged with Kala Singh son of Kharak Singh for an amount of Rs. 2,698/-. Bukan Singh sold it in favour of Hakam Singh by virtue of a registered sale deed dated February 24, 1912, for an amount of Rs. 2,500/, and left an amount of Rs. 1,800/- with the vendee for payment to the mortgagee. It is further averred that Hakam Singh after paying the amount of Rs. 2,698/- to the mortgagee on May 10, 1912, got the land redeemed and obtained possession thereof. Hakam Singh died about 30 years back, leaving two sons, Mangal Singh and Harnam Singh plaintiff. Later, Mangal Singh also died issueless and wifeless, leaving a will regarding the property in favour of Kundan Singh, Dalip Singh and Massa Singh plaintiff Nos. 1 to 3. On the basis of the will, mutation regarding the share of Mangal Singh was sanctioned in favour of plaintiff Nos. 1 to 3 on April 22, 1964. It is alleged that thus, plaintiff Nos 1 to 4 became owners of the property and came in its possession. It is further averred that the defendants were threatening the plaintiffs to dispossess them forcibly which they could not do. They consequently, filed a suit for declaration to the effect that they were owners in possession of the property previously owned by Wadhawa Singh, in the alternative that the defendants be restrained from interfering in the plaintiffs' possession except on payment of Rs. 1,349/-, the share of mortgage amount due from Wadhawa Singh.

3. The suit of the plaintiffs was resisted by the defendants, who admitted that Wadhawa Singh was a co-sharer in the land. They pleaded that they being the sister's son of Kishen Singh, father of Bukan Singh and Wadhawa Singh, were entitled to the property after the death of Wadhawa Singh. They, however, did not admit that any mortgage existed in favour of Kala Singh and that the same had been redeemed by the plaintiffs. On the pleadings of the parties, the following issues were framed—

1. Whether the suit property has been allotted in consolidation in lieu of the land mentioned in para No. 3 of the plaint?

2. Whether Shri Wadhawa Singh is presumed to have died prior to the enforcement of the Hindu Succession Act?

3. Whether Bukan Singh was the nearer heir to Wadhawa Singh?

4. Whether Bukan Singh had sold the land, mentioned in para No. 3 to Hukam Singh, the ancestor of the plaintiff?

5. Whether the plaintiffs had paid Rs. 2,698/- towards the mortgage amount of the said land? If so, to what effect?

6. Relief.

4. The trial Court decided all the issues in favour of the plaintiffs and decreed their suit. On appeal, two points were urged before the appellate Court — one regarding the time of death of Wadhawa Singh and the second that the defendants could not interfere with the property without payment of Wadhawa Singh's share of the mortgage amount. The learned Additional District Judge held that the plaintiffs were estopped from pleading that Wadhawa Singh died before the date of sale by Bukan Singh in favour of Hakam Singh, their predecessors-in-interest and that the plaintiffs failed to prove that Hakam Singh redeemed the property in dispute on payment of Rs. 2,698/- from Kala Singh. He consequently, accepted the appeal and dismissed the suit of the plaintiffs. They have come up in second appeal to this Court.

5. The first question that arises for determination is as to whether Wadhawa Singh will be presumed to have died before February 24, 1912, when the property was sold by Bukan Singh in favour of Hakam Singh. There is a mutation concerning the death of Wadhawa Singh which was entered on July 24, 1959. In that mutation, Harnam Singh, appellant, appeared before the revenue authorities and asserted that Wadhawa Singh was alive. Now he, including other

appellants, says that Wadhawa Singh died prior to the date of sale in favour of Hakam Singh. It may also be mentioned that in the revenue records the property stood in the name of Wadhawa Singh even subsequent to the sale by Bukan Singh. In these circumstances, I am of the view that it cannot be held that Wadhawa Singh died prior to the date of the sale by Bukan Singh in favour of Hakam Singh.

6. The second question that requires determination is as to whether Hakam Singh redeemed the property, by paying Rs. 2,698/- to Kala Singh, mortgagee. In order to prove this fact, the plaintiffs produced receipt Exhibit P. 18. The learned appellate Court came to the conclusion that the receipt was not admissible into evidence to prove redemption as it was un-registered. The counsel for the appellants, has vehemently argued that the receipt does not require registration, as Hakam Singh paid whole of the mortgage amount and got the property redeemed. According to him, if it was mentioned in the receipt that possession of the property was delivered to the mortgagee or that the property had been redeemed, these words were surplusage and case would squarely fall within cl. (xi) of sub-section (2) of S. 17 of the Registration Act. He also argued that in any case, the receipt would furnish proof of payment of the mortgage money to the mortgagee. In support of his contention he placed reliance on Kaur Chand v. Das Raj 62 Pun LR 566: (AIR 1960 Punj 529) and Ram Kumar Missir v. Ram Nath Missir, AIR 1942 Pat. 315.

7. I have given a thoughtful consideration to the arguments of the learned counsel but regret my inability to accept it. It cannot be disputed that if the receipt is not covered by cl. (xi) of sub-s. (2) it is compulsorily registrable under clause (c) of sub-section (1) of Section 17. It will be advantageous to read clause (xi) of sub-section (2) which is as follows:—

"17 (2). Nothing in clauses (b) and (c) of sub-section (1) applies to—

(xi) any endorsement on a mortgage deed acknowledging the payment of the whole or any part of the mortgage-money, and any other receipt for payment of money due under a mortgage when the receipt does not purport to extinguish the mortgage."

From a reading of the clause it is apparent that it relates to two types of writings — first endorsement on a mortgage deed acknowledging the payment of whole or any part of the mortgage-money and secondly any other receipt for payment of money due under a mortgage. The present case is not covered by the first part as the endorsement regarding payment is not on the back of the mortgage deed. The receipt for payment of mortgage money would be exempt from registration when it does not purport to extinguish the mortgage. In the present case, there are clear indications that the receipt does not merely acknowledge the payment but purports to redeem the property as well. It is settled so far this Court is concerned by a large number of authorities that if the receipt relates to payment of whole of the mortgage money and purports to extinguish the mortgage, it is compulsorily registrable. In Bhan Singh v. Narinjan Singh, AIR 1940 Lah 68, it was held that the essence of redemption consists in either the cancellation and return of the mortgage deed or where the mortgage is with possession, in the restoration of possession of the mortgaged property to the mortgagor after the mortgage money has been paid. It was further held that where receipt recited that the balance of the mortgage money had been paid to the mortgagee and possession had been given back, the receipt is inadmissible in evidence if it was not registered. A similar question arose before a Division Bench of Lahore High Court in Naman v. Hari Singh, AIR 1941 Lah 246. Tek Chand, J. speaking for the Bench held that the exemption in Section 17 (2) (xi) covers any endorsement on a mortgage deed acknowledging payment of the whole or part of the mortgage money, irrespective of whether it contains words which expressly or by necessary implication, purport to extinguish the mortgage. But as regards other receipts (i. e. receipts other than endorsements) for payment of money due under a mortgage, the exemption can be claim-

ed only if they do not purport to extinguish the mortgage. Later, an identical question arose in this High Court and the matter was referred by a learned Single Judge to a Division Bench. The case is reported in Gurdial Singh v. Kartar Singh, AIR 1964 Punj 141. After taking into consideration various cases including those on which the learned counsel for the appellants relied, the Bench held that in view of the plain language of sub-secs. (1) (c) and (2) (xi) of Section 17 of the Indian Registration Act and the rule of law as laid down in the authorities cited by the learned counsel for the appellants, a receipt for payment of money under mortgage (other than an endorsement on a mortgage deed) issued by a mortgagee mentioning not only the payment of the full mortgage amount but also the extinction of the mortgage required registration. The same view was taken by Narula, J. (as he then was) in Hazura Singh v. Jaggar Singh, AIR 1965 Punj 479. I am in respectful agreement with the aforesaid view. It may be mentioned that in the present case there is a recital in the receipt by the mortgagee, that he had given up the mortgaged property and given its possession to the purchaser. The aforesaid words amount to extinguishment of the mortgage. These are not surplusage as contended by Mr. Bahal. After considering all the aforesaid circumstances, I am of the view that the receipt required registration.

8. Kaur Chand's case (AIR 1960 Punj 529) (supra), which was referred to by the learned counsel for the appellants is distinguishable. In that case, the endorsement was made on the back of the mortgage deed. Therefore, that case has no relevancy. In Ram Kumar Missir's case (AIR 1942 Pat 315) (supra) it was held that the wording of Section 17 (2) (xi) implied that the endorsement on the deed was also regarded as a receipt since the expression used is "any other receipt" and the limitation of the exemption is intended to all such receipts including those which might be endorsed on the mortgage deed itself. Hence an endorsement made on mortgage deed was inadmissible in evidence to prove extinguishment of the mortgage. But this ban would not prevent its being taken into evidence in proof of the payment of the money. The above observations rather help the respondents. Even if it is accepted that the receipt can be taken into consideration to prove payment of the amount to the mortgagee, that will not entitle the appellants to be subrogated to the rights of the mortgagee. They can claim such rights if the property had been redeemed and not otherwise. Section 92 of the Transfer of Property Act specifically provides that right of subrogation shall not be conferred on any person unless the mortgage in respect of which the right is claimed has been redeemed in full. In the present case, the receipt Exhibit P. 18 cannot be taken into consideration for the purpose of proving the redemption of the property. Therefore, the appellants cannot be deemed to have been subrogated to the rights of the mortgagee. Consequently the receipt Exhibit P. 18 is of no help to them.

9. For the reasons recorded above, the appeal fails and the same is hereby dismissed with costs. Counsel fee Rs. 100/-.

Appeal dismissed.

AIR 1979 PUNJAB & HARYANA 215

D. S. TEWATIA, J.

Darbara Singh, Appellant v. Karminder Singh and others, Respondents.

Second Appeal No. 1823 of 1973, D/- 22-2-1979*

Hindu Minority and Guardianship Act (32 of 1956), Section 8 (1) — Guardian entering into a contract for the benefit of minor — Not enforceable against the minor. (Pr. 5)

Cases Referred : Chronological	Paras
AIR 1973 Cal 1 (FB)	3, 4
1973 Rev LR 37 (Punj)	6, 7
AIR 1971 Mys 194	3, 4
AIR 1948 PC 95 : 1948 All LJ 226	3, 4

G. R. Majithia, for Appellant; K. O. Puri with R. C. Puri, for Respondents.

JUDGMENT:— The short question that arises for consideration in this regular second appeal of the defendant

*Against order of Aftab Singh Bakshi, Addl. Dist. J; Ferozepore, D/- 29-11-1973.

is as to whether the agreement to sell the plaintiff-minors' property entered into by their father Sadhu Singh with the defendant-appellant on 24-10-1967, and in pursuance of which the actual possession of the land was delivered to the defendant-appellant, was or was not in the nature of a personal covenant and thus not binding upon the plaintiff-minors in view of the provisions of sub-section (1) of Section 8 of the Hindu Minority and Guardianship Act, 1956, hereinafter referred to as the Act.

2. The relevant provisions of S. 8 of the Act are in the following terms:

"8. (1) The natural guardian of a Hindu minor has power, subject to the provisions of this section, to do all acts which are necessary or reasonable and proper for the benefit of minor or for the realization, protection or benefit of the minor's estate; but the guardian can in no case bind the minor by a personal covenant.

(2) The natural guardian shall not, without previous permission of the Court,—

(a) mortgage or charge, or transfer by sale, gift, exchange or otherwise any part of the immovable property of the minor; or

(b) lease any part of such property for a term exceeding five years or for a term extending more than one year beyond the date on which the minor will attain majority.

(3) Any disposal of immovable property by a natural guardian in contravention of sub-section (1) or sub-section (2) is voidable at the instance of the minor or any person claiming under him.

xxxx xxx xxx xxxx"

3. Learned counsel for the appellant contended that the provision of sub-section (1) of Section 8 of the Act did not preclude the natural guardian of the minors from entering into a contract on behalf of the minors for their benefits and, therefore, the crux of the problem would be that in case the contract so entered into on behalf of the minors by the natural guardian was for their benefit, then such a contract would be enforceable against the minors if there had been part-performance of the contract, for to such a contract the provisions of S. 53-A of the Transfer of Property Act, 1882, would be clearly attracted. Learned counsel for the appellant sought to underpin his aforesaid submission with the ratio of the decision of the Privy Council reported in Subramanyam v. Subba Rao, AIR 1948 PC 95, followed in Linga Reddy v. Ramachandrappa, AIR 1971 Mys 194 and Piru Charanpal v. Sunilmoy Nemo, AIR 1973 Cal 1 (FB).

4. I am afraid there is no merit in the contention advanced on behalf of the appellant. Any law laid down prior to the enforcement of the Act to the extent it happened to be contrary to what is specifically provided for in the Act would be totally unavailing by virtue of Section 5 thereof which is in the following terms:

"5. Save as otherwise expressly provided in this Act—

(a) any text, rule or interpretation of Hindu Law or any custom or usage as part of that law in force immediately before the commencement of this Act shall cease to have effect with respect to any matter for which provision is made in this Act;

(b) any other law in force immediately before the commencement of this Act shall cease to have effect in so far as it is inconsistent with any of the provisions contained in this Act."

Hence, neither the ratio of Subramanyam's case (Privy Council case) nor that of the Mysore and Calcutta High Courts' cases in Linga Reddy and Piru Charan Pal respectively would be attracted to the facts of the present case.

5. The provision of sub-section (1) of Section 8 of the Act makes it expressly clear in unqualified terms that no personal covenant of the guardian shall be binding on the minor. It means only this that, when looked from the standpoint that the aforesaid interdiction is added at the fag-end of Section 8 (1) by way of proviso to the clause that preceded it, a guardian though well within his right to enter into a contract for the benefit of the minor, but the said contract would not be enforceable against the minor even when it was entered for his benefit and would be voidable at his instance.

6. Learned counsel for the appellant also placed reliance on a Single Bench decision of this Court reported

in Paras Ram v. Bhal Singh, 1973 Rev LR 37.

7. The decision in Paras Ram's case does not go any farther than this that the provision of sub-section (1) of Section 8 of the Act does not prevent a guardian to enter into a contract regarding the property of a minor for his benefit without the prior permission of the Court but that is not the same thing as saying that such a contract would be binding upon the respondent. That was a case in which the decree was sought against the guardian and not against the minor and the decree was not the decree for specific performance but for the return of earnest money received by the guardian and damages envisaged in the contract, in the failure of the contracting party to fulfil its own part of the contract.

8. For the reasons stated, there is no merit in this appeal and the same is dismissed, but with no order as to costs.

Appeal dismissed.

AIR 1979 PUNJAB & HARYANA 217

S. S. SANDHAWALIA, C. J. AND

HARBANS LAL, J.

Nagender Singh Chohan, Petitioner v. The State of Haryana and another, Respondents.

Civil Writ No. 3555 of 1978, D/- 20-4-1979.

Haryana Ceiling on Land Holdings Act (26 of 1972), Sections 7, 9 (2) — Major son of landowner — Determination — Appointed day mentioned in Section 7 i. e., 24-1-1971 is the relevant date. (Prs. 10, 11, 12, 14 and 15)

The majority of the son of a landowner is to be determined on the appointed day i. e. 24th January 1971 mentioned in Section 7. Hence, instructions issued by the State Government under Section 9 (1) to the effect that material date for determining the majority of sons of a landower is the appointed day, is not open to challenge. It is not correct to say that the terminus for determining the age of majority of the son of a landowner is the actual date of filing the declaration. (Para 15)

Where the challenge was laid only to the declaration issued by the State Government under Section 9 (1) and validity of Section which has made the Act retrospective was not challenged by the landowner and, indeed, the retrospectivity of Section 7 was conceded, the challenge to the declaration would lead to the curious result that whereas the date fixed for selection of the surplus area of the landholder himself would be appointed day mentioned in Section 7 yet, the date as regards the separate unit permitted for his adult son would be fluctuating day within three months of the date specified by the notification under S. 9 (1). The concept of a separate unit for the son was not so much the right of the adult son to hold the land, but in essence was the right of the land owning father to hold extra land for each of his adult sons living with him. It could not also be said that since the concept of family under Section 2 (f) and separate unit under Section 3 (9) had fluctuated and widened by subsequent amendments, the date of the majority of the landowner's son could also remain fluctuating and be related in each case to the particular date on which the returns under Section 9 (1) and (2) may be filed. (Paras 10, 11)

Uniformity, fixity and clear predictability are the necessary hallmarks of law and an interpretation which leaves the laws in a state of ambivalence must necessarily be avoided unless the language of the statute leaves no other choice. (Para 12)

Cases Referred : Chronological Paras

(1978) 80 Pun LR 660 : AIR 1979 Punj & Har 19 — 3
AIR 1977 Pat 171 — 6, 7, 8, 9
1977 Pun LJ 126, (F. Commrs) — 14
1975 Pun LJ 454 : AIR 1976 SC 49 — 12, 14

K. P. Bhandari with Ravi Kapur, for Petitioner; S. C. Mohunta, Advocate General with B. L. Gulati, for Respondents.

S. S. SADNHAWALIA, C. J.:— Whether the crucial date for determining the majority of a son of a landowner (and his consequent eligibility for a separate unit of land) is the appointed day of the 24th of January, 1971, under the Haryana Ceiling on Land Holdings Act, 1972, — admittedly is the sole,

though meaningful, question which arises for determination in this set of sixteen writ petitions.

2. As is apparent from the above, the question is primarily legal and the facts, therefore, pale into relevant (sic-relative?) insignificance. It, therefore, suffices to make a brief reference to those in C. W. P. No. 3555 of 1978 (Naginder Singh v. The State of Haryana). The petitioner therein claims to have been born on the 24th of April, 1954, and it is averred that his father owned considerable agricultural land in various village estates. The Haryana Ceiling on Land Holdings Act, 1972, came into force on the 23rd of December, 1972, by publication in the gazette of that date. By virtue of its provisions the father of the petitioner was entitled to select a separate unit of permissible area for each of his adult sons. The claim of the petitioner is that with effect from the aforesaid date of enforcement there arose a vested right to a separate unit of permissible area which could be claimed for each adult son at the time of making the selection under Section 9 (2) of the Act. The petitioner claims that on this material date he had attained adulthood. However, the respondent-State had issued instructions, annexure P. 1, for filling in the declaration form wherein in paragraph 7 it was prescribed that the material date for determining the majority of the sons of a landowner was the 24th of January, 1971. The petitioner's grievance is that in the absence of a specific provision in the Act, the respondent-State has no authority to prescribe the aforesaid date for determining the age of majority and thus to divest him of the right accruing to him under the statute. The aforesaid annexure P. 1 has, therefore, been challenged as patently unreasonable and in violation of the petitioner's fundamental right to hold property under Article 19 of the Constitution of India.

3. It calls for pointed notice that in many of the writ petitions a substantial part of the challenge was also levelled against Section 18 (7), (8) and (9) of the Act which lay down the pre-conditions for presenting an appeal against the order of the prescribed authority under the Act. However, at the time of the hearing it was frankly conceded that this aspect of the case now stood concluded against the petitioners by the exhaustive Division Bench judgment of this Court in Sri Chand v. State of Haryana, 1978-80 Pun LR 660. No reference to this aspect of the averments in the writ petitions is hence called for.

4. The material part of annexure P. 1, the impugned instructions, which is under challenge is as follows:—

"In column 3 of Part I the ages of the persons named as on 24-1-1971 should be given. The entry in the births and deaths register and, failing that, in the School Leaving Certificates shall, in the first instance, be accepted as proof of the age. The Medical certificate and the oral evidence will be entertained only on proof of the existence of these entries."

Now the core of the argument on behalf of the petitioners is that the terminus for determining the age of majority of the son of a landowner is the actual date of filing the declaration under Section 9 (1) of the Act. The date so originally prescribed (within three months wherefrom the landowner was obliged to file the declarations) was the 15th of April, 1976, which appears to have been later extended by one month. In the alternative it was argued that at the highest the crucial date cannot be set back beyond 23rd of December, 1972, when the Act came into force.

5. Inevitably the argument here must revolve around the relevant provisions of the statute and it is, therefore, best to reproduce these at the very outset:—

"3. In this Act, unless the context otherwise requires:—

(a) 'adult' means a person who is not a minor;

(c) 'appointed day' means the twenty-fourth day of January, 1971;

(f) 'family' means husband, wife and their minor children or any two more of them;

Explanation:— xx xx xx

(q) 'separate unit' means an adult son living with his parent or either of them and in case of his death his widow and children, if any.

Sec. 4 (1) — The permissible area in relation to a landowner or tenant or mortgagee with possession or partly in

one capacity or partly in another, of person or family consisting of husband, wife and up to three minor children (hereinafter referred to as 'the primary unit of family'), shall be, in respect of

(a) land under assured irrigation capable of growing at least two crops in a year (hereinafter referred to as land under assured irrigation), 7.25 hectares;

(b) & (c) xx xx xx

S. 4 (3)—The permissible area shall be further increased up to the permissible area of the primary unit of a family for each separate unit:

S. 7 — Notwithstanding anything to the contrary contained in any law, custom, usage or agreement, no person shall be entitled to hold whether as landowner or tenant or as a mortgagee with possession or partly in one capacity or partly in another, land within the State of Haryana exceeding the permissible area on or after the appointed day.

S. 9 (1) — Every person, who on the appointed day or at any time thereafter holds land exceeding the permissible area, shall within a period of three months from such date as the State Government may, by notification, specify in this behalf or subsequent acquisition of land, furnish to the prescribed authority a declaration supported by an affidavit giving the particulars of all his land and that of the separate unit in the prescribed form and manner and stating therein his selection of the parcel or parcels of land not exceeding in the aggregate the permissible area which he desires to retain.

Provided xx xx xx

Explanation xx xx xx

Sec. 9 (2) — Every person making a selection of the permissible area under sub-section (1) may also select land for the separate unit.

Explanation: An adult son, who owns or holds land and is living separately from his parents, shall file the declaration under sub-section (1) and make the selection of permissible area under sub-section (2) separately."

6. Though a wide variety of contentions was raised by the learned counsel appearing for the petitioners it is plain that in essence they stem from the corner-stone of the reasoning of the Division Bench in Nalini Rajan Singh v. State of Bihar, AIR 1977 Pat 171. It was on this judgment that firm reliance was repeatedly placed by the learned counsel and in particular by Mr. K. P. Bhandari, who led the argument in the case. It is, therefore, best to deal with this authority first, because rest of the arguments on behalf of the petitioners would thereafter fall in place. In Nalini Ranjan Singh's case (supra) a question of similar nature arose, but under the substantially different provisions of the Bihar Land Reforms (Fixation of Ceiling Area and Acquisition of Surplus Land) Act, 12 of 1962, as amended by Act No. 1 of 1973. Therein it was held that the material date for the determination of the majority of a child of the landowner was the date on which notice under Section 6 (3) of the amended Act was published.

7. At first flush reliance on the said judgment by the learned counsel for the petitioners seems attractive but a closer analysis in depth would disclose that the provisions of the Bihar Act (Both the original and the amended) and those in the present case are, on the material points, so significantly different that the said case could have but little analogy for deciding the issue here. At the very outset what calls for pointed notice in this context is the admitted fact that whilst determination of the surplus area is wholly correlated to the appointed day under the Haryana Act—in fact this appointed day is the pole star immutably fixed around which the other provisions seem to revolve— in the Bihar Act there is not the least reference or even a concept of an appointed day for the determination of the surplus area either of the landowner or of a major or minor child. Even a plain reading of the judgment in Nalini Ranjan Singh's case (supra) would show that a considerable part of the argument turns round Section 5 (1) (i) and Section 5 (3) (i) of the Bihar Act and these make no mention of any fixed or appointed day. In sharp contradistinction thereto is Section 7 of the Haryana Act, which is the basic provision for the fixation of the ceiling of land and this on its plain language provides that no person shall be entitled to hold land within the State of Haryana exceeding

the permissible area on or after the appointed day. The terminus and indeed the very core of the legislation herein is pegged on the appointed day. On the contrary there is not even a remotely corresponding provision of this nature in the Bihar Act and in any case none was brought to our notice. What then calls for significant notice is the fact that the basic statute which fell for construction in Nalini Ranjan Singh's case (supra) was the earlier statute of Bihar Land Reforms (Fixation of Ceiling Area and Acquisition of Surplus Lands) Act, 1962. Substantial amendments were introduced therein by Bihar Act No. I of 1973. It was this inter-play of the original provisions and the amendments introduced therein later which raised difficulties of construction which fell to be resolved before the Division Bench. Neither the original statute, nor the amending Act had even the concept of any fixed or appointed day. On the other hand the Haryana Act is a self-contained statute in which itself the concept of the appointed day is writ large from the beginning to the end.

8. Again in Nalini Ranjan Singh's case the Division Bench held that the date on which the notice under Section 6 (3) of the amending Act was published was a crucial date and this was so because except for Section 6 there was no other provision in whole of the Act, there was no other fixed date either mentioned or to be prescribed thereunder. On the other hand Section 9 of the Haryana Act provides for the selection of permissible area and the filing of the declaration and affidavits by the landowners with regard thereto. At the very outset it provides that every person, who on the appointed day or at any time thereafter holds land exceeding the permissible area shall have to furnish a declaration, supported by requisite documents giving all particulars of the land owned by him as also of the separate units in the prescribed form etc. Herein again the liability to file the requisite declaration, as also the right to hold permissible area both of the landowner and the separate unit for his major son appears to be directly correlated to the appointed day. What further highlights the dis-similarity of the provisions of the Haryana Act and the Bihar Act is Section 16 (2) of the latter Act which provided that it was on the publication of the notification under Section 15 (1) thereof that the land specified therein would be deemed to have been acquired and vested in the State free from all encumbrances etc. Diametrically opposite thereto are the provisions of Sec. 12 (3) of the Haryana Act which lay down that the area declared surplus or the tenant's permissible area under the Punjab law and the area declared surplus under the Pepsu law, which has not so far vested in the State, shall be deemed to have so vested in the State Government with effect from the appointed day.

9. Now it would be plain from the patent dis-similarity of the material provisions noticed above and without burdening this judgment by reference to other provisions of the Bihar Act, which are quite different, that the whole scheme of the two statutes with regard to the material date is so fundamentally different that no rational analogy can be drawn from the Bihar statute for the purposes of constructing upon the specific provisions of the Haryana Act. The fundamental difference is manifest that whilst Haryana Act is correlated to and revolves around the fixed concept of the appointed day, the Bihar Act is totally oblivious of any such idea. Nalini Ranjan Singh's case, therefore, is so totally wide of the mark that it cannot in any way advance the case of the petitioners.

10. Once the basic precedent relied upon by the learned counsel for the petitioners is out of the way, the argument on their behalf on principle either does not seem to withstand a closer scrutiny. At the very outset it may be noticed that it was fairly conceded that the Haryana legislature has the power to legislate retrospectively with regard to the agrarian laws and no challenge to the competency of the Haryana legislature to enact the provisions was laid. Equally it is not in dispute that the appointed day is not an arbitrary day fixed without relevance or purpose. It is the admitted position that it was on this day that the decision of the high powered Central panel on land reforms had been publicly announced declaring broadly

the quantum of land which should be uniformly held within the whole country. Transfers or other dispositions of land made after the said date in order to defeat the larger purpose of the agrarian reforms, ceiling legislations were, therefore, to be excluded from consideration. The said date, therefore, became the immutable fixed point from which the ceiling of land and the areas surplus or permissible thereunder had to be worked out. In the aforesaid background it was again conceded by the learned counsel for the petitioners that Section 7 patently is retrospective in operation because though the Act was promulgated on 23rd December, 1972, the ceiling on land and the permissible area declared by the Act was to come into force with effect from the appointed day of 24th January, 1971, i. e., nearly two years earlier. Counsel had conceded that this retrospectivity was valid and no challenge to Section 7 was laid either in the writ-petitions or in the course of the arguments. Now once this is so, it is obvious that the surplus area of the landowner himself is, therefore, to be immutably fixed with regard to the date of 24th January, 1971. It would indeed be a curious situation that if this is so qua the landowner himself, yet as regards the separate unit permitted for his adult son, the same should be determined with reference to a constantly fluctuating day within three months of the date to be specified by the notification under Section 9 (1) sometimes in mid 1976. From the provisions of the Act it is apparent that the concept of a separate unit is not so much a right of the adult son himself to hold the land, but in essence is the right of the land-owning father to hold extra land for each one of his adult sons living with him. It would indeed be an anomalous and uncalled for situation that whereas for the determination of his own permissible area the date immutably fixed by law should be 24th January, 1971, but for the purposes of separate unit under Section 9 (2), the corresponding provision for his adult sons, the criteria should be of a different date fluctuating whimsically for well-nigh five years thereafter. There is neither any provision of the statute, nor any rational principle, and for that matter any precedent either, which can possibly warrant such a construction.

11. Learned counsel for the petitioners had then argued that the selection of land for a separate unit was provided under Section 9 (2) of the Act and the scope of the separate unit defined by Section 3 (q) was widened by the amending Haryana Act No. 17 of 1976 by the addition of an explanation thereto which was given retrospectivity from the date of the original Act. The tenor of this argument was that since the concept of the family under Section 2 (f) and separate unit under Section 3 (q) had fluctuated and was widened by the amending provision, therefore, the date of the majority of the landowner's son and the consequent right attached thereto of a separate unit could also remain fluctuating and be related in each case to the particular date on which the return under Section 9 (1) and (2) may be filed.

12. The aforesaid argument suffers patently from the vice of attaching the stigma of unpredictability to the statute. If it were to be accepted, then a mere empirical delay in filing the declaration would become material and in fact crucial to the valuable and vital right to a separate unit which undoubtedly means a substantial area of agricultural land added to the permissible area of the landowner. Section 9 (1) leaves a period of three months at the option of landowner for filing his return and declarations from the specified date. Therefore, if the date of the filing of the return —which inevitably remains varying and fluctuating with every land-holder — is to be made the crucial date then the vital right of the parties must equally remain in a flux meanwhile. Such an intention cannot easily be attributed to the legislature. Uniformity, fixity, and clear predictability are the necessary hallmarks of law and an interpretation which leaves the laws in a state of ambivalence must necessarily be avoided unless the language of the statute leaves no other choice. It is instructive to recollect the picturesque language of Krishna Iyer J. in Rameshwar v. Jot Ram, 1975 Pun LJ 454:—

"Of course, a construction which will promote predictability of results,

maintenance of reasonable orderliness, simplification of the judicial task, advancement by the Court of the purpose of the legislation and the judicial preference for what it regards as the sounder rules of law as between competing ones, must find favour with us. A plain reading of Section 18 without reference to consideration of subsequent events at the appellate lavel, yields the easy and only conclusion that the rights of parties are determined on the date they come to Court and what is an insurmountable obstacle to any other construction is that once deposit is made title to the land vests in the tenant. Agrarian reform law affects a considerable number of people and to keep rights uncertain over a long stretch of time till appeals and reviews and revisions and other processes are exhausted, is to inject unpredictability of results for it is quite on the cards that a landlord may die in the long course of litigation, or other events may happen at later stages beyond the trial Court. Can rights of parties fluctuate with such uncertain contingencies?

13. Apart from the canons of construction I find no ambiguity in the provisions of the main statute. Indeed at the cost of repetition it has to be reiterated that in fact it introduces the fixed concept of the appointed day for the determination of the parties' rights. The language of the Act, therefore, is unequivocal and should be given effect to. Any attempt on behalf of the petitioners to attach ambiguity or uncertainty thereto by a process of interpretation, therefore, has to be scrupulously avoided.

14. An ancillary argument as a matter of last resort was that under Section 12 (1) of the Act, the surplus area of a landowner vests in the State and is deemed to have been acquired by the State Government for a public purpose with effect from the date on which it is declared as such. It was submitted, rather superficially, that if the vesting of the surplus area can be from the date of its declaration, which necessarily varies, then the crucial date for the determination of the majority of the son could also be allowed to fluctuate with the time prescribed for the filing of the returns under Section 9 (1). Reliance was sought to be placed on Rameshwar v. Jot Ram, 1978 Pun LJ 454 and Malkiat Singh v. The State of Punjab; 1977 Pun LJ 126 (F. Commr). Adverting first to the aforesaid two authorities, it appears on a close perusal thereof that they do not in any way advance the argument aforesaid. The compliment of a detailed refutation with regard to these precedents is, therefore, not called for and it suffices to mention that both of them are wholly wide of the mark. On principle the argument suffers from the basic fallacy of equating the vesting of the surplus area with the declaration thereof. It deserves recalling that under the Punjab Secruity of Land Tenures Act, the surplus area does not at all vest in the State and is merely utilised for the settlement of tenants. Therefore, the concept of surplus area and the vesting thereof in the State are not necessarily identical terms. The date with regard to which the surplus area is to be determined and the date when it may be vested in the State, therefore, do not have to be necessarily conterminous. It is otherwise plain that it is only when the area has been declared as surplus in the hands of a landowner that the question of its subsequent vesting could possibly arise. Secondly the fixation of the time of the vesting of surplus area in the State by the relevant provisions of Section 12 does not in any way afford an analogy or advance the case of the petitioners.

15. For the foregoing reasons the answer to the question posed in the opening part of the judgment is rendered in the affirmative, i. e., the majority of the son of a landowner is to be determined on the appointed day and consequently the validity of the impugned instructions Annexure P-1 is upheld.

16. Learned counsel for the parties are agreed that the crucial issue of law having been settled, the merits in individual case have now to be determined by the prescribed authority under the Act or the appellate and revisional forums. The individual cases of the petitioners would, therefore, go back for finalisation to the statutory authorities.

17. The writ petitions are dismissed. But in view of the slightly ticklish

issues involved the parties are left to bear their own costs.

Petitions dismissed.

AIR 1979 PUNJAB & HARYANA 223

S. S. SANDHAWALIA, C. J. AND G. C. MITAL, J.

Gurbachan Singh and others, Petitioners v. State of Punjab and another, Respondents.

Civil Writ Petn. No. 4263 of 1978, D/- 6-4-1979.

(A) Constitution of India, Art. 14 — Punjab Cycle-Rickshaw (Regulation of Licence) Act (41 of 1976), Section 3 — Validity — Not violative of Art. 14 — (Punjab Cycle-Rickshaw (Regulation of Licence) Act (41 of 1976), S. 3).

Act has made reasonable classification between Cycle-Rickshaw owners who want to ply the rickshaws themselves and those who just want to own and get them plied on hire through others. (Para 3)

(B) Constitution of India, Art. 19 (1) (g) — Punjab Cycle-Rickshaw (Regulation of Licence) Act (41 of 1976), S. 3 — Validity — Not violative of Article 19 (1) (g) — (Punjab Cycle-Rickshaw (Regulation of Licence) Act (41 of 1976), Section 3).

Legislature has not totally prohibited plying of Cycle-Rickshaws but had tried to regulate it by granting a licence only to an owner of a cycle-rickshaw who was prepared to ply it himself and to exclude any middle-man who might own a cycle-rickshaw but might not like to ply it himself. Section 3 of the Act not hit by Art. 19 (1) (g) restriction placed being reasonable restriction covered under Art. 19 (6) of the Constitution. (Paras 9, 10, 15)

Cases Referred:	Chronological Paras
AIR 1978 SC 771	4, 6, 10, 11, 13
AIR 1970 SC 564	4, 11, 12
AIR 1960 SC 430	11, 15
AIR 1958 SC 731	4, 5, 10, 15
AIR 1954 SC 747	4, 7, 10

H. L. Sibal, with S. C. Sibal, for Petitioners; I. S. Tiwana, Addl. Advocate General, Punjab (for No. 1) and Harinder Singh (for No. 2), for Respondents.

FW/FW/C926/79/DHZ

G. C. MITAL, J.:— In this writ petition, the vires of Section 3 of the Punjab Cycle-Rickshaw (Regulation of Licence) Act 41 of 1976 (hereinafter referred to as the Act), has been challenged being violative of Articles 14 and 19 (1) (g) of the Constitution of India, inasmuch as cycle-rickshaw owners who used to give their cycle-rickshaws on hire for being plied by the hirers have been denied the right of carrying on their trade and business and to earn their livelihood.

2. The six petitioners owned about 26 cycle-rickshaws for which they held licences for plying till 1976-77 and they used to give their cycle-rickshaws on hire for being plied by the hirers. The Act has been brought in force with effect from November 2, 1976, by the notification issued by the Punjab Government. The licences had to be renewed with effect from April 1, 1977, for the period ending March, 31 of the following year. The petitioners allege that their licences for the year 1976-77 have come to an end or stood revoked on the expiry of thirty days of the enforcement of the Act although the same were valid up to March 31, 1977. Under the impugned Act, they are not entitled either to have their licences renewed or to apply for fresh licences and, therefore, they are totally excluded from carrying on the trade and business of giving their cycle-rickshaws on hire and in this manner their trade and business has been completely stopped, which is not permissible under Article 19 (1) (g) of the Constitution of India.

3. The challenge on the ground of violation of Article 14 of the Constitution is that under the Act some specified categories of persons are allowed to ply cycle-rickshaws whereas the petitioners are not allowed to own and run the cycle-rickshaws on hire which they were doing before the Act came into force and hence there is deprivation of equal protection guaranteed under Article 14 of the Constitution. We are not impressed with this argument as the Act has made reasonable classification. The classification is between cycle-rickshaw owners who want to ply the rickshaws themselves and those who just want to own and get them plied on hire through others. We are of the opinion that this is a reasonable classification and if there was any dis-

crimination within the same class, then it could be said that it violates Article 14 of the Constitution. All rickshaw owners who want to ply themselves have been allowed to take licences for the rickshaws they own and which they want to ply. Similarly, each of the petitioners can get a licence for his rickshaw which he wants to ply himself. Hence within the same class there is no discrimination and we repel the contention of the learned counsel.

4. The other point canvassed by Mr. Sibal is that Section 3 of the Act is violative of Atricle 19 (1) (g) of the Constitution and is not saved by clause (6) of the Article. In elaborating his argument, he has mentioned that the carrying on of the business of cycle-rickshaws has not been found to be obnoxious or bad and once this is not done, then the plying of rickshaws will continue to be a legitimate business and as such Section 3 of the impugned Act, which prohibits the issue of licence to cycle-rickshaw owners for hire purposes, is violative of Article 19 (1) (g) of the Constitution as they are being deprived of carrying on business of owning cycle-rickshaws for purposes of giving on hire to the rickshaw pliers and since it is a case of complete prohibition, therefore, the question of placing reasonable restriction does not arise. In support of the aforesaid argument, he has relied on Rustom Cavasjee Cooper v. Union of India, AIR 1970 SC 564 (paras 46, 46-A and 56) for the proposition that the impairment of the right of individual is to be considered for testing the validity and constitutionality of the impugned Act and is not to be tested with regard to the object of the State in taking the impugned action. To concentrate merely on the power of the State and the object of the State action in exercising that power is to ignore the true intent of the Constitution. According to the learned counsel, this is not the true test, as held in the aforesaid decision. According to the learned counsel, the rule laid down therein is to be kept in view in considering the validity and constitutionality of the impugned provision. The other cases relied on behalf of the petitioners are Mohd. Hanif Quereshi v. State of Bihar, AIR 1958 SC 731, Pathumma v. State of Kerala, AIR 1978 SC 771, and R. M. Seshadri v. Dist. Magistrate, Tanjore, AIR 1954 SC 747.

5. Reliance has been placed on para 21 of Mohd. Hanif Quereshi's case (supra). That case relates to total banning of cow slaughter. The matter was summarised in para 41 of the judgment and the conclusion was arrived at in para 44, the relevant passage of which is reproduced below:—

"So approaching and analysing the problem, we have reached the conclusion (i) that a total ban on the slaughter of cows of all ages and calves of cows and calves of she-buffaloes, male and female, is quite reasonable and valid and is in consonance with the directive principles laid down in Article 48; (ii) that a total ban on the slaughter of she-buffaloes or breeding bulls or working bullocks (cattle as well as buffaloes) as long as they are as milch or draught cattle is also reasonable and valid and (iii) that a total ban on the slaughter of she-buffaloes, bulls and bullocks (cattle or buffalo) after they cease to be capable of yielding milk or of breeding or working as draught animals cannot be supported as reasonable in the interest of the general public."

On the aforesaid three principles laid down, the Supreme Court upheld the constitutionality of the Bihar Preservation and Improvement of Animals Act (2 of 1956), the U. P. Prevention of Cow Slaughter Act, 1955 (1 of 1956) and the M. P. Acts 23 of 1951 and 10 of 1956, amending the C. P. and Berar Animal Preservation Act (52 of 1949), whith regard to the total prohibition of cow slaughter on the first and second conclusions but declared them void with regard to the ban on the third conclusion.

6. The decision of the Supreme Court in Pathumma v. State of Kerala (supra), relates to the constitutional validity of the Kerala Agriculturists Debt Relief Act, 1970, which was held to be constitutionally valid by the Supreme Court. Reliance was placed on the following guidelines laid down by the Supreme Court in determining the question of reasonableness of "restriction":

(1) that, in judging the reasonableness of the restrictions imposed by cl. (5) of Article 19, the Court has to

bear in mind the Directive Principles of State Policy:

(2) that restrictions must not be arbitrary or of an excessive nature so as to go beyond the requirement of the interest of the general public:

(3) that in order to judge the quality of the reasonableness no abstract or general pattern or a fixed principle can be laid down so as to be of universal application and the same will vary from case to case:

(4) that a just balance has to be struck between the restriction imposed and the social control envisaged by clause (6) of Article 19:

(5) that there must be a direct and proximate nexus or a reasonable connection between the restriction imposed and the object which is sought to be achieved. In other words, the Court has to see whether by virtue of the restriction imposed on the right of the citizen the object of the statute is really fulfilled or frustrated;

(6) that Court must see the prevailing social values whose needs are satisfied by restrictions meant to protect social welfare:

(7) that so far as the nature of reasonableness is concerned, it has to be viewed not only from the point of view of the citizen but the problem before legislature and the object which is sought to be achieved by the statute. In other words, the Courts must see whether the social control envisaged in clause (6) of Article 19 is being effectuated by the restrictions imposed on the fundamental right.

7. The other case relied on is R. M. Seshadri v. Dist. Magistrate, Tanjore (supra), in which the notifications issued by the State of Madras were challenged as being hit by Article 19 (1) (g) of the Constitution. The impugned conditions of the notifications which were sought to be challenged were:—

"4 (a) The licensee shall exhibit at each performance one or more approved films of such length and for such length of time, as the Provincial Government or the Central Government may, by general or special order, direct.

(b) The licensee shall comply with such directions as the Provincial Government may by general or special order give as to the manner in which approved films shall be exhibited in the course of any performance.

Explanation: 'Approved Films' means a cinematograph film approved for the purpose of this condition by the Provincial Government or the Central Government.

Special condition 3: The licensee should exhibit at commencement of each performance not less than 2,000 feet of one or more approved films."

While considering the constitutionality, the Supreme Court came to the conclusion that the length of the time for which the approved films may be shown is unspecified and the Government may compel a licensee to exhibit an approved film, say for an hour and a half or even two hours when the exhibition of a film generally takes two hours and a quarter and in this manner whole of the time may be utilised in exhibiting the approved films. Taking this consideration with other considerations, condition 4 (a) and special condition 3 were held to be violative of Article 19 (1) (g) of the Constitution and were struck down.

8. Keeping the aforesaid principles laid down by the Supreme Court in view, let us see the provisions of the impugned Act. The statement of objects and reasons of the Act reads as under:—

"In order to eliminate the exploitation of rickshaw pullers by the middlemen and for the giving a fillip to the scheme of the State Government for arranging interest-free loans for the actual pullers to enable them to purchase their own rickshaws, it is considered necessary to regulate the issue of licences in favour of the actual drivers of cycle-rickshaws plying within the municipal area in the State."

The definition of "cycle-rickshaw" as contained in the Act is as follows:—

"2 (a) 'cycle-rickshaw' means a three-wheeled cycle-rickshaw driven by manual labour and includes all its components and accessories."

Section 3 of the Act deals with grant of licence for cycle-rickshaws which is reproduced below:—

"3. Licence for cycle-rickshaws. — (1) Notwithstanding anything contained to the contrary in the Punjab Municipal Act, 1911, or any rule or order or bye-law made thereunder or any

other law for the time being in force, no owner of a cycle rickshaw shall be granted any licence in respect of his cycle-rickshaw nor his licence shall be renewed by any municipal authority after the commencement of this Act unless the cycle-rickshaw is to be plied by such owner himself.

(2) every licence in respect of a cycle-rickshaw granted or renewed prior to the commencement of this Act shall stand revoked on the expiry of a period of thirty days after such commencement if it does not conform to the provisions of this Act."

Section 4 of the Act deals with exemptions which is reproduced below:—

"4. Exemption:— (1) Notwithstanding anything contained in this Act, a licence in respect of a cycle-rickshaw may be granted to a widow or to a disabled person to be plied by another person if this is the only source of her or his livelihood and in such a case it shall be lawful for the municipal authority to grant a driving licence to a person other than the owner of the cycle-rickshaw, giving full particulars of the owner and the driver engaged to ply it with a photograph of the driver.

(2) A licence in respect of a cycle-rickshaw may also be granted or renewed by a municipal authority to an institution to be plied through any other person, if the institution has to ply it not for hire but to meet its own requirements of conveyance and transportation and in such a case it shall be lawful for the municipal authority to grant a driving licence to a person other than the owner of the cycle-rickshaw giving full particulars of the owner and the driver engaged to ply it with a photograph of the driver. The body of such a cycle-rickshaw will be painted yellow."

Ss. 5 and 6 of the Act deal with penalties to be imposed on violation of any of the provisions of the Act and forfeiture of the cycle-rickshaw in respect whereof the offence is committed respectively, and the last S. 7 deals with the power to make rules.

9. A reading of the aforesaid provisions would show that what the Legislature has intended to do is not to totally prohibit the plying of cycle-rickshaws but has tried to regulate it by granting a licence only to an owner of a cycle-rickshaw who is prepared to ply it himself and to exclude any middle-man who may own a cycle-rickshaw but may not like to ply it himself. In this manner, the exploitation of rickshaw pullers by the middle-men has been obviated by giving facility to the actual rickshaw pullers to own their rickshaws either by arranging loans from the State Government, which may be interest free, or by purchasing their own rickshaws from their own resources. The whole underlying idea of the impugned Act is to favour grant of licences to such actual pliers of cycle-rickshaws who own the cycle-rickshaws and not to those who are prepared to ply rickshaws on hire. In this manner, the Legislature has made a classification for the grant of licences under the Act.

10. The argument of Mr. Sibal is that there is total bar on his clients to obtain licences for plying their rickshaws on hire and as such the impugned Act is hit by Art. 19 (1) (g) of the Constitution. If we look at the impugned Act from this angle, of course, there is a total bar for obtaining licences by rickshaw owners who want to ply the same on hire and not ply themselves. But, such a bar does not amount to violation of Art. 19 (1) (g) by itself as the restriction which has been placed is to be seen, whether it is reasonable or not. If it is reasonable, then the Act is valid and if it is not, then the Act has to be struck down. Now, once again, reference may be made to M. H. Qaureshi's case (supra), where total ban on cow slaughter was upheld on the first and second conclusions, reproduced above. On the third conclusion, it was stated that the total ban on the slaughter after they cease to be capable of yielding milk or of breeding or working as draught animals cannot be supported as reasonable in the interest of general public. Therefore, the question which required to be determined is whether the restriction is reasonable or not, which will be answered a little later. R. M. Seshadri's case (supra) is of no assistance either way in deciding the validity of the impugned Act as the same was decided on the wording of a peculiar notification which was under challenge in that case. So far as Pathumma's case (supra) is concerned, it has laid down seven guidelines which are of great help in deciding the reasonableness of restriction imposed in

the present case, which would be considered a little later after we have considered the arguments of Mr. I. S. Tiwana, the learned Additional Advocate General, Punjab, and the rulings cited by him.

11. The learned Additional Advocate General, in reply to the argument of the learned counsel for the petitioners, has placed reliance on Narendra Kumar v. Union of India, AIR 1960 SC 430, Rustom Cavasjee Cooper's case (supra) and the principles laid down in Pathumma's case (supra), for his submissions that total prohibition of the kind in dispute on the cycle-rickshaw owners who do not want to ply themselves and want to give on hire is permissible in law and in any case is a reasonable restriction under Art. 19 (6) of the Constitution and as such the impugned Act is a valid piece of legislation. In Narendra Kumar's case (supra) the Government of India issued an Order called the 'non-ferrous Metal Control Order, 1958', in exercise of its powers under S. 3 of the Essential Commodities Act. Cls. 3 and 4 of the Order were sought to be challenged as violative of Arts. 14, 19 (1) (f) and (g) of the Constitution. For facility of reference, these clauses are reproduced below:—

"3 (i) No person shall sell or offer to sell any non-ferrous metal at a price which exceeds the amount represented by an addition of 34 p.c. to its landed cost,

(ii) no person shall purchase or offer to purchase from any person non-ferrous metal at a price higher than at which it is permissible for that other person to sell to him under sub-cl. (i).

4. No person shall acquire or agree to acquire any non-ferrous metal except under and in accordance with a permit issued in this behalf by the Controller in accordance with such principles as the Central Government may from time to time specify."

The constitutional validity of the aforesaid clauses was upheld and the relevant part of the Supreme Court decision is given in paras 23 and 24, which is reproduced below:—

"23. It must, therefore, be held that Cl. 3 of the Order even though it results in the elimination of the dealer from the trade is a reasonable restriction in the interests of the general public. Cl. 4 read with the principles specified must also be held for the same reason to be a reasonable restriction.

24. It was next urged that these principles are discriminatory as between manufacturers and dealers and so violate Art. 14 of the Constitution. Quite clearly the dealers and manufacturers are by these principles placed in different classes and while some manufacturers are eligible for permits dealers are not. It is equally clear however from what has already been said above that the differentia which distinguish dealers as a class from manufacturers placed in the other class have a reasonable connection with the object of the legislation. There is therefore no substance in the contention that the specification of the principles violates Art. 14 of the Constitution."

This clearly shows that Cl. 3 of the Order which totally eliminated a dealer from the trade was held to be a reasonable restriction in the interest of general public and for the same reason cl. 4 was also held to be placing a reasonable restriction. It was further found that there was no discrimination or violation of Art. 14 of the Constitution although dealers and manufacturers were placed in two different classes.

12. The learned Additional Advocate General placed reliance on para 45 of the decision of the Supreme Court in R. C. Cooper's case (supra), for the proposition that limitations under Articles 19 (5) and 31 are not generically different, for the law authorising the exercise of the power to take the property of an individual for a public purpose or to ensure the well-being of the community, and the law authorising the imposition of reasonable restrictions under Art. 19 (5) are intended to advance the larger public interest. According to him, the same would be the position with regard to Art. 19 (6). According to him, reasonable restrictions have been provided by the impugned section to do away with the monopoly of the cycle-rickshaw owners who do not ply the same themselves and give them on hire and instead to eliminate the exploitation of the rickshaw pullers by the middle-men and for giving a fillip to the scheme of the State Government for arranging interest-free loans for the actual pullers to enable them to purchase their own rickshaws for plying in the municipal area after obtaining licences. According to the

learned Additional Advocate General, this is a reasonable restriction within the meaning of Art. 19 (6) and as such the impugned section is valid and intra vires.

13. The learned Additional Advocate General, while relying on Pathumma's case (supra), has stressed on guidelines 4 to 7 contained in that judgment and reproduced above, and has argued that all the tests laid down above have been fulfilled in the impugned legislation. According to him, the object of the legislature was to give licences to actual rickshaw pullers and to eliminate the exploitation of the rickshaw pullers by the middle-men and this object has been achieved by the impugned legislation and that there is a direct and proximate nexus or reasonable connection between the restrictions imposed and the object which is sought to be achieved.

14. Mr. Tiwana goes on to argue and has stated that there is an exemption clause also in S. 4 where a licence in respect of a cycle-rickshaw may be granted to a widow or to a disabled person to be plied by another person if that is the only source of her or his livelihood and in such a case it shall be lawful for the municipal authority to grant a driving licence to such persons. There is yet another exemption clause where licence in respect of a cycle-rickshaw can also be granted or renewed by a municipal authority to an institution to be plied through any other person if the institution has to ply it not for hire but to meet its own requirements of conveyance and transportation. So, according to the learned counsel for the State, enough safeguard has been provided in the impugned legislation and the right of widows, disabled persons and of institutions to have the rickshaws plied through other persons has been protected and in this manner it is a beneficial legislation enacted taking into consideration the prevailing social values and to protect social welfare of the persons who are really engaged in actually plying the rickshaws for their benefit except for the exemptions which have been specified in the Act.

15. After taking into consideration the arguments of both the sides and the rulings cited by them, we are of the opinion that S. 3 of the Act is a valid piece of legislation and is not hit by Art. 19 (1) (g) as the restriction placed is a reasonable restriction covered under Art. 19 (6) of the Constitution. The scheme of the Act which has been reproduced above clearly shows that the classification which has been made is reasonable and only the middlemen have been excluded. The licences are to be granted only to actual rickshaw pullers and not to those who want to give the rickshaws on hire. So far as the total prohibition of rickshaw owners like the petitioners, who want to ply the same on hire, is concerned, it is justified in view of the decision of the Supreme Court in Narendra Kumar v. Union of India and M. H. Quareshi v. State of Bihar (supra), relevant passages (from which) have been quoted while adverting to them. In Narendra Kumar's case (supra), the Supreme Court clearly held that though cl. 3 of the Order results in elimination of the dealers from the trade yet is a reasonable restriction in the interest of general public. Similarly, in M. H. Quareshi's case (supra), total ban on cow slaughter was upheld as justified and constitutionally valid and it only struck down the total ban on the slaughter of such cattle which had ceased to be capable of yielding milk or of breeding or working. Therefore, on reading the scheme of the Act, the statement of objects and reasons and keeping in view the principles of law laid down by the Supreme Court in the aforesaid judgments, we are satisfied that the restriction placed on the grant of licences to such rickshaw owners who are prepared to ply the same and to exclude the middle-men is a reasonable restriction within the meaning of Art. 19 (6) of the Constitution as there is a proximate nexus and reasonable connection between the restriction imposed and the object which is sought to be achieved. Moreover, it is based on sound public policy.

16. For the reasons recorded above, we find no merit in this writ petition and the same is dismissed. However, we leave the parties to bear their own costs as constitutional validity was involved.

S. S. SANDHAWALIA, C. J.:— I agree.

Petition dismissed.

quash the orders of respondents Nos. 1 to 3 dated August 28, 1969, March 3, 1969 and September 13, 1967. I also accept Civil Writ Petition No. 2309 of 1969 and quash the impugned orders.

14. The authorities concerned may, however, proceed afresh in accordance with law. The parties are directed to appear before the Collector (Agrarian) Ferozepur, on August 30, 1979. C. M. Applications have become infructuous. No costs.

Petitions allowed.

AIR 1979 PUNJAB AND HARYANA 255

HARBANS LAL, J.

Union of India, Appellant v. M/s. Manchanda Brothers and another, Respondents.

F. A. F. O. No. 155 of 1978, D/- 7-8-1979.*

(A) Arbitration Act (1940), S. 30 — Powers of Court.

Where a cause or matters in difference are referred to an arbitrator, he is constituted the sole and final Judge of all questions both of law and of fact. The only exception to that rule are cases where the award is the result of corruption or fraud and where the question of law necessarily arises on the face of the award or upon some paper accompanying and forming part of the award. AIR 1923 PC 66, Foll. (Para 6)

In such cases, the discretion of the court either for remission or for setting aside the award will not be readily exercised and will be strictly confined to the specific grounds set out in Ss. 16 and 30; AIR 1971 SC 696, Foll. (Para 8)

(B) Arbitration Act (1940), S. 30 — Error of law on face of award.

An error in law on the face of the award means that you can find in the award or a document actually incorporated thereto, as for instance, a note appended by the arbitrator stating the reasons for his judgment, some legal proposition which is the basis of the award and which you can then say is erroneous. It does not mean that, if in a narrative a reference is made to a contention of one party that opens the door to seeing first what that contention is and then going to the contract on which the parties' rights depend, to see if that contention is sound; AIR 1923 PC 66; Foll (Para 6)

(C) Arbitration Act (1940), S. 30 — Scope of jurisdiction of arbitrator.

Whether the arbitrator acts within his jurisdiction or not depends solely upon the clause of reference; AIR 1923 PC 66, Foll. (Para 6)

(D) Arbitration Act (1940), S. 30 — Powers of Court — Construction of award — Principle of reading contracts or other documents into the award not to be encouraged.

Answer to the question whether a contract or any of its clauses was incorporated in the award, depends upon the construction of the award. The test is, does the arbitrator come to a finding on the wording of the contract. If he does, he can be said to have impliedly incorporated the contract or a clause in it whichever be the case. But a mere general reference to the contract in the award is not to be held as incorporating it. The principle of reading contracts or other documents into the award is not to be encouraged or extended; AIR 1971 SC 696, Foll. (Para 9)

(E) Arbitration Act (1940), S. 30 — Award — Setting aside — Claim for payment of amount with interest referred — Jurisdiction of arbitrator to award interest pendente lite.

Where all the disputes including the claim for payment of the amount with interest is referred to the arbitrator, the arbitrator has the jurisdiction to award interest during the pendency of the proceeding also. AIR 1972 SC 1507, Foll. (Para 10)

(F) Arbitration Act (1940), S. 30 — Error of law or fact on face of award — Award of amount barred by time.

Even where a question of limitation had been raised by the other party, but the award without expressly adverting to the same, awarded a certain sum on account of certain claims made by the contractor, the award was not vitiated on account of any mistake or error apparent on the face of the award. The umpire as sole arbitrator was not bound to give a reasoned award and if in passing the award he makes a mistake of law or of fact, that is no ground for challenging the validity of the award. (Para 11)

(G) Arbitration Act (1940), S. 30 — Error of law or fact on face of award — Building contract with Government — Arbitration clause in respect of disputes arising under contract — Non-speaking

*(Against order of B. R. Gupta, Sub-J. 1st Class, Chandigarh, D/- 17-1-1978.)

HW/IW/E98/79/VBB

award — Jurisdiction of arbitrator to look into claim of contractor not challenged or disputed before arbitrator — Award held not vitiated or invalid on account of any mistake or error of law or fact on the face of the award.

(Paras 12, 20, 21)

Cases Referred: Chronological	Paras
AIR 1975 SC 230	11, 20
AIR 1972 SC 1507	10
AIR 1971 SC 696	8
AIR 1968 Raj 99	19
AIR 1967 SC 1030	7
AIR 1967 SC 1032	7
ILR (1961) Cut 544	16
AIR 1960 Punj 478	18
AIR 1958 All 692	17
AIR 1954 Cal 1	14
AIR 1924 Sind 75 (FB)	15
AIR 1923 PC 66	6, 7, 12, 15
AIR 1920 Bom 256	6, 15
(1857) 3 CB NS 189 : 140 ER 712, Hodgkinson v. Fernie	6

R. K. Chhibber, Govt. Pleader, Chandigarh Admn., for Appellant; N. C. Jain, V. K. Jain and Arun Jain, for Respondents.

JUDGMENT:— The legality and the validity of the award dated December 14, 1976, by Brigadier Gur Dayal, arbitrator, against the Union of India, was challenged under Sections 30 and 33 of the Arbitration Act, 1940, (hereinafter called the Act) by the appellant on a number of grounds in the Court of the Subordinate Judge, First Class, Chandigarh, in their objection petition. The objection petition was dismissed by the Subordinate Judge by his judgment dated January 17, 1978. In the present appeal, the learned counsel for the appellant, has confined the challenge to the award in so far as the arbitrator allowed a sum of Rs. 1,91,170.28 as reimbursement of extra expenditure incurred by respondent No. 1 (hereinafter called the contractor), on the sole ground that the arbitrator had committed a blatant legal misconduct as the award in this regard was beyond jurisdiction in view of clause 9 of the contract between the parties. In order to appreciate the contention, the relevant facts, in brief, may be enumerated as under.

2. M/s. Manchanda Brothers, M.E.S. Contractors and government builders, respondent No. 1, entered into a contract with the Government of India for the construction of certain buildings. Their tender having been accepted on August 21, 1972, the work regarding the construction of quarters was to be completed in two phases. Phase 1 was to be completed within nine months and Phase II within 18 months. With the issuance of the work order, construction work was commenced. However, subsequently, the execution of work with regard to the construction of some buildings was suspended on June 21, 1973 by Major Raghu Nandan, Garrison Engineer, vide his letter, Exhibit A. Thereafter, by another letter, dated September 4, 1973, Exhibit B, the execution of some other work was also suspended for some time. This suspension order was withdrawn later on and thereafter, the contractor completed the work. Some dispute having been raised by the contractor, Lieutenant-General J. S. Bawa, Engineer-in-Chief by his letter dated January 21, 1976, appointed Brigadier Gur Dayal as the arbitrator under the terms of the contract. Claim was filed by the contractor before the arbitrator in which objections were raised on behalf of the appellant. Evidence was adduced by both the sides and thereafter, the arbitrator, respondent No. 2, gave his award on December 14, 1976. As the contentions of both the parties involve the interpretation of this award, the same is reproduced below:

"WHEREAS CERTAIN differences arose between the parties out of a contract in writing viz. CA No. CENWZ/CHD-20/72-73 for provision of married accommodation for JCOs, HAVs, ORs, and NCs, E at Chandigarh between them,

AND WHEREAS I was appointed the sole Arbitrator in the matter vide Engineer-in-Chief, Army Headquarters, Kashmir House, New Delhi Letter No. 13600/WC/157/E8 dated 21 Jan., 76.

NOW, I BRIG. GUR DAYAL, having taken upon myself the burden of reference and having heard, examined and considered the statements of the parties and the documentary evidence produced before me by them.

I Do HEREBY make and publish this my final award in writing of and concerning the matter referred to me. Dealing with each claim separately, award and direct as under:—

A. Claims of The Claimant

1. Reimbursement of extra-expenditure in executing the work Rs. 4,06,355.58 The claim is allowed for Rs. 1,91,170.28 (Rupees one lac ninety one thousand one hundred seventy and paise twenty eight only).

2. Compensation for idle labour due to shortage of cement Rs. 14,688.00.

The claim is rejected.

3. Refund of recovery wrongfully made in respect of water proofing treatment Rs. 36,296.80

The claim is allowed for Rs. 36,296.80 (Rupees thirty six thousand two hundred ninety six and paise eighty only).

4. Payment of C. I. pipe WC connectors — Rs. 4,558.40.

The claim is allowed for Rs. 4,558.40 (Rupees four thousand five hundred fifty eight and paise forty only).

5. Compensation of loss due to forfeiture of advances for steel windows Rs. 3,000.00

The claim is rejected.

6. Compensation of loss on account of flush shutters — Rs. 9,595.00

The claim is rejected.

7. Cost of Arbitration — Rs. 8,000.00

The claim is allowed for Rs. 1,000/- (Rupees one thousand only).

B. CLAIMS OF THE RESPONDENT

1. Cost of arbitration — Rs. 2,000.00

The claim is rejected.

As a result of the above award, the Respondent shall pay to the Claimant a sum of Rs. 2,33,025.48 (Rupees two lacs thirty three thousand twenty five and paise forty eight only).

Cost of stamp paper viz. Rs. 113/- (Rupees one hundred and thirteen only) shall be borne by the Respondent."

3. It is conceded by both the sides that the dispute had been referred to the arbitrator under clause 70 of the Contract which is reproduced below:—

"All disputes, between the parties to the contract (other than those for which the decision of the C. W. E. or any other person is by the contract expressed to be final and binding), shall, after written notice by either party to the Contract to the other of them be referred to the sole arbitration of an Engineer Officer to be appointed by "the authority mentioned in the tender documents.

Unless the parties otherwise agree such reference shall not take place until after the completion, alleged completion or abandonment of the works or the determination of the Contract.

If the Arbitrator so appointed resigns his appointment or vacates his office or is unable or unwilling to act due to any reason whatsoever, the authority appointing him may appoint a new Arbitrator to act in his place.

The Arbitrator shall be deemed to have entered on the reference on the date he issues notice to both the parties, fixing the date of hearing.

The Arbitrator may, from time to time with the consent of the parties, enlarge the time, for making and publishing the award.

The Arbitrator shall give his award on all matters referred to him and shall indicate his findings, along with the sums awarded, separately on each individual item of dispute.

The venue of Arbitration shall be such place or places as may be fixed by the Arbitrator in his sole discretion.

The Award of the Arbitrator shall be final and binding on both parties to the Contract."

4. Subsequent to the pronouncement of the award, an application under Ss. 14 and 17 of the Act was filed on behalf of the contractor for the purpose of the award being made the rule of the Court, in the Court of the Subordinate Judge, First Class, Chandigarh. In this application, objection petition was filed on behalf of the appellant under Ss. 30 and 33 of the Act for setting aside the award on the following grounds:—

1. that the arbitrator has misconducted in allowing a sum of Rs. 1,91,170.28 paise to the applicant as reimbursement of extra expenditure allegedly incurred by the applicant due to the suspension of the contract, in contravention of condition No. 9 of I. A. F. W. 2249 (General Conditions of Contract Agreement);

2. that the arbitrator has admitted into evidence illegally, vouchers which did not bear any reference to the contract; and

3. that the arbitrator has admitted into evidence a letter dated 15-11-1976 of the applicant although the arbitration proceedings were closed on 13-11-1976 and this action amounts to a legal misconduct on the part of the arbitrator.

On the pleadings of the parties, the following issues were framed:—

1. Whether the arbitrator has misconducted himself and proceedings, as alleged?

2. Whether the objection petition is not maintainable?

3. Whether the objection petition does not require verification according to law, if the answer is in negative, then to what effect?

According to the findings of the trial Court, the appellant had not raised any contention in the objection petition that the mistake alleged in the award was apparent on the face of the record, nor was

any such mistake discernible from a perusal of the award as there was no reference to any provision of the contract or condition No. 9 of the contract. Even if the arbitrator committed any mistake either in law or fact, the award cannot be remitted or set aside on any such ground. It was also concluded that the evidence led by the parties before the arbitrator cannot be appraised by the Court as the trial Court could not sit as a Court of appeal. It was also held that it was not disclosed from the award if any evidence had been allowed by the arbitrator improperly. Some other conclusions were also reached which are not relevant for the purpose of the present appeal.

5. The learned counsel for the appellant, at the outset, frankly conceded that he was challenging only the acceptance of the claim of the contractor by the arbitrator for the amount of Rs. 1,91,170.28 under the heading, "Reimbursement of extra-expenditure in executing the work" out of the total claim of Rs. 4,06,355.58 as had been put forward by the contractor in his claim petition and that the findings or the acceptance of the other claims of the contractor in the award were not being disputed. It was stressed that in this regard, the award suffered from the basic defect inasmuch as the arbitrator had no jurisdiction to allow the said claim in view of condition 9 of the contract which is reproduced below:

"The Contractor shall suspend execution of the Works or any part thereof, whenever called upon in writing by the Garrison Engineer to do so, and shall not resume Work thereon until so directed in writing by the Garrison Engineer. The Contractor will be allowed by the G. E. an extension of time (not less than the period of suspension) for completion of the item or group of items of Work for which a separate period of completion is given in the contract and of which the suspended work forms part but no other claims in this respect for compensation or otherwise, howsoever, shall be admitted."

It was argued that, during the course of the execution of the contract, the execution of some works had been suspended by the Garrison Engineer for some time. The order of suspension was later on withdrawn and the work was carried out by the contractor in accordance with the instructions. The disputed claim related to the compensation on account of the extra expenditure incurred by the contractor after the resumption of work due to rise in the prices of material, the enhanced wages and the labour employed. Such a claim was barred under condition 9 and, therefore, the arbitrator had no jurisdiction to consider the claim of the contractor in this regard and award any amount as compensation. As against this, the emphatic contention of the learned counsel for the contractor is that the impugned award was non-speaking one inasmuch as there is no reference to the respective contentions of the parties before the arbitrator or any provision of the contract or any reference to condition 9 on which the case of the appellant was based, nor was there any discussion even indirectly with regard to any legal proposition or any evidence which may have been led. As such, it was not possible to hold, according to the settled law, that the arbitrator was guilty of any legal misconduct or that the award suffered from any want of jurisdiction. It was also emphasised that the appellant had participated in the proceedings before the arbitrator and had taken a chance of a decision whether favourable or unfavourable to him, from the arbitrator and now, the appellant was estopped from raising any such objection and that it is not within the competence of the Court to look into the proceedings or the evidence which may have been adduced before the arbitrator. Thus, the impugned award cannot be held to suffer from any error apparent on the face of the award. In order to appreciate these contentions, it will be necessary to have a peep into the legal propositions as laid down from time to time by the various decisions of the Privy Council, the Supreme Court and the High Courts, as to the scope and ambit of S. 30 of the Act under which only, an award can be set aside.

6. The ambit and scope of the jurisdiction of the Court vis-a-vis the award of the arbitrator was laid down in very lucid and clear terms by the Privy Council in Champsey Bhara & Company v. Jivraj Balloo Spinning and Weaving Co. Ltd., AIR 1923 PC 66 while reversing the judgment of the Bombay High Court as reported in Jivraj Baloo Spinning and Weaving Co. Ltd. v. Champsey Bhara and Co., AIR 1920 Bom 256. The law as laid down by Williams, J., in Hodgkinson v. Fernie (1857) 3 CB NS 189, was approved as under:—

"The law has for many years been settled and remains so at this day, that,

where a cause or matters in difference are referred to an arbitrator, a lawyer or a layman, he is constituted the sole and final judge of all questions both of law and of fact. ..... The only exception to that rule are cases where the award is the result of corruption or fraud, and one other, which though it is to be regretted, is now, I think firmly established viz., where the question of law necessarily arises on the face of the award or upon some paper accompanying and forming part of the award. Though the propriety of this latter may very well be doubted, I think it may be considered as established."

Some contention had been raised with regard to an error in law on the face of the award. The controversy was set at rest in the following words:—

"An error in law on the face of the award means, in their Lordships' view, that you can find in the award or a document actually incorporated thereto, as for instance, a note appended by the arbitrator stating the reasons for his judgment, some legal proposition which is the basis of the award and which you can then say is erroneous. It does not mean that if in a narrative a reference is made to a contention of one party that opens the door to seeing first what that contention is and then going to the contract on which the parties' rights depend to see if that contention is sound."

With regard to the scope of jurisdiction of arbitrator, it was held that it was the clause of reference on the basis of which the matter of dispute is to be referred to the arbitrator which is the sole determining factor. It was held as under:—

"The question of whether an arbitrator acts within his jurisdiction is, of course, for the Court to decide, but whether the arbitrator acts within his jurisdiction or not depends solely upon the clause of reference. It is, therefore, for the Court to decide in this case whether the dispute which has arisen is a dispute covered by Cl. 13 of the articles. It clearly is so, because it is undoubtedly a dispute arising out of or in relation to a contract made subject to the rules and regulations of the Cotton Trade Association."

7. In Firm Madanlal Roshanlal Mahajan v. Hukumchand Mills Ltd., Indore, AIR 1967 SC 1030, the ratio of the decision in Champsey Bhara and Co's case was approved and it was held that the arbitrator's award both on fact and law is final and there is no appeal from his verdict. The same principle of law was reiterated in the Union of India v. Bungo Steel Furniture Private Ltd., AIR 1967 SC 1032.

8. In Allen Berry and Co. Pvt. Ltd v. Union of India, AIR 1971 SC 696, it was emphasised that when the parties had chosen their arbitrator, they cannot object to the award either upon the law or the facts when the award is good on the face of it and the mistake alleged is not apparent from a perusal of the award or any document appended to or incorporated in it so as to form a part of it. It was also laid down as under:—

"Before we proceed to consider these propositions, it is necessary to ascertain the scope of S. 30 of the Arbitration Act, 1940, and the principles underlying that section. The general rule in matters of arbitration awards is that where parties have argreed upon an arbitrator, thereby displacing a court of law for a domestic forum, they must accept the award as final for good or ill. In such cases the discretion of the Court either for remission or for setting aside the award will not be readily exercised and will be strictly confined to the specific grounds set out in Ss. 6 and 30, of the Act."

9. As to the question whether a contract or any of its clauses was incorporated in the award, it was held that answer to the same depends upon the construction of the award. In this regard, the following test was laid down:—

"The test is does the arbitrator come to a finding on the wording of the contract? If he does, he can be said to have impliedly incorporated the contract or a clause in it whichever be the case. But a mere general reference to the contract in the award is not to be held as incorporating it. The principle or reading contracts or other documents into the award is not to be encouraged or extended."

On behalf of the appellant, it was pointed out that in this case, the jurisdiction of the arbitrator had been conceded by the counsel. However, this fact does not detract from the merit of the principle of law laid down by their Lordships of the Supreme Court.

10. For some time, there was a controversy as to whether the arbitrator was competent to award interest pendente lite, i. e. during the pendency of the arbitration proceedings. In the State of Madhya Pradesh v. Saith and Skelton (P) Ltd., AIR 1972 SC 1507, it was made clear that where all the disputes including the claim for payment of the amount

with interest is referred to the arbitrator, the arbitrator has the jurisdiction to award interest during the pendency of the proceedings also.

11. The propositions of law, as enunciated in the decisions above referred to, were again approved in N. Chellappan v. Secretary, Kerala State Electricity Board, AIR 1975 SC 230 and it was even held that where even a question of limitation had been raised by the other party, but the award without expressly adverting to the same, awarded a certain sum on account of certain claims made by the contractor, the award was not vitiated on account of any mistake or error apparent on the face of the record. It was emphasised as under:—

"The umpire as sole arbitrator was not bound to give a reasoned award and if in passing the award he makes a mistake of law or of fact, that is no ground for challenging the validity of the award. It is only when an erroneous proposition of law is stated in the award and which is the basis of the award, can the award be set aside or remitted on the ground of error of law apparent on the face of the record."

12. A close and analytical perusal of the award in the present case leaves no manner of doubt that the arbitrator did not make any reference even impliedly to any provision or clause of the contract or the contentions which may have been raised by the respective parties before him. In the award, the claim of the contractor with regard to various items has been partly allowed or rejected. Thus, when viewed in the light of the propositions of law as have been laid down in the various decisions of the Supreme Court as discussed above approving the law as laid down in Champsy Bhara & Company's case (supra), it is not possible to hold that the award is vitiated or invalid on account of any mistake or error of law or fact. Condition 9 of the contract which is the sole basis of attack by the learned counsel for the appellant is only to the effect that in case of suspension of execution of work by the Garrison Engineer for some time and resumption of the work subsequently, the contractor will not be entitled to any compensation on account of suspension of work. According to the award, an amount of Rs. 1,91,170.28 was allowed to the contractor as reimbursement of extra expenditure in executing the work. From this part of the award, it cannot be spelt out whether this amount was allowed as compensation in lieu of the suspension of work as contemplated under condition 9 or it related to the execution of other works regarding which no suspension had been ordered. Only a lump sum in part acceptance of the entire claim of the contractor on account of extra expenditure in executing the work was allowed. In the award, absolutely no reasons have been given, nor any propositions of law or fact have been adverted to so that this Court is not in a position to express any opinion whether the award suffered from any mistake of law which may be apparent on the face of the award.

13. The learned counsel for the appellant, placed reliance on some decisions in support of his proposition which, however, do not render any assistance to his case.

14. In Hanutmull Bold v. Fatehchand Murlidhar, AIR 1954 Cal 1, Jute Control Order expired on Sept. 30, 1946. However, the damages were awarded on Oct. 1, 1946, being far in excess of the price controlled under the said Order. The arbitrator thus awarded charges not at controlled rate, but at blackmarket rates. On a perusal of the award, the High Court came to the conclusion that paragraph 1 of the award should be read with paragraph 2 and the contents of paragraph 1, in fact, were the basis for the award of the damages as contained in paragraph 2 thereof. Thus, the award in this case was based on the reasoning and premises which were found to be erroneous. Besides, it was also held that if a party to a contract challenges the very existence of the contract and in spite of the challenge the arbitrator proceeds with the reference and makes an award, such an award would be a nullity.

15. The decision in G. P. Gunnis. & Co. Ltd. v. M/s. Amanmal Tulsidas, AIR 1924 Sind 75 (FB), was based on the decision in Jivraj Baloo Spinning and Weaving Co.'s case (supra), which was clearly reversed by the Privy Council in Champsey Bhara & Co.'s case (supra). It appears the decision of the Privy Council in the aforesaid case was not brought to the notice of the learned Judges of the High Court.

16. A close perusal of ILR (1961) Cut 544, Union of India v. Joginder Singh & Co. makes it evident that this decision rather lends support to the contention of the opposite side, and it was held that the arbitrator had not purported to construe any clause of the contract and thus,

there was no error of law apparent on the face of the award.

17. The learned counsel for the appellant also placed reliance on the following observations in the Indian Minerals Co. v. The Northern India Lime Marketing Association, AIR 1958 All 692:—

"Misconduct not amounting to moral turpitude is called legal misconduct and has a very wide meaning. It is difficult to give an exhaustive definition of what amounts to legal misconduct. It may however be stated that legal misconduct means misconduct in the judicial sense arising from some honest, though erroneous, breach and neglect of duty and responsibility on the part of the arbitrator causing miscarriage of justice. There may be ample misconduct in a legal sense to make the Court set aside the award even when there is no ground to impute the slightest improper motive to the arbitrator. It includes failure to perform the essential duties which are cast on an arbitrator as such. It also includes any irregularity of action which is not consonant with general principles of equity and good conscience which ought to govern the conduct of an arbitrator."

No exception can be taken to the scope and ambit of legal misconduct as laid down above, but the learned counsel has not been able to point out as to which principle of legal misconduct, as above referred to, vitiated the impugned award. It is not the case of the appellant that proper opportunity was not given to him by the arbitrator nor did the appellant impute any improper motive to the arbitrator.

18. In Union of India v. United Timber Works of Jamna Nagar, AIR 1960 Punj 478, it was held that an award suffered from a patent error of law where compensation was allowed on the ground of equity for loss of profit in the absence of proof that any damages had been sustained. A close perusal of the judgment makes it evident that in this case the award was not a non-speaking one and the facts and the evidence had been adverted to. The learned Judge after analytical scrutiny of the award came to the conclusion that the compensation had been awarded in the absence of proof of any damages.

19. In Union of India v. Sharma & Sons, AIR 1968 Raj 99, principles were broadly enunciated as to under what circumstances the award could be set aside. It was clearly stated,—

"The award if baldly stated, without giving any reasons for it, cannot be assailed even if it be against facts or repugnant to law. In other words, the award is not open to judicial review, but if a reference to arbitration be made generally and not specifically and the arbitrator enunciates a proposition of law and states his own view of law as a ground of his award, such an award is open to attack in a Court of law and is liable to be set aside if there be an error of law apparent on the face of it."

I am afraid, the principle of law thus enunciated lends no strength to the case of the appellant. In the present case, as referred to above, the award, in dispute, is without any reasons and no legal propositions have been stated or commented upon.

20. It was also stressed by the learned counsel for the contractor that the appellant fully participated in the proceedings before the arbitrator and did not challenge the jurisdiction of the arbitrator with reference to condition 9 and, therefore, in view of the law laid down in N. Chellappan's case (supra), the appellant was estopped from raising the question of jurisdiction. This contention is also not without substance. A close perusal of the objection petition filed before the arbitrator shows that though it was contended that the contractor was not entitled to any compensation in view of condition 9 of the contract, yet the jurisdiction of the arbitrator was not specifically challenged or disputed. According to the learned counsel for the appellant the lacuna may be due to the ignorance or wrong drafting of the objections, but the objection did amount to a challenge to the jurisdiction of the arbitrator. I am afraid, I cannot subscribe to this view. If the appellant had really and seriously challenged the jurisdiction of the arbitrator to look into certain claim of the contractor, they have taken appropriate proceedings under the provisions of the Act to divest the arbitrator of proceeding with the arbitration proceedings culminating in the award.

21. In view of the above discussion, I am clearly of the opinion that the impugned award does not suffer from any error of law or fact apparent on the face of the award and that the award is a bald one, so to say, it is a non-speaking award. As the parties chose to abide by the decision of the arbitrator instead of going to the civil Court and the arbitra-

tor had full powers to give his award in respect of all disputes arising under the contract except those which were specifically exempted under clause 70, under which the reference was made to the arbitrator, the award cannot be held to be without jurisdiction.

22. Consequently, the decision of the trial Court is affirmed and the appeal is dismissed with no order as to costs.

Appeal dismissed.

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PREM CHAND JAIN AND
D. S. TEWATIA JJ.

Ram Niwas, Petitioner v. Mithan Lal and others, Respondents.

Civil Revn. No. 34 of 1978, D/- 10-8-1979.*

Civil P. C. (Amendment) Act (1976), S. 97 (2) (a) and (3) — Interpretation of — S. 97 (2) saves only pending matters enumerated in Cls. (a) to (z) — Appeal against order dismissing objection under S. 47 filed after Amending Act came into force is incompetent. (Civil P. C. (1908) Ss. 2 (2), 47 as amended in 1976). (Interpretation of Statutes — Intention of Legislature to save vested rights — Harmonious construction).

Sub-sec. (2) S. 97 of the Amending Act, 1976 has to be interpreted keeping in view the well-known rule of interpretation that the language of statute has to be so construed as to save the vested right from being taken away if that can be done without doing violence to the language of the statute and if it does not conflict with the express or necessarily implied intention of the legislature which it sought to give effect to by enacting the said statute. However, one can also not lose sight of another equally important rule of interpretation of statutes that the Court has to harmonise various provisions as it has to be assumed that the legislature does not enact anything that is irrelevant or contrary to the purpose behind the enactment.

(Para 18)

So construed S. 97 (2) of the Amending Act was intended to save the pending matters only as enumerated in Cls. (a) to (z) of S. 97 (2). The use of the expression "and without prejudice to the generality of the provisions of S. 6 General Clauses Act 1897" therein was by way of abundant caution with a view to fully effectuate the intention of the legislature to save the enumerated pending matters. It follows that cl. (a) of sub-sec. (2) of S. 97 of the Amending Act saves only the pending appeal against the determination of the objections filed under S. 47, that is, the pending appeal should not be non-suited on the ground that no such appeal was competent by virtue of cl. (2) of S. 2 of the principal Act, as amended by S. 3 of the Amending Act. Hence an appeal against an order dismissing an objection under S. 47 of the Code filed after the Amendment Act came into force is incompetent and has to be dismissed. Case law discussed.

(Paras 19, 21, 24)

Cases Referred: Chronological Paras

AIR 1978 Orissa 129	2, 8
(1978) 80 Punj LR 368	2, 6, 7
(1978) 80 Punj LR 779	2, 7
AIR 1978 Raj 127	2, 9
AIR 1975 SC 1843	11
AIR 1957 SC 540	10, 11
AIR 1927 PC 242	11
1905 AC 369 : 74 LJ PC 77, Sugar Refining Co. Ltd., Irving	11

P. C. Mehta, for Petitioner; Hari Mital, for Respondents.

D. S. TEWATIA, J.:— The determination of the ambit of sub-ss. (2) (a) and (3) of S. 97 of the Civil P. C. (Amendment) Act, 1976, hereinafter referred to as the Amending Act, is the legal issue of some substance that falls for consideration in this referred revision petition.

2. This revision petition, in the first instance, came up before Goyal, J. who finding himself unable to subscribe to the view enunciated by Sharma, J. in two reported decisions in Darshan Kumar v. Raghunandan Sharma, (1978) 80 Pun LR 368 and Surjit Singh v. Sardara Singh, (1978) 80 Pun LR 779 and a similar view taken in Orissa High Court decision reported in Nanda Kishore Moharana v. Mahabir Prasad Lath, AIR 1978 Orissa 129 and also finding a contrary view being taken in Mohan Dass v. Kamala Devi, AIR 1978 Raj 127, referred the matter to the larger Bench and that is how the matter is before us.

3. In order to appreciate the legal point, a reference to certain basic facts at this very stage would be relevant. The petitioner herein preferred objections under S. 47 of the Civil P. C. which were dismissed by the executing Court, vide order dated 16-7-1977,

*(Against order of N. S. Rao Dist. J., Hissar, D/- 15-12-1977.)

Against that order, the objector preferred an appeal to the District Judge who held that, in view of the amendment effected in S. 2 (2) (a) of the Civil P. C. by S. 3 of the Amending Act, the order passed under S. 47 of the Civil P. C. ceased to be a decree and, therefore, no appeal was competent. This order came to be assailed in the High Court in the present revision petition.

4. For facility of reference, the relevant provisions of the Civil P. C. as these stood prior to the amendment and after the amendment deserve to be noticed at this stage:

5. Sub-clause (a) of cl. (2) of S. 2 of the unamended Civil P. C. was in the following terms:—

"2. In this Act, unless there is anything repugnant in the subject or context—

* * * *

(2) 'decree' means the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final. It shall be deemed to include the rejection of a plaint and the determination of any question within S. 47 or S. 144, but shall not include—

(a) any adjudication from which an appeal lies as an appeal from an order, or

* * * *"

6. Sub-clause (a) of cl. (2) of S. 2 of the amended Civil P. C. is in the following terms:

"2. In this Act, unless there is anything repugnant in the subject or context—

* * * *

2. 'decree' means the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final. It shall be deemed to include the rejection of a plaint and the determination of any question within S. 144, but shall not include—

(a) any adjudication from which an appeal lies as an appeal from an order, or

* * * *"

Further the relevant provisions of S. 97 of the Amending Act are as under:—

"97. (1) Any amendment made, or any provision inserted in the principal Act by a State Legislature or a High Court before the commencement of this Act shall, except in so far as such amendment or provision is consistent with the provisions of the principal Act as amended by this Act, stand repealed.

(2) Notwithstanding that the provisions of this Act have come into force on the repeal under sub-s. (1) has taken effect, and without prejudice to the generality of the provisions of S. 6 of the General Clauses Act, 1897 (10 of 1897)—

(a) the amendment made to cl. (2) of S. 2 of the principal Act by S. 3 of this shall not affect any appeal against the determination of any such question as is referred to in S. 47 and every such appeal shall be dealt with as if the said S. 3 had not come into force;

* * * *

(3) Save as otherwise provided in sub-sec. (2), the provisions of the principal Act, as amended by this Act, shall apply to every suit, proceeding, appeal or application, pending at the commencement of this Act or instituted or filed after such commencement, notwithstanding the fact that the right, or cause of action, in pursuance of which such suit, proceeding, appeal or application is instituted or filed, had been acquired or had accrued before such commencement".

The facts involved in the case of Darshan Kumar (supra) were that one Vishnu Dutt Aggarwal, owner of the property in dispute, on 2-9-1964, obtained an order of ejectment against one Raghunandan Sharma. Before this order could be executed, Darshan Kumar petitioner purchased the suit property from Vishnu Dutt Aggarwal on 7-7-1975. He then on 1-9-1976 filed a suit for possession of the said property on the ground that the tenancy of Raghunandan Sharma had come to an end and he was a trespasser. In the return an objection was taken that the suit for possession was not maintainable as the petitioners should have executed the order of ejectment obtained by Vishnu Dutt Aggarwal. On 30-11-1976, petitioner Darshan Kumar filed an application before the learned trial Court that suit under Section 47, sub-sec. (2) of the Civil P. C. as unamended, be converted into an execution petition. This prayer was turned down by the learned trial Court on the ground that sub-sec. (2) of Section 47 of the Code had, by then, been deleted and it was not open to him to convert

the suit into an execution petition. It is this order that came up in challenge in the revision petition in the High Court, Sharma, J., who decided the revision petition, observed that the opening words used in sub-sec. (3) of Section 97 of the Amending Act were 'save as otherwise provided in sub-sec. (2)'. These words clearly implied that sub-sec. (2) should dominate the field and sub-sec. (3) would apply only to those cases to which sub-sec. (2) would not be applicable. And that substantive rights of the litigants had thus been preserved by the legislature under sub-sec. (2) of Section 97 by expressly laying down that the provisions of that statute would not affect the generality of the provisions of Section 6 of the General Clauses Act and thus Section 6 of the General Clauses Act enjoyed precedence over the provisions of Section 97 of the Amending Act.

7. In Surjit Singh's case (supra), the facts were that a decree for possession by way of pre-emption was passed in respect of agricultural land. When the respondent took out execution proceedings, the petitioner therein raised an objection that the decree was unexecutable on the ground that if execution was allowed, the total land which the respondent would come to possess would go beyond his permissible area. These objections were dismissed by the learned executing Court on 22-4-1978. The petitioner went up in appeal before the learned Additional District Judge, Ambala. That appeal was dismissed on the ground that because of the amended Civil P. C. no appeal lay against the order passed by the learned executing Court dismissing the objections filed under Section 47 of the Code of Civil Procedure. Following his earlier decision in Darshan Kumar case (supra), Sharma, J. observed that substantive rights of the parties which became subject-matter of proceedings instituted prior to the amendment of the Code had been preserved by the legislature under sub-sec. (2) of S. 97 of the Amending Act.

8. In Nanda Kishore Maharana's case (supra), the facts were that the executing Court dismissed the objections preferred under Section 47 of the Code. The aggrieved party preferred an appeal before the District Judge on 4-7-1975. when that appeal failed, the aggrieved party preferred a second appeal in the High Court. In the High Court the respondent raised a preliminary objection challenging the maintainability of the appeal on the ground that by the amendment of the Code in the year 1976 orders passed under Section 47 of the Code would not be taken to be a decree and so that appellant could not prefer the said appeal against the order of the Court below determining a question under Section 47 of the Civil P. C. In the facts mentioned in the judgment it is not clear as to whether the appeal was preferred after the Amending Act had come into force or it was at that time pending. The learned Judge, however, took the view that the provisions of sub-sec. (2) of Section 97 of the Amending Act protected the right that existed prior to the coming in force of the Amending Act.

9. The facts involved in Mohan Dass, case (supra) were that it was a case of special leave under Section 18 of the Rajasthan High Court Ordinance, 1949, directed against the judgment of the learned Single Judge dated 9-5-1977. A preliminary objection was raised that in view of the amendment of cl. (2) of Section 2 of the principal Act by Section 3 of the Amending Act, the appeal was not maintainable. P. D. Kudal, J., who delivered the judgment for the Court, repelled the contention with the following observations:

".....The basic question for consideration is, whether by the Amending Act, 1976, the necessary intendment can be inferred by which a right of appeal has been taken away. In the scheme of the Amending Act, 1976, it is writ large that the litigation should be shortened and curtailed and by omission of the words 'Section 47 or', the orders under Section 47, Civil P. C. are no more appealable. The intention of the Legislature, therefore, is that decree-holder should be able to reap the fruits of his decree as expeditiously as possible, and that the judgment-debtor should not be allowed to have a second inning by way of frivolous objections and thus defeat the very purpose of the decree. The Legislature further intended that execution matter should be disposed of as expeditiously as possible and hence these amendments. In our considered opinion, the necessary intendment can be clearly inferred from the fact that appeals against the orders under Section 47, Civil P. C. are barred".

We, however, find no detailed discussion in any of the decided cases referred to us from either side.

10. Mr. P. C. Mehta, learned counsel for the petitioner, has contended that the language of cl. (a) of sub-sec. (2) and sub-sec. (3) of Section 97 of the Amending Act leaves no scope for any doubt that application of cl. 6 of the General Clauses Act far from being dispensed with was on the contrary invoked in express terms by the Amending Act and that once it is held that clause 6 of the General Clauses Act continued to apply, then all rights that vested in a litigant on the date of the filing of a suit in view of the law then prevailing would remain intact and available to the litigating parties throughout the career of their suits. In support of the above wide proposition, he sought sustenance from the following observations of their Lordships of the Supreme Court in Garikapati Veeraya v. N. Subbiah Chaudhry, AIR 1957 SC 540.

"From the decisions cited above the following principles clearly emerge:

(i) That the legal pursuit of a remedy, suit, appeal and second appeal are really but steps in a series of proceedings all connected by an intrinsic unity and are to be regarded as one legal proceeding.

(ii) The right of appeal is not a mere matter of procedure but is a substantive right.

(iii) The institution of the suit carries with it the implication that all rights of appeal then in force are preserved to the parties thereto till the rest of the career of the suit.

(iv) The right of appeal is a vested right and such a right to enter the superior Court accrues to the litigant and exists as on and from the date the lis commences and although it may be actually exercised when the adverse judgment is pronounced such right is to be governed by the law prevailing at the date of the institution of the suit or proceeding and not by the law that prevails at the date of its decision or at the date of the filing of the appeal.

(v) This vested right of appeal can be taken away only by a subsequent enactment, if it so provides expressly or by necessary intendment and not otherwise".

11. The learned counsel for the petitioner also placed reliance on Jose Da Costa v. Bascora Sadashiva Sinai Narcornin, AIR 1975 SC 1843, and drew our pointed attention to the following observations therefrom:

"Before ascertaining the effect of the enactments aforesaid passed by the Central Legislature on pending suits or appeals, it would be appropriate to bear in mind two well-established principles. The first is that 'While provisions of a statute dealing merely with matters of procedure may properly, unless that construction be textually inadmissible, have retrospective effect attributed to them, provisions which touch a right in existence at the passing of the statute are not to be applied retrospectively in the absence of express enactment or necessary intendment' (see Delhi Cloth and General Mills Co. Ltd. v. Income-tax Commr.) 54 Ind. App. 421: (AIR 1927 PC 242). The second is that a right of appeal being a substantive right the institution of a suit carries with it the implication that all successive appeals available under the law then in force would be preserved to the parties to the suit throughout the rest of the career of the suit. There are two exceptions to the application of this rule, viz. (1) when by competent enactment such right of appeal is taken away expressly or impliedly with retrospective effect and (2) when the court to which appeal lay at the commencement of the suit stands abolished (see Garikapati Veeraya v. N. Subbiah Choudhry 1957 SCR 488: (AIR 1957 SC 540) and Colonial Sugar Refining Co. Ld., Irving, 1905 AC 369)".

There is no dispute with the proposition of law enunciated by their Lordships in the aforesaid two decisions, but whether any right vested in a litigant under the existing law, after the enforcement of a subsequent law, survives or not with or without the aid of Section 6 of the General Clauses Act would depend on the languge used in the Amending Act, and the intention of the legislature which the amending statute attempted to effectuate.

12. A bare reading of sub-sec. (3) minus the expression 'save as otherwise provided in sub-sec. (2)' would show that the legislature expressly intended the principal Act as amended to apply to every suit, proceeding, appeal or application pending at the commencement of the Amending Act or instituted or filed after such amendment notwithstanding the fact that the right or cause of action in pursuance of which such suit, proceedings, appeal or application was

instituted or filed had been acquired or had accrued before such commencement. The legislature could not have expressed its intention in language most unequivocal than the one we find used above in sub-sec. (3) and if sub-sec. (2) had stood as mentioned above, then no doubt whatsoever could be entertained that not only the suit, proceeding, appeal or application that were pending were to be governed by the principal Act as amended, but even those which were to be filed, were to be so governed despite the fact that right or cause of action had accrued, in pursuance whereof the suit, proceeding, appeal or application was to be instituted or filed had been acquired or had accrued before the commencement of the Amending Act. When considered in that undiluted form, that was the effect of sub-sec. (3).

13. Now we have to see as to what extent the expression 'save as otherwise provided in sub-sec. (2)' dilutes such drastic retrospective effect of the Amending Act. This takes us to sub-sec. (2) in order to examine the ambit of the said provision.

14. If sub-sec. (2) had stood minus the expression 'and without prejudice to the generality of the provisions of S. 6 of the General Clauses Act, 1897 (10 of 1897)' then there could be no controversy and doubt about the scope thereof which was to save from the application of the Amending Act only such pending matters as were enumerated in cls. (a) to (z) thereof, but then the question arises, what to make of the expression 'and without prejudice to the generality of the provisions of Section 6 of the General Clauses Act, 1897 (10 of 1897)'. The learned counsel for the petitioner interpreted the incorporation of the said expression in sub-sec. (2) as being intended by the legislature to protect such rights as accrued to a litigant on the filing of the suit under the then prevailing law for being availed throughout the career of the said suit in regard to matters enumerated in cls. (a) to (z) of sub-sec. (2) of Section 97 of the Amending Act.

15. On the other hand, on behalf of the respondents, it was argued that the use of the said expression in sub-sec. (2) signifies no such thing as urged on behalf of the petitioner. What it signifies, according to the learned counsel for the respondents, is that despite Section 6 of the General Clauses Act what the legislature intended to save were the pending matters enumerated in cls. (a) to (z) of sub-sec. (2) and nothing more.

16. At this stage, relevant provisions of Section 6 of the General Clauses Act require noticing:

"6. Where this Act, or any Central Act or Regulation made after the commencement of this Act repeals any enactment hitherto made or hereafter to be made then, unless a different intention appears, the repeal shall not—

(a) revive anything not in force or existing at the time at which the repeal takes effect; or

(b) affect the previous operation of any enactment so repealed or anything duly done or suffered thereunder; or

(c) affect any right, privilege, obligation or liability acquired, accrued or incurred under any enactment so repealed;

* * * *"

17. If one is to accept the interpretation put upon sub-sec. (2) on behalf of the petitioner, then sub-sec. (3) becomes totally redundant and otiose, but if we accept the interpretation sought to be put on behalf of the respondents, then use of the expression 'and without prejudice to the generality of the provisions of Section 6 of the General Clauses Act, 1897 (10 of 1897)' in sub-sec. (2) becomes totally irrelevant.

18. Sub-sec. (2) has to be interpreted keeping in view the well known rule of interpretation that the language of statute has to be so construed as to save the vested right from being taken away if that can be done without doing violence to the language of the statute and if it does not conflict with the express or necessarily implied intention of the legislature which it sought to give effect to by enacting the said statute. However, one can also not lose sight of another equally important rule of interpretation of statutes that the Court has to harmonise various provisions as it has to be assumed that the legislature does not enact anything that is irrelevant or contrary to the purpose behind the enactment.

19. When the construction of sub-sec. (2) is approached in the light of the aforesaid rule of interpretation, then one reaches an inescapable conclusion—

(1) that the legislature intended by incorporating sub-sec. (2) to save the enumerated pending matters alone from the application of the principal Act as amended;

(2) that by way of abundant caution the legislature used the expression 'and without prejudice to the generality of the provisions of Section 6 of the General Clauses Act, 1897 (10 of 1897),' in order to fully effectuate its intention of saving the pending matters enumerated in cls. (a) to (z) of sub-sec. (2); and

(3) that the use of the said expression was not intended at all by the legislature either to bring within the purview of sub-sec. (2) any pending matter that had not been enumerated therein or saving the institution of any such matter after the commencement of the Amending Act from the application thereof.

When sub-sec. (2) is so read, then this provision is completely harmonised with sub-sec. (3) and use of the expression 'and without prejudice to the generality of the provisions of Section 6 of the General Clauses Act, 1897 (10 of 1897)' in sub-sec. (2) is also not rendered irrelevant.

20. Mr. Mehta, learned counsel for the petitioner, then sought to argue that the perusal of cl. (a) of sub-sec. (2) of Section 97 of the Amending Act would show that the language used therein is different from the language used in the other clauses of sub-sec. (2) and that wherever the legislature intended to save matters pending before the commencement of the Amending Act, only it has expressly said so. Since in cl. (a) of sub-sec. (2) no such expression as 'pending immediately before the commencement of the said Section' as used in cls. (a) to (z) thereof is used, it would show that in regard to the appeal against the order disposing of the objections under Section 47, not only the pending appeal, but also the appeal to be filed is also intended to be protected.

21. We find no merit whatsoever in this contention. Cl. (a) of sub-sec. (2) can make sense when between the two words 'appeal' and 'against', either the word 'pending' or 'to be filed' or 'to be preferred' or 'to be instituted' is used. If the word 'pending' is used, then it clearly brings in accord this clause with the intention behind sub-s. (2) which was to save matters pending immediately before the coming into force of the relevant provisions of the principal Act, but if the words 'to be preferred' or 'to be filed' or 'to be instituted' are read between the two words 'appeal' and 'against' occurring in cl. (a), then it would render the amendment effected in cl. (2) of S. 2 of the principal Act by S. 3 of the Amending Act as wholly nugatory, in that it would protect the character of the order disposing of the objections arising even from a suit filed after the commencement of the Amending Act.

22. Our reasons for the aforesaid conclusions will become immediately clear from the mere reading of cl. (e) with the insertion of the latter category of words, as when the said words are so incorporated, cl. (a) would read:

"(a) the amendment made to cl. (2) of S. 2 of the principal Act by S. 3 of this Act shall not affect any appeal 'to be instituted' against the determination of any such question as is referred to in S. 47 and every such appeal shall be dealt with as if the said S. 3 had not come into force."

Clause (a), when so read in simple language, would mean this 'any appeal filed against the determination of any such question as is referred to in S. 47 shall be dealt with as if the said S. 3. which amended cl. (2) of S. 2 of the principal Act, had not come into force'. When so read, we find no limiting words in the clause which may confine the scope of saving to an appeal to be filed against an order disposing of objections under S. 47 arising only in a suit instituted prior to the commencement of the Amending Act alone.

23. For the aforesaid reasons, we are clearly of the view that cl. (a) of sub-sec. (2) of S. 97 of the Amending Act saves only the pending appeal against the determination of the objections filed under S. 47, that is, the pending appeal should not be non-suited on the ground that no such appeal was competent by virtue of cl. (2) of S. 2 of the principal Act, as amended by S. 3 of the Amending Act.

24. In the present case, the appeal was not pending before the District Judge when the Amending Act became operative. The appeal in question was filed after the Amending Act came into force. Such appeal on the day on which it was filed was clearly incompetent and, therefore, the District Judge rightly dismissed the same on that ground. Accordingly, we find no merit in this revision petition and dismiss the same but with no order as to costs.

Revision dismissed.

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S. S. SANDHAWALIA, C. J. AND GOKAL CHAND MITAL, J.

Smt. Lajwant Kaur and another, Appellants v. Abnashi Singh and others, Respondents.

Letters Patent Appeal No. 415 of 1976, D/- 20-3-1979.*

(A) Civil P. C. (1908), O. 2, R. 2 — Suit when barred under — Earlier suit for injunction and declaration that business run by defendant was a joint family business dismissed — All joint family property not included in earlier suit — Subsequent suit for partition of all joint family property and business — Cause of action in previous suit held was different — Subsequent suit not barred by principles of O. 2, R. 2. (Paras 5, 6)

(B) Limitation Act (1963), Arts. 110, 65 — Suit for partition — Limitation — Art. 110 applicable only when property is joint family property which is sought to be partitioned — Property in dispute found to have ceased to be joint family property long before 12 years prior to filing suit when one co-sharer had given notice of his intention to separate from joint Hindu family — Art. 110 held was not applicable — Plaintiff however held entitled to maintain suit within 12 years from date when possession of defendant became adverse to him by virtue of Art. 65. AIR 1977 Punj & Har 1, Reversed. (Paras 7, 8)

Cases Referred: Chronological Paras

1959 SCR 1287 : AIR 1959 SC 198	9
AIR 1958 SC 827	9
AIR 1949 East Punj 243	6

K. S. Thapar with Deepak Thapar, for Appellants; Bhagirath Dass with S. K. Hirajee, for Respondents.

G. C. MITAL, J.: — This is a Letters Patent Appeal against the judgment of a learned single Judge, dated Aug. 25, 1976, in R. F. A. No. 6 of 1964, by which the plaintiffs' appeal was allowed and the case was remanded to the trial Court for further proceedings in accordance with law.

2. Abnashi Singh, Tarlok Singh and their mother Smt. Rajwans Kaur filed a suit for partition of joint properties and for rendition of accounts against Smt. Lajwant Kaur, widow of Bhupinder Singh, and Iqbal Singh son of Bhupinder Singh, Bhupinder Singh was brother of Avnashi Singh and Tarlok Singh plaintiffs and their father was Lakha Singh. Bhupinder Singh had died before the institution of the suit.

3. In the aforesaid suit, out of which this appeal arises, the plaintiffs stated that Lakha Singh with his sons formed a joint Hindu family of which he was the Karta and after his death, his eldest son Bhupinder Singh took over the family business of printing press under the name and style of Wazir Hind Press, Hall Hazar, Amritsar and after the death of Bhupinder Singh on September 28, 1952, his widow Smt. Lajwant Kaur took over the business and started running the same. Besides this, the joint Hindu family owned house bearing No. 384/7, situate in Kucha Kahan Singh, Amritsar. The plaintiffs claimed partition of the aforesaid properties as a dispute arose between them about the management and control of the family business. It is pleaded that the plaintiffs earlier brought Civil Suit No. 104 of 1953, for a declaration that the property Wazir Hind Press, its assets and liabilities and family house were the properties of the joint Hindu family and for the grant of a permanent injunction restraining Smt. Lajwant Kaur from interfering in the enjoyment by the plaintiffs of the joint Hindu family property including Wazir Hind Press and also restraining her from refusing to allow the plaintiffs from acting as Karta and Manager of the joint family assets. That earlier suit for injunction was decreed by the trial Court on March 31, 1954, but on appeal, a Division Bench of this Court on April 11, 1960, allowed the appeal and dismissed the suit for injunction on the finding that the joint Hindu family had disrupted in 1944 when Avnashi Singh plaintiff had served notice to separate from the Hindu undivided family and, therefore, the declaration sought for that the properties belong to Hindu undivided family could not be granted. The Division Bench specifically observed as follows:—

"They can if they are so advised, file a suit for actual partition of the property or seek any other appropriate relief."

That is how the plaintiffs filed the present suit for partition of the joint pro-

*(Against judgment of M. R. Sharma, J., reported in AIR 1977 Punj & Har 1).

AIR 1979 PUNJAB & HARYANA 229

RAJENDRA NATH MITTAL, J.

Manak Chand, Petitioner **v.** Suresh Chand Jain, Respondent.

Civil Revn. No. 324 of 1979, D/- 28-3-1979.*

Civil P. C. (5 of 1908), S. 35-B (1), (2) — Awarding costs for causing delay to a party in a proceeding — Payment on the next following date — It is condition precedent for further prosecution of case — Fact of non-payment of costs not brought to the notice of the Court on the date — Party taking steps or leading evidence — He cannot be deprived of his right to further prosecute the case on subsequent date. (Para 4)

B. S. Tyagi for Adarsh Goyal, for Petitioner; N. C. Jain with V. K. Jain, for Respondent.

ORDER:— This revision petition has been filed by the respondent against the order of the Rent Controller, Hissar, dated Jan. 29, 1979, whereby he rejected the application for striking off the right to prosecute the application for fixation of fair rent by Suresh Chand Jain, applicant.

2. Briefly the facts are that Suresh Chand Jain filed an application for fixation of fair rent, under S. 4 of the Haryana Urban (Control of Rent and Eviction) Act, against Manak Chand respondent. The Rent Controller fixed various dates for the evidence of the petitioner but he could not lead full evidence. Ultimately Oct. 3, 1978 was fixed for the statement of the petitioner. On that date he made a request for summoning the additional witnesses. The learned Rent Controller allowed the request subject to payment of Rs. 15 as costs and adjourned the case to Nov. 4, 1978. On that date too the petitioner did not produce the additional witnesses nor he himself appeared in the witness box. He also did not pay the costs awarded on Oct. 3, 1978. On his request the case was again adjourned to Nov. 29, 1978, subject to payment of Rs. 10 as costs. On the adjourned date he again did not pay the costs which were awarded on Oct. 3, 1978 and on Nov. 4, 1978. On December 19, 1978, the respondent filed an application that the petitioner has forfeited his right of prosecution of the application for fair rent under S. 35-B of the Civil P. C. as he had failed to pay the costs. The Rent Controller dismissed the application. The respondent has come up in revision petition against that order of the Rent Controller.

3. The question that arises for determination in the present case is that if costs are awarded against the petitioner under S. 35-B of the Civil P. C. which are not paid on the next date of hearing and matter is not brought to the notice of the Court on that date, can he be debarred from prosecuting the case on a subsequent date. In order to determine this question, it will be proper to refer to the provisions of Section 35-B of the Code which reads as follows:—

"35-B Costs of causing delay—

(1) If, on any date fixed for the hearing of a suit or for taking any step therein, a party to the suit—

(a) fails to take the step which he was required by or under this Code to take on that date, or

(b) obtains an adjournment for taking such step or for producing evidence or on any other ground,

the Court may, for reasons to be recorded, make an order requiring such party to pay to the other party such costs as would, in the opinion of the Court, be reasonably sufficient to reimburse the other party in respect of the expenses incurred by him in attending the Court on that date, and payment of such costs, on the date next following the date of such order, shall be a condition precedent to the further prosecution of—

(a) the suit by the plaintiff, where the plaintiff was ordered to pay such costs,

(b) the defence by the defendant, where the defendant was ordered to pay such costs.

Explanation.— Where separate defences have been raised by the defendants or groups of defendants, payment of such costs shall be a condition precedent to the further prosecution of the defence by such defendants or groups of defendants as have been ordered by the Court to pay such costs.

(2) The costs, ordered to be paid under sub-sec. (1), shall not, if paid,

*(Against order of Suresh Chand Jain, Rent Controller, Hissar, D/- 29-1-1979.)

be included in the costs awarded in the decree passed in the suit; but, if such costs are not paid, a separate order shall be drawn up indicating the amount of such costs and the names and addresses of the persons by whom such costs are payable and the order so drawn up shall be executable against such persons."

4. From a reading of the above section, it is evident that if costs are awarded to the respondent on the ground that the petitioner failed to take the step which he was required under the Code to take on some date, or obtained an adjournment for taking such step or for producing evidence or on any other ground, the payment of costs on the next following date of the order shall be a condition precedent for further prosecution of the case by the petitioner. It is further evident that if he fails to do so, he would not be allowed to prosecute the case. The words 'on the date next following the date of such order' are important. (Emphasis supplied by underlining the words). The section deprives the petitioner to prosecute the case if he fails to pay the costs, on the date next following the date of the order. This is an extreme penalty and shall not be imposed unless the case squarely falls within the four corners of the section. It is also well established that a penal section is to be construed strictly. The provisions of the section, being penal in nature, shall apply where on the date when the costs are to be paid, the fact is brought to the notice of the Court before the party liable to pay the costs takes step in the case. If on that date it is not brought to the notice of the Court and the party takes step or leads evidence, he cannot be deprived of his right to further prosecute the case on the subsequent date. The reason for arriving at this conclusion is that if the fact had been brought to his notice at the relevant time, he might have paid the costs. It is also worth highlighting that if costs are not paid to a party, he has got the right to recover them under sub-sec. (2). After taking into consideration all the circumstances, I am of the opinion that in the present case, the Court rightly rejected the application of Manak Chand, revision petitioner. There is, therefore, no scope for interference with the order of the Rent Controller.

5. For the reasons recorded above, the revision petition fails and the same is dismissed with no order as to costs. The parties through their counsel are directed to appear in the trial Court on April 23, 1979.

Petition dismissed.

AIR 1979 PUNJAB & HARYANA 230
FULL BENCH

S. S. SANDHAWALIA, C. J., PREM CHAND JAIN AND S. S. KANG, JJ.

State of Haryana, Appellant v. Man Singh and others, Respondents.

Letters Patent Appeal No. 200 of 1977, D/- 29-3-1979.*

Land Acquisition Act (1894), S. 18 — Wrong reference by the Collector under S. 18 — Court is competent to go behind the validity of reference and reject it. AIR 1978 Punj & Har 27, Reversed; AIR 1975 Punj & Har 52 (FB) and AIR 1979 SC 404, Rel. on.

(Para 4)

Cases Referred: Chronological Paras

AIR 1979 SC 404 4
AIR 1975 Punj & Har 52 (FB) 4
AIR 1958 Punj 490 3, 4

A. S. Nehra, Addl. Advocate General, Haryana with Hanwant Singh Hooda, for Appellant.

S. S. SANDHAWALIA, C. J.:— A supposed conflict of precedent had necessitated the admission of this Letters Patent appeal for hearing before the Full Bench. However, it is now the unrebutted stand of the appellant-State of Haryana that the matter stands concluded in their favour both by a Full Bench judgment of this Court as also its approval by the final Court.

2. In view of the above the briefest reference to the facts suffices. The respondent-landowners aggrieved by the compensation awarded to them by the Collector in acquisition proceedings preferred applications under Section 18 of the Land Acquisition Act seeking a reference to the Court for enhancement of the compensation. After notice to the Government, the references were

*(Against judgment of O. Chinnappa Reddy, J. reported in AIR 1978 Punj & Har 27.)

duly made to the Court. However, before the Additional District Judge, a preliminary objection was strenuously raised on behalf of the appellant-State that these references were incompetent as the conditions prescribed by Section 18 of the Land Acquisition Act were not fulfilled. The specific ground taken was that the references were sought after the prescribed period of limitation and that the claimants having accepted the compensation without protest were disentitled to seek a reference to the Court. The preliminary objection was overruled by the learned Additional District Judge and compensation was enhanced by him.

3. The State of Haryana then preferred regular first appeals against the said judgment. Therein the only question raised was that the references were incompetent for specific reasons which had been urged before the learned Additional District Judge. The learned single Judge noticed that the solitary issue that arose for decision was whether it was open to a Court to which a reference is made under Section 18 of the Land Acquisition Act to go behind it and investigate whether the same was properly made. Both on principle and following a number of authorities including the Division Bench judgment of this Court in Hari Krishan Khosla v. State of Pepsu, AIR 1958 Punj 490 (by which he held himself to be bound) the learned single Judge held that the Court had no power to go behind the reference made to it by the Collector under Section 18 and dismissed all the appeals.

4. Despite service, no appearance has been put in on behalf of the respondents. Mr. Nehra, learned Addl. Advocate General appearing on behalf of the appellant rightly contends that the counsel for the parties before the learned single Judge were sorely remiss in not bringing to his notice the Full Bench judgment of this Court reported in Swatantra Land & Finance Pvt. Ltd. v. State of Haryana, AIR 1975 Punj & Har 52, wherein Hari Krishan Khosla's case (supra) was expressly overruled. This apart, it is further pointed out that the controversy has now been set at rest by the recent judgment of their Lordships in Mohammed Hasnuddin v. State of Maharashtra, AIR 1979 SC 404 wherein it has been observed as follows:—

"..... Even if a reference is wrongly made by the Collector the Court will still have to determine the validity of the reference because the very jurisdiction of the Court to hear a reference depends on a proper reference being made under Section 18, and if the reference is not proper, there is no jurisdiction in the Court to hear the reference. It follows that it is the duty of the Court to see that the statutory conditions laid down in Section 18 have been complied with, and it is not debarred from satisfying itself that the reference which it is called upon to hear is a valid reference. It is only a valid reference which gives jurisdiction to the Court and, therefore, the Court has to ask itself the question whether it has jurisdiction to entertain the reference."

Equally it calls for pointed notice that in the aforesaid case their Lordships have expressly approved the Full Bench judgment in Swatantra Land & Finance Pvt. Ltd.'s case and in categoric terms held that the contrary decisions thereto do not lay down good law and have been in terms overruled. It has not been disputed before us that in the present case, the references were claimed beyond the prescribed period of time and further that the respondent-landowners were estopped from presenting the same for the reason of having accepted the compensation without protest. That being so, this appeal has necessarily to be allowed, the order of the learned single Judge is set aside and the references made by the respondent-landowners are dismissed. There will be no order as to costs.

Appeal allowed.

AIR 1979 PUNJAB & HARYANA 231

J. V. GUPTA, J.

Kesho Dass, Appellant v. Union of India and another, Respondents.

Ex. First Appeal No. 633 of 1974, D/- 3-4-1979.*

Limitation Act (1963), S. 31; Art. 136 — Execution application — Bar pro-

*(From order of Sr. Sub. J., Gurdaspur, D/- 23-4-1974.)

vided under S. 31 — When operates — First execution application consigned to record room on 21-12-1963 — Second application held could be filed within further 3 years under old Act — As such limitation cannot be said to have expired before 1-1-1964 i.e. date of commencement of new Act — S. 31 therefore not attracted — Application filed within 12 years from date of decree sought to be executed held was within limitation under new Art. 136.

(Para 2)

Cases Referred: Chronological Paras

AIR 1975 Punj & Har 246 (FB) 2
(1973) 75 Pun LR (D) 127 2

T. S. Doabia, for Appellant; S. C. Goyal, Sr. Advocate (O. P. Goyal with him), for Respondent No. 1.

JUDGMENT:— In order to appreciate the controversy between the parties, the following facts may be noticed:—

M/s. Surjit & Co. obtained a money decree against the Union of India, for a sum of Rs. 32696/2/- on 24th July, 1954. An appeal was filed in the High Court by the Union of India against the said decree in which the amount was reduced from Rs. 32696/2/- to Rs. 10570/2/-, vide its judgment and decree dated 26th Oct. 1960. Before the execution proceedings were stayed by the High Court, the decree-holder realised the decretal amount on 10th Feb., 1956, on furnishing security to the satisfaction of the Executing Court. Kesho Dass, appellant in the present appeal, stood surety for the refund of the amount in case the appeal was allowed. After the decision of the High Court, Union of India made an application under Section 144 read with S. 145 of the Civil P. C. on 15th Dec., 1962, against both i.e. the decree-holder M/s. Surjit & Co., as well as against the surety Kesho Dass. During the pendency of that application, Kesho Dass appellant admitted the claim of the Union of India in his application dated 30th Oct., 1963, which is Exhibit DE/4, on the record. He stated in the said application that in case the amount is not realised from the decree-holder, i.e. M/s. Surjit & Co. the balance may be deducted out of a decree standing in his favour against the Union of India passed by the Court on 16th June, 1961. Consequently, the Executing Court vide its order dated 21st Dec., 1963, copy of which is Exhibit DH/3 on the record, consigned this application to the record room. On 21st July, 1964, again a second application for execution under S. 144 read with S. 145 of the Civil P. C., was made, but the same was also consigned to the record room along with the application filed on 20th August, 1964, under O. 21, R. 68 of the Civil P. C. on 7th Nov., 1964. The present application, out of which this appeal has arisen was filed on 16th April, 1970, to which Kesho Dass, surety, filed the present objection petition. The Executing Court framed the following issues on the pleadings of the parties:—

1. Whether the execution application does not lie?

2. Whether the execution application is within time?

3. Whether the execution does not lie against the objector, without executing it against the J. D.?

4. Whether the objector is not liable as alleged?

The Executing Court came to the conclusion that the objections filed by the surety are not valid. The execution application is within time and the objector Kesho Dass being liable is being properly proceeded against.

2. In this appeal filed by Kesho Dass, the main argument of the learned counsel is that the application dated 15th April, 1970, filed by Union of India, is barred by time. In support of his contention, he relied upon S. 31 of the Limitation Act, 1963, (hereinafter referred to as the new Act) which reads as under:—

"Provision as to barred or pending suits, etc.

Nothing in this Act shall,—

(a) enable any suit, appeal or application to be instituted, preferred or made for which the period of limitation prescribed by the Indian Limitation Act, 1908, expired before the commencement of this Act; or

(b) affect any suit, appeal or application instituted, preferred or made before, and pending at such commencement."

According to the learned counsel, Union of India could not take benefit of the new Act, because of S. 31 as limitation had already expired and no application was pending at the commencement of

the new Act. It may be noticed here that under the Indian Limitation Act, 1908, (hereinafter called the old Act) Article 182 provided the limitation of 3 years for the execution of a decree; whereas under the new Act, Art. 136 provides a period of 12 years for the execution of any decree or order of a Civil Court. It will also be relevant to note here that S. 48 of the Civil P. C. (prior to its repeal by the new Act) provided that no order for the execution of a decree shall be made upon any fresh application presented after the expiration of 12 years from the date of the decree sought to be executed. So under the old law, an application was to be made within three years from the date of decree under Art. 182 of the old Act, but the maximum period was 12 years, after which no fresh application could be made. In other words, any fresh application was to be made within three years from the earlier application, which was to be treated as a step in aid for the execution. The learned counsel for the appellant contended that the Union of India could only avail of the provisions of the old Act read with S. 48 of the Civil P. C. if it had made an application within three years from the last application which was consigned to the record room on 7th November, 1964. Since the present application was filed after more than three years, the same is time barred under the old Act. I am unable to agree with the learned counsel. The provisions of Section 31 are only attracted if any suit, appeal or application to be instituted, preferred or made for which the period of limitation prescribed by the old Act had expired before the commencement of the new Act. Admittedly, the period under the old Act read with S. 48 of the Civil P. C. had not expired before the commencement of the new Act as obviously the second execution application which was to be filed subsequent to 21-12-73 when the first application was consigned to the record room, cannot be said to be an application for which the period of three years provided in Art. 188 of the old Act expired before 1st Jan., 1964. Therefore, cl. (a) of S. 31 is not attracted. As regards cl. (b), the requirement is that an application must be pending at the commencement of the new Act. Admittedly no application as such was pending at the commencement of the Act and limitation under the old Act was still available to the Union of India under Art. 182 and therefore, cl. (b) is not attracted. It will also be relevant to note here that by virtue of Section 28 of the new Act, certain amendments have been made in the Indian Easements Act, as well as in S. 48 of the Civil P. C. Section 28 reads as under:—

"Amendment of certain Acts:— In the Indian Easements Act, 1882, in Section 15, for the words 'sixty years' the words 'thirty years' shall be substituted and in the Civil P. C. 1908 Section 48 shall be omitted."

In order to make an application after coming into force of the new Act, Union of India could only avail of the provisions of Art. 136 of the new Act. For this view, support can be had from a judgment of the Delhi High Court, reported in Daljit Singh v. Din Dayal, (1973) 75 Pun LR(D) 127; wherein it was held that the period of limitation for the next execution application has to be reckoned from that date under an Article which was in force on that date. Art. 136 of the new Act, unlike Art. 182 of the old Act, does not provide a period of limitation for successive applications for execution of a decree. It provides a consolidated period of 12 years for the execution of a decree. In the case before the Delhi High Court also, decree was passed when the old Act was in force and the period of limitation for filing an application for execution of the decree was three years prescribed under Article 182 of that Act. Admittedly, in that case the first application was within time as required by the old Act, but the same was dismissed on 27th July, 1966. The period of limitation for the next execution application had to be reckoned from a date under an Article which was in force on that date. Admittedly, in the case in hand, the present application was filed within 12 years from the order of the High Court dated 26th Oct., 1960, and, therefore, was within limitation under Art. 136 of the new Act. The learned counsel for the appellant placed reliance on a case reported as Amar Nath v. Mul

Raj AIR 1975 Punj & Har 246 (FB), in support of his contention that if the execution application was already barred by time under the old Act, the provisions of the new Act could not be invoked. Of course, it is so, as Section 31 (a) of the new Act is quite clear and in the case cited above, the execution application has already become time barred before the new Act came into force. Admittedly, in the present case, Union of India had the limitation under the old Act to make a fresh application and as a matter of fact it did make an application on 21st July, 1964, after coming into force of the new Act to which no objection was taken. Under the circumstances, in my view, S. 31 of the new Act is not attracted and the application was rightly held to be within time.

3. No other point arises in this case.

4. Hence the appeal fails and is dismissed with no order as to costs.

Appeal dismissed.

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S. S. SANDHAWALIA, C. J. AND GOKAL CHAND MITAL, J.

Atma Ram, Appellant v. Smt. Parsini and others, Respondents.

Letters Patent Appeal No. 521 of 1975, D/- 2-4-1979.*

(A) Succession Act (1925), S. 63 — Will — Attesting witness belonging to another village — No ground for discarding his statement — Non-production of other attesting witness — Not sufficient ground for upsetting the findings of fact recorded by courts below. Second Appeal No. 451 of 1972, D/- 16-9-1975 (Punj & Har), Reversed. (Paras 5, 6)

(B) Evidence Act (1872), S. 13 — Matter of Will directly and substantially involved in a previous litigation and finding recorded by courts about the due execution of Will — Relevant and valuable piece of evidence. Second Appeal No. 451 of 1972, D/- 16-9-1975 (Punj & Har), Reversed. (Para 8)

(C) Civil P. C. (1908), S. 100 — Second appeal — Courts below exercising their discretion and permitting defendant to lead secondary evidence after satisfying about the loss of the Will — Discretion should not be lightly interfered in appeal. Second Appeal No. 451 of 1972, D/- 16-9-1975 (Punj & Har), Reversed. (Para 10)

Cases Referred: Chronological Paras

AIR 1973 Cal 460	6
(1972) 74 Pun LR 625: AIR 1973 Punj 213 (FB)	12
(1969) 71 Pun LR 735	8, 9
1966 Cur LJ (Punj) 899	14
AIR 1964 Andh Pra 109	8
AIR 1964 Pat 66	8
AIR 1961 Bom 169	7, 9
AIR 1950 PC 34	8
AIR 1946 Lah 387	8
AIR 1937 PC 69	8
AIR 1931 PC 89	8

Y. P. Gandhi, for Appellant; S. L. Ahluwalia, for Respondents.

G. C. MITAL, J.:— This appeal under Clause X of the Letters Patent is directed against the judgment of a learned single Judge dated Sept. 16, 1975, in S. A. No. 451 of 1972, decreeing the suit of the plaintiff-respondent on reversing the concurrent judgments and decrees of the Courts below, by which the suit was dismissed.

2. Shrimati Parsini, plaintiff, filed the present suit for possession claiming the estate left by Bhagwana, as his daughter, against Atma Ram appellant and others, on May 26, 1966, on the ground that Bhagwana died on Sept. 2, 1958 and she being his daughter was entitled to succeed to the property which he possessed at the time of his death.

3. Atma Ram defendant-appellant contested the suit and denied that Smt. Parsini plaintiff was the daughter of Bhagwana and claimed succession to the estate left by Bhagwana on the basis of registered will dated Oct. 15, 1957. He also relied on the previous judgments delivered by the first appellate Court and the High Court between him and Ram Chand and Ram Piara, wherein the registered will was held to have been proved. He also pleaded that the suit is barred by limitation besides challenging the locus standi of the plaintiff to file the present suit.

4. On the pleadings of the parties, the following issues were framed:—

*(Against judgment of A. S. Bains, J., in S. A. No. 451 of 1972, D/- 16-9-1975.)

1. Whether the suit is within time? O.P.P.

2. Whether the plaintiff has any locus standi to file the present suit? O.P.P.

3. Whether the suit is properly valued for purposes of Court-fee and jurisdiction? O.P.P.

4. Whether the will is valid? If not, its effect? O.P.D.

5. Whether the plaintiff is daughter of Bhagwana? O.P.D.

6. Relief.

The learned trial Court, by its judgment and decree dated June 7, 1969, dismissed the suit holding that Smt. Parsini plaintiff is not daughter of Bhagwana, she has no locus standi to file the suit and that Bhagwana had executed a valid will, Exhibit D-2, in favour of Atma Ram defendant who is the rightful owner of the property in dispute. On appeal, the learned Additional District Judge maintained the findings recorded by the trial Court and dismissed the appeal on January 7, 1972. Smt. Parsini plaintiff filed a second appeal in this Court which has been allowed by a learned single Judge by judgment dated Sept. 16, 1975 holding that the plaintiff is the daughter of Bhagwana, she has locus standi to file the suit and that the execution of the will in favour of Atma Ram defendant is not proved. Consequently, the suit for possession was decreed.

5. Mr. Y. P. Gandhi, the learned counsel for Atma Ram defendant-appellant has sought to challenge the decision of the learned single Judge primarily on the ground that pure findings of fact were recorded by the trial Court and the first appellate Court and those concurrent findings of fact could not be reversed in second appeal in view of the various decisions of the Supreme Court and, therefore, argued that on this ground alone, the appeal deserves to be allowed and the judgment and decree of the first appellate Court deserves to be restored. So far as issue No. 4 regarding the will is concerned, we find from a reading of paras 25 to 28 of the judgment of the first appellate Court that relying on the statement of Banarsi Dass D.W. 1, a regular petition writer, Tulsi Ram D.W. 3, an attesting witness of the will, and Exhibit D-2, copy of register of documents maintained by Banarsi Dass, apart from other material on the record, it came to a finding of fact that the execution of the will left by Bhagwana was duly proved. This part of the judgment of the first appellate Court has been met by the learned single Judge at page 12 of his judgment wherein the sole ground for discarding the statement of Tulsi Ram D.W. 3 is that he belongs to another village. In our opinion, this is no reason to discard the statement of an attesting witness of a will. It deserves mention that the statement of Banarsi Dass D.W. 1, who is the petition writer, has not been discussed at all nor has it been rejected. The will has been held to be suspicious on one of the grounds that Aziz Khan Lambardar of the village, who was the other attesting witness of the will, has not been produced. The will has been held to be suspicious also on the ground that Bhagwana was about 95 years of age. For the reasons given by the learned single Judge we are not satisfied that the concurrent findings of fact recorded by the Courts below could be upset on these grounds. Accordingly, the decision of the learned single Judge on this aspect of the matter is reversed.

6. The learned counsel for the plaintiff-respondent then urged that there were two attesting witnesses and it was incumbent on the defendant to produce both of them and failure to do so would necessarily mean that the execution of the will is not proved. He placed reliance on Billeswar Kumar v. Smt. Nirupama Debi, AIR 1973 Cal 460. That case is distinguishable as the High Court upheld the finding of fact recorded by the first appellate Court that the will is not proved to be genuine on consideration of several factors in the case. If the learned Judges had held as a matter of law that unless all the attesting witnesses are produced as witnesses in the case, the execution of the will would not stand proved, we would have, with great respect, dissented from that view. It is for the Court of fact to believe one attesting witness and to uphold the will or to disbelieve all the attesting witnesses and hold the will to be not a genuine document. Hence, we repel the contention of the learned counsel as

in this case the first two Courts of fact have come to a firm finding of fact that the execution of the will, which is a registered document in this case, has been duly proved.

7. The trial Court and the first appellate Court also relied on Exhibits D-3 to D-7, some of which are judgments in the previous litigation between Atma Ram on one side and Ram Chand and Ram Piara on the other side. In that litigation also, Atma Ram relied on the registered will dated Oct. 15, 1957, which is the subject-matter of dispute in this case as well. The two Courts below found that these were relevant pieces of evidence under Section 13 of the Evidence Act and relying on them held that this was an additional factor for holding that the will in dispute was duly proved. The learned single Judge while adverting to these documents in his judgment at page 11, has observed that they could not be relied upon. It will be better to quote his words:—

"Admittedly these judgments are not inter partes. Parsini appellant was not a party to these proceedings and hence the same can have no effect on the present proceedings, as has been held in Ramaji Batanji v. Manohar Chintaman, AIR 1961 Bom 169. The Courts below have wrongly placed reliance on Section 13 of the Evidence Act, which is not applicable to the facts of the present case."

8. The learned counsel for the appellant has argued that the learned single Judge committed an error of law in coming to the conclusion that the judgments in the previous case are not relevant under S. 13 of the Evidence Act and in support of his argument has relied on Ganga Sagar v. Inam Ilahi, AIR 1946 Lah 387; Hira Lal v. Shivlal, (1969) 71 Pun LR 735, Gobinda Narayan Singh v. Sham Lal Singh, AIR 1931 PC 89, Kesho Prasad Singh v. Mt. Bhagjogna Kuer, AIR 1937 PC 69, Nataraja Pillai v. Subbaraya Chettiar, AIR 1950 PC 34, Smt. Venkatratnam v. Venkatanarasayamma AIR 1964 Andh Pra 109 and Mahabir Mahton v. Mt. Sonmati Kuer, AIR 1964 Pat 66, for the proposition that the previous decisions although not inter partes have high probative value and were relevant and admissible under Section 13 of the Evidence Act. He has pointed out from the documents, Exhibits D-7 and D-3, which are copies of judgments of the Additional District Judge and the trial Court in the previous litigation where an issue about the will in dispute was framed and the sole basis for decision in the previous case was to tilt on the finding of the issue about the will. In that litigation Atma Ram was the plaintiff who claimed possession of the land which was to belong to Bhagwana on the death of Smt. Naraini whose husband's collateral Bhagwana was. It will be useful to state here that Smt. Naraini made a gift in favour of Ram Chand and Ram Piara and that gift was challenged by Bhagwana as collateral of the husband of Smt. Naraini and he got a declaration that the gift would not affect his reversionary rights after the death of Smt. Naraini. Smt. Naraini died on June 27, 1957, and her property which was held by Ram Chand and Ram Piara donees would have come to be owned by Bhagwana as the next heir after the death of Smt. Naraini. Since Bhagwana died on Sept. 2, 1958, and after mutation of the property of Bhagwana was entered in favour of Atma Ram on January 5, 1959, on the basis of the will, he filed the previous suit for possession against Ram Chand and Ram Piara who disputed the will and contested his claim. Therefore, the will was directly in dispute in that case, the execution of which, on the preponderance of evidence, was held to be proved by the trial court vide Exhibit D-3, and by the first appellate Court vide Exhibit D-7, and the concurrent finding of fact was not disputed before the High Court in Exhibit D-6, possibly on the ground that the finding was well based and was a concurrent finding of fact. Not only this, even the special leave application was rejected by the Supreme Court. Therefore, once we find that the matter of will was directly and substantially involved in the previous litigation and a finding was recorded by the Courts about the due execution of the will, those judgments are of high probative value. According to the Division Bench decision of the Lahore High Court in Ganga Sagar v. Inam Ilahi (supra), they are valuable pieces of evidence. According to Nata-

raja Pillai v. Subharaya Chettiar (supra), the decisions have great weight. In Smt. Venkatratnam v. Venkatanarasayamma (supra), the Hon'ble Judges of the Division Bench also considered the effect of delay in filing of the suit in coming to the conclusion about the value to be attached to the decision in the previous litigation. From the aforesaid decisions, we find the recognised rule of law that previous decisions although not inter partes are not only relevant but have high probative value and are valuable pieces of evidence. To say in other words, they are in a way good precedents and deserve to be followed in this litigation. While doing so, we hold that documents D-3 to D-7 are relevant pieces of evidence under S. 13 of the Evidence Act and have great value as aforesaid. Therefore, relying on the same, we hold that the execution and validity of the will is duly proved. It is worth mentioning that Smt. Parsini plaintiff appeared as a witness in the previous litigation for Ram Chand and Ram Piara and denied the execution of the will and waited to file the present suit after those persons lost in the previous litigation up to the Supreme Court.

9. So far as Ramaji Batanji v. Manohar Chintaman (supra), is concerned, which has been referred to by the learned single Judge, the same is of no assistance to the plaintiff-respondent for two reasons. Firstly, in that case a finding was recorded by the High Court that the identity of the house in dispute in the previous case and the case before them was not established and, secondly, that decision has already been distinguished by this Court in Hira Lal v. Shivlal (supra). Hence that case is clearly distinguishable and is not applicable to the facts of this case. We, therefore, hold that the learned single Judge was in error in holding that documents D-3 to D-7 are not relevant under Section 13 of the Evidence Act and reverse this part of his judgment.

10. Before concluding the issue of will, we may refer to one more aspect of the matter and that is that the learned single Judge has held that the Courts below were in error in allowing secondary evidence as it was not shown as to how the will was lost and because no report was lodged. In this case, the Courts below exercised their discretion in permitting the defendant-appellant to lead secondary evidence after they were satisfied about the loss of the will and this discretion should not have been lightly interfered with. Before us, it is not shown as to how the discretion was wrongly exercised. It will be important to mention here that even in the previous litigation the loss of the will was proved and there also Atma Ram was allowed to lead secondary evidence and the permission to lead secondary evidence was maintained up to the Supreme Court. Therefore, disallowing secondary evidence in the second suit would not have been justified. The learned single Judge was in error in this regard also.

11. Consequently, we reverse the decision of the learned Single Judge under issue No. 4 and hold that the registered will dated October 15, 1957, is duly proved and is a valid document.

12. Issues Nos. 2 and 5, with regard to the locus standi of the plaintiff and her being the daughter of Bhagwana, deserve to be dealt with together as they are inter-connected. After going through the judgment of the learned Single Judge on these issues, we find that he was right in coming to the conclusion that the evidence produced by Shmt. Parsini plaintiff about her relationship with Bhagwana was legal and admissible under Sections 50 and 60 of the Evidence Act and that the Courts below were wrong in rejecting the same as inadmissible. There has been some conflict in this Court about the scope of Sections 50 and 60 of the Evidence Act which was resolved by a Full Bench decision in Amar Singh v. Chhaju Singh (1972) 74 Pun LR 625. On the basis of that decision, the evidence produced by Smt. Parsini plaintiff was admissible and it duly proved that she was the daughter of Bhagwana.

13. In the result, we uphold the decision of the learned Single Judge on these issues and hold that the plaintiff was the daughter of Bhagwana and had locus standi to sue.

14. Shri S. L. Ahluwalia, who appeared for Shmt. Parsini plaintiff-respondent, last of all raised a conten-

tion that the will would be operative only qua the property which Bhagwana owned in his own right and would not be operative qua the property which was owned by Shmt. Naraini about which he obtained a declaratory decree against Ram Chand and Ram Piara. For this matter, he has relied on Khushi Ram v. Jaswant Rai 1966 Cur LJ (Punj) 899, and has argued that no right flows to the collaterals until they file a suit against the donee and succeed therein. He goes on to argue that since Bhagwana did not file a suit for possession after the death of Shmt. Naraini, therefore, no title with regard to the property once owned by Shmt. Naraini passed on to Bhagwana and, to that extent, the will is not operative and the suit of the plaintiff with regard to that part of the property deserves to succeed as she is the daughter of Bhagwana.

15. There is no merit in this contention. Firstly the will is operative for the entire estate left by Bhagwana, including the one which was once owned by Shmt. Naraini. The moment Shmt. Naraini died on June 27, 1957 the succession to her estate opened out and the next heir admittedly was Bhagwana who was alive at that time. Since succession does not remain in abeyance, therefore, Bhagwana succeeded to that property on the death of Shmt. Naraini and on the date of his death, that is on September 2, 1958, Bhagwana left not only what he possessed before this date but also the estate which was once owned by Shmt. Naraini and, therefore, it passed on to Atma Ram and he is owner of the entire property and to no part of it Shmt. Parsini can lay claim.

16. If the argument of Mr. Ahluwalia is to be accepted on the face of it, even then the plaintiff would not succeed because if somebody gets ownership of the estate of Shmt. Naraini only after getting a decree, then that suit had to be filed within three years of the date of death of Shmt. Naraini which occurred on June 27, 1957. The present suit was filed by her on May 26, 1966, which is hopelessly barred by time with regard to the estate once owned by Shmt. Naraini. On the other hand, Atma Ram filed the suit for the estate of Shmt. Naraini against Ram Chand and Ram Piara and in that suit he succeeded. Therefore, that matter is also concluded against Shmt. Parsini plaintiff.

17. For the reasons recorded above, this appeal is accepted, the judgment and decree of the learned Single Judge, are set aside and the suit filed by Shmt. Parsini plaintiff-respondent is dismissed. Since, we are reversing the decision of the learned Single Judge on the issue of will only, we leave the parties to bear their own costs.

S. S. SANDHAWALIA, C. J.:— I agree.

Appeal allowed.

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M. R. SHARMA, J.

Subhash Chander, Petitioner v. State of Punjab and others, Respondents.

Civil Writ Petn. No. 6070 of 1976, D/- 5-12-1978.

Drugs and Cosmetics Act (1940), Sections 10, 33-E — Punjab Government Notification dated 25-2-1971 read with Notification dated 15-1-1975, prohibiting possession of Ayurvedic or Unani drug, not manufactured by licensed manufacturer, or from specified date — Possession of Ayurvedic drugs manufactured by unlicensed manufacturer before that date — Notifications held not applicable — Notifications violated Articles 304 (b) and 19 (1) (f) of the Constitution but not Art. 20 — (Constitution of India, Arts. 19 (1) (f) & (g), 20 (1) and 304 (b).)

The Punjab Government, on 25-2-1971, issued a notification, which had the effect of prohibiting the sale or stocking or distribution, or exhibition for sale of any Ayurvedic or Unani drug other than that manufactured by a manufacturer licensed under Chapter IV-A of the Act. By a subsequent notification dated 15-1-1975, that date was specified as the date of the publication of the said notification for the purposes of Section 33-E of the Act. On the basis of those facts, the Inspector filed a complaint against the petitioner and his partners for contravention of the Notification read with S. 33-E. The Notification was challenged in writ proceedings as contravening Arts. 304, 19 (1) (f) and (g) and 20 of the Constitution.

The complaint related to possession of Ayurvedic drugs manufactured by unlicensed manufacturer before the date on which the Notification came into force;

Held: (i) that the impugned notification violates the rights of the petitioner under Arts. 304 (b) and 19 (1) (f) and (g) of the Constitution. The complaint against the petitioner and pending in the Court was, therefore, quashed. (Para 23)

(ii) The act of possessing a contraband or a prohibited article constitutes a continuing offence. Even if the petitioner could validly put forth the defence of Article 20 against his prosecution for possession of drugs on the date of the issue of notification, he could not do so for his acts of possession of such durgs during any period following the date of the issue of notification and thereafter. The Notification, therefore, could not be held to have contravened Art. 20 of the Constitution. (Para 22)

Cases Referred: Chronological Paras

AIR 1964 SC 925 16, 20
AIR 1955 SC 123 22
AIR 1953 SC 394: 1953 Cri LJ 1480 21
AIR 1951 Punj 27 21
(1940) 312 US 100: 85 L Ed 609, United States v. Fred W. Darby 14
(1918) 248 US 158: 63 L Ed 180, Pure Oil Co. v. Minnesota 12
(1902) 187 US 137: 47 L Ed 108, Ed. H. Reid v. People of the State of Colorado 13

Rajinder Kumar Chhibbar, for Petitioner; D. N. Rampal Dy. Advocate General, Punjab, for Respondents.

ORDER:— The petitioner is a partner of the firm of the name and style of M/s. Desi Dwa Khana, Chemists, Chauri Sarak, Ludhiana. The said firm is carrying on the business of sale and distribution of Ayurvedic drugs. The premises of the firm were inspected by respondent No. 4 in the company of Shri K. S. Bedi, Divisional Inspector of Drugs Central, Faridkot, and Shri Bhagwan Singh Drugs Inspector, Ludhiana. The firm was found to possess certain Ayurvedic drugs which were not manufactured by a licensed manufacturer as required by S. 33-E of the Drugs and Cosmetics Act, 1940 (hereinafter called the Act). After obtaining the necessary orders for the custody of the seized drugs, respondent No. 4 who is Inspector Ayurveda, Punjab, Chandigarh, under the Act, took them into possession. The firm was served with a show-cause notice in reply to which it sent six attested copies of the purchase vouchers to respondent No. 4 but failed to explain its position in regard to contravention of Section 33-E of the Act.

2. The Punjab Government had earlier on 25-2-1971 issued a notification which had the effect of prohibiting the sale or stocking or distribution, or exhibition for sale of any Ayurvedic or Unani drug other than that manufactured by a manufacturer licensed under Chapter IV-A of the Act. By a subsequent notification dated 15-1-1975, that date was specified as the date of the publication of the said notification for the purposes of Section 33-E of the Act. On the basis of the aforementioned facts, respondent No. 4 filed a complaint on July 9, 1976 in the Court of the learned Chief Judicial Magistrate, Ludhiana against the petitioner and his two partners.

3. The petitioner filed the instant petition on the grounds that the aforementioned notification interfered with the provision relating to the freedom of trade, commerce and intercourse throughout the territory of India contained in Articles 301 to 304 of the Constitution, as also his right to carry on trade as envisaged by Article 19 (1) (f) and (g) of the Constitution. The other objection raised was that the impugned notification was in the nature of an ex post facto law for the contravention of which he could not be tried and punished as laid down in Article 20 of the Constitution.

4. Separate written statements have been filed on behalf of the State Government, the State Drug Controller, Punjab, Chandigarh respondent No. 3 and the Inspector Ayurveda, Punjab, Chandigarh, respondent No. 4. In none of the three written statements, the material facts have been controverted. The only common legal objection against the intervention by this Court is taken which is to the effect that the sale of goods produced by an unlicensed manufacturer was an offence under Section 33-E of the Act.

5. Before taking up the constitutional issues raised by the petitioner against his prosecution, it becomes necessary to notice the scheme of the relevant provisions of the Act. The provisions relating to Ayurvedic and Unani drugs are contained in Chapter IV-A of the Act. Section 33-C lays down the constitution of a Ayurvedic and Unani Drugs Technical Advisory Board. Section 33-D prohibits the manufacture for sale of Ayurvedic and Unani drugs under certain conditions, and reads as under:—

"33-D. Phohibition of manufacture for sale of Ayurvedic (including Sidha) and Unani Drugs:

From such date as may be fixed by the State Government by notification in the Official Gasette in this behalf, no person shall himself or by any other person on his behalf, manufacture for sale any Ayurvedic (including Sidha) or Unani drug—

(a) except under prescribed hygenic conditions:

(b) except under the supervision of a person having the prescribed qualifications;

(c) except under and in accordance with the conditions of a licence issued for such purpose under this Chapter;

(d) unless the raw materials used in the preparation of such drug are genuine and are properly identified;

(e) unless such drug is labelled with the true list of all the ingredients contained in it and with such other particulars as may be prescribed; and

(f) in contravention of any of the provisions of this Chapter or any rule made thereunder:

Provided that nothing in this section shall apply to Vaidyas and Hakims who manufacture such drugs for the use of their own patients:

Provided further that nothing in clauses (a), (b) and (c) shall apply to the manufacture, subject to prescribed conditions of small quantities of any such drug for the purpose of examination, test or analysis."

6. Section 33-E places a restriction on the sale of such drugs and reads as under:—

"33-E: Restriction on sale, etc., of Ayurvedic (including Sidha) and Unani drugs:

From such date as may be fixed by the State Government by notification in the Official Gazette in this behalf no person shall himself or by any other person on his behalf, sell, or stock or exhibit for sale, or distribute, any Ayurvedic (including Sidha) or Unani drug other than that manufactured by a manufacturer licensed under this Chapter."

7. Section 33-G empowers the Central Government or a State Government to appoint persons having prescribed qualifications to act as Inspectors. Under Section 33-I, a person who contravenes Section 33-E is liable to be punished with imprisonment for a term which may extend to 3 months or with fine which may extend to Rs. 500/- or with both. Such Inspectors have been authorised to file complaints against the persons who contravene the provisions of the Act. Section 33-P appearing in Chapter V, empowers the Central Government to give such directions to any State Government as may appear to it to be necessary for carrying into execution in the State any of the provisions of the Act. Section 34 lays down that when an offence under the Act has been committed by a company, anybody who at the time the offence was committed was in charge of the company for the conduct of business as also the company shall be liable to be proceeded against and punished accordingly. Under Section 36 of the Act, the jurisdiction to take cognizance of the offences has been invested in the Presidency Magistrates or the Magistrates of the Ist Class.

8. In nutshell, with effect from the date a notification under Section 33-D is published in the Official Gazette a manufacturer of Ayurvedic drugs can manufacture such drugs only under a licence and under other conditions mentioned in that section. However, Vaidyas and Hakims who manufacture such drugs for the use of their own patients are exempted from the operation of this provision. With effect from the date when a notification under Section 33-E of the Act is issued, no dealer can sell, stock or exhibit for sale or distribute any Ayurvedic drug other than that manufactured by a manufacturer licenced under this section. If he is found doing so, an Inspector ap-

pointed under Section 33-G of the Act can prosecute him by filing a complaint in the Court of a Magistrate Ist Class who may in turn punish him with imprisonment for a term of three months and a fine of Rs. 500/- or with both.

9. The gravamen of the first objection raised by Mr. Chhibbar is that the petitioner was carrying on the sale of Ayurvedic and Unani drugs manufactured by manufacturers of international repute like Daburs (Dr. S. K. Burman) Limited, Gurukul Kangri Pharmacy, Jaggi Pharmacy, Charak Ayurvedic Pharmacy, etc. etc. It is claimed that these firms have been manufacturing Ayurvedic drugs of pure quality for the last so many years and the State Governments within the jurisdiction of which their factories are located have not called upon these firms to take out licences under Section 33-D of the Act. It is further claimed that since the State Government cannot impose upon the outside manufacturers a restriction regarding the obtainment of the licences, it cannot validly restrain the petitioner from selling the Ayurvedic drugs manufactured by them strictly in accordance with the requirements of the Ayurvedic Pharmacopoeia.

10. I may now make brief survey of the constitutional provisions in the background of this argument raised. Article 301 of the Constitution lays down that subject to the other provisions of this Part, trade, commerce and intercourse throughout the territory of India shall be free. Article 302 empowers the Parliament to impose by law such restrictions on the freedom of trade, commerce or intercourse between one State and another or within any part of the territory of India as may be required in the public interest. Article 303 prevents the Parliament or the Legislature of the State from giving of preferential treatment to one State over the other. It also prevents the making of any laws which have the effect of discriminating one State from the other. There is, however, one exception to these principles. The Parliament could make any law giving or authorising the giving of preferential treatment to a State or discriminating against another by declaring in such law that it is necessary to do so for the purpose of dealing with the situation arising from the scarcity of goods in any part of the country. Sub-clause (a) of Article 304 of the Constitution empowers a State Legislature to impose by law tax on goods imported from other States subject to the condition that while doing so it would not discriminate between goods so imported and goods manufactured or produced in the State itself. Sub-clause (b) of this Article authorises the State Legislature to impose by law such reasonable restrictions on the freedom of trade, commerce or intercourse with or within that State as may be required in the public interest. However, no bill relating to such law can be moved in the Legislature of the State without the previous sanction of the President. The term "law" used in Articles 302 and 304 of the Constitution admits, in its ambit and scope, delegated legislation and executive action also; for, what the Constitution prevents a legislation from doing it cannot be taken to allow an authority charged with the mandate of giving effect to its command, to do.

11. Similar provisions regarding the freedom of intercourse in trade and commerce appearing in Amedican Constitution have received judicial interpretation in some cases to which references may now be made.

12. In Pure Oil Co. v. Minnesota, (1918) 248 US 158, it was held that in the exercise of its police power a State may enact inspection laws which are valid if they tend in a direct and substantial manner to promote the public safety and welfare, or to protect the public from frauds and imposition when dealing in articles of general use as to which Congress has not made any conflicting regulation, and a fee reasonably sufficient to pay the cost of such inspection may constitutionally be charged, even though the property may be moving in inter-State commerce when inspected.

13. In Ed. H. Reid v. People of the State of Colorado, (1902) 187 US 137, the Court was concerned with the interpretation of Colo. Sess Laws 1885 p. 335, prohibiting the importing of cattle from south of the 36th parallel of north latitude between April Ist and November Ist, unless first kept for

ninety days at some place north of that parallel or unless a certificate of freedom from contagious or infectious disease has been obtained from the State Veterinary Sanitary Board. It held that the privileges and immunities of citizens in the several States were not denied by the impugned legislation because it tended to protect the domestic cattle against the communication of disease by cattle from other States.

14. In United States of America v. Fred W. Darby, (1940) 312 US 100, the Court upheld the validity of Fair Standard Act, 1938, by which the Congress prohibited the transportation in the inter-State commerce of goods manufactured with the help of child labour. It held—

"The motive and purpose of the present regulation are plainly to make effective the Congressional conception of public policy that inter-State commerce should not be made the instrument of competition in the distribution of goods produced under sub-standard labour conditions, which competition is injurious to the commerce and to the States from and to which the commerce flows."

15. The freedom of intercourse in trade and commerce like any other freedom does not imply an absolute absence of restraint or control, for, individual action has to give way to the larger interests of the community as a whole. While determining whether a restriction on freedom of trade as contemplated in Article 304 of the Constitution is in the public interest or not a Court has to take into consideration a variety of factors like the manner in which the restrictions are imposed, the nature of the commercial activity and the potential effect of the commodity forming the subject-matter of intercourse of trade on the health and moral conscience of the receiving State which imposes such restrictions. Such a State cannot be expected to carry the enthusiasm of non-discrimination to the extent of self-annihilation. It would be open to it to protect the legitimate interests of its own citizens; but while doing so it has also to act in a reasonable manner. One way of doing it is to make a prior assessment of the impact of the restriction and to make it as soft as it can be. Further, it makes no difference to a citizen if his freedom of intercourse of trade and commerce is put in jeopardy partly because of the neglect of the agency of the Union of India and partly that of the State Government. If the cumulative effect of the actions taken by the two agencies mentioned above produces a result which is prima facie discriminatory it shall be open to a citizen to contend that the entire action should be struck down unless of course the State proves that the resultant restrictions are reasonable.

16. In Khyerbari Tea Co. Ltd. v. State of Assam AIR 1964 SC 925, it was observed—

"The position with regard to the onus would be the same in dealing with the law passed under Article 304 (b). In fact, in the case of such a law, the position is somewhat stronger in favour of the citizen, because the very fact that a law is passed under Article 304 (b) means clearly that it purports to restrict the freedom of trade. That being so, we think that as soon as it is shown that the Act invades the right of freedom of trade it is necessary to enquire whether the State has proved that the restrictions imposed by it by way of taxation are reasonable and in the public interest within the meaning of Article 304 (b). This enquiry would be of a similar character in regard to clause (6) of Article 19."

17. I may now examine the restriction imposed in the instant case in the light of the aforementioned observations.

18. The plea raised in the petition that the petitioner stocks and sells Ayurvedic drugs of pure quality manufactured by the firms of repute has not been expressly denied in the written statement. No evil consequence inheres in the manufacture of such drugs, if their purity is not disputed; it would perhaps be in the interest of the receiving State to have them in large quantities so that people who have faith in the efficacy of Ayurvedic medicines are able to get them more freely. If the receiving State were to impose restrictions regarding their analysis for determining their purity, such restrictions would, no doubt, be held as re-

asonable. But the petitioner is not being charged for selling adulterated drugs. The gravamen of the charge against him is that the drugs stocked and sold by him have been produced by a manufacturer who should have obtained a licence under Section 33-D of the Act even though the State in the territory of which such drugs are being manufactured has not issued any notification making it incumbent upon such manufacturers to obtain a licence as required under Section 33-D of the Act. The action complained of by him is prima facie discriminatory and apart from the averment that a manufacturer is under an obligation to obtain a licence under the provisions of the Act, no other plea justifying the restriction has been taken in the written statement.

19. There is no averment in the written statement to show that the Central Government either on its own or on the asking of the receiving State issued any directions under S. 33-P of the Act to the States within the territories of which such drugs were being manufactured to take necessary steps for carrying into execution the provisions of the Act. In other words, it can be justifiably agrued on behalf of the petitioner that before the notification under Section 33-E of the Act was issued by the Punjab Government, no steps were taken under S. 33-P of the Act for ensuring the uniform application of the provisions of the statute in all the States. The resultant effect of the impugned provision is that whereas Ayurvedic drugs of purity are being allowed to be stocked and sold in some of the States without any restrictions, the petitioner is being accorded discriminatory treatment for indulging in the same activity. As far as he is concerned the difficulty experienced by the Punjab State, if any, about the proper execution of this statute on account of the non-enforcement of its provisions by some other States is of no consequence. He is aggrieved of the end result and in my considered opinion the grievance made by him appears to be legitimate.

20. As laid down in Khyerbari Tea Company's case (supra) the enquiry about the reasonableness of the restrictions under Art. 304 of the Constitution has to be of a similar character in regard to Cl. (6) of Art. 19. The State Government could not impose any condition re: license on the outside manufacturers. The Government of the territory in which such units are located has not considered it fit to impose such a condition. The purity of drugs stocked for sale can be properly ensured by their chemical analysis which can be validly enforced by the Statute. The condition re: licence has no relevance vis-a-vis scarcity of raw materials, over-crowding of the industry or any other reason of the like nature. The prohibition imposed on the petitioner, in the peculiar circumstances of the case, obviously impinges on his right to possess and sell commodities. The impugned notification is clearly violative of his rights under Art. 19 (1) (f) and (g) and I hold accordingly.

21. The argument advanced on the basis of Art. 20 may be summarised thus, sub-sec. (3) of S. 5 of the General Clauses Act, 1897, lays down that a Central Act or a Regulation shall be construed as coming into operation immediately on the expiration of the day preceding its commencement, which implies that even if a notification is issued during day time, by a legal fiction it would be deemed to have commenced after the mid-night of the preceding day. So considered, an innocent action of the petitioner about stocking and sale of Ayurvedic drugs had become illegal from the morning of the day on which the impugned notification was issued. On the basis of the principle laid down in Tara Chand Gopi Chand v. State, AIR 1951 Punj 27, it was submitted that if some action which was constitutional and valid and some of it which was unconstitutional could be taken under the same provision, the whole of it should be declared unconstitutional. On the authority of Rao Shiv Bahadur Singh v. State of Vindhya Pradesh, AIR 1953 SC 394, it was argued that Art. 20 (1) in its broad import has been enacted to prohibit convictions and sentences under ex post facto laws.

22. However, on a careful examination of the submissions made by Mr. Chhibbar, I am of the view that this argument does not advance the case of the petitioner in any manner. If the

notification is assumed to have been validly issued, it prohibits the stocking and sale of goods not only on the date of its issue but for future sale also. The act of possessing a contraband or a prohibited article constitutes a continuing offence. Even if the petitioner could validly put forth the defence of Art. 20 against his prosecution for possession of drugs on the date of the issue of notification, he could not do so for his acts of possession of such drugs during any period following the date of the issue of notification and thereafter. In Behram Khurshid Pesikaka v. State of Bombay, AIR 1955 SC 123, it was held that the American rule that if a statute is repugnant to the Constitution it becomes void from its birth, had not been adopted in this country. Consequently, I am unable to give any relief to the petitioner on this ground.

23. For the foregoing reasons, I hold that the impugned notification violates the rights of the petitioner under Articles 304 (b) and 19 (1) (f) and (g) of the Constitution. The complaint dated July 9, 1976 filed by respondent No. 4 against the petitioner and pending in the Court of the learned Chief Judicial Magistrate, Ludhiana, is, therefore, quashed, with no order as to costs. The goods seized from the petitioner be restored to him.

Order accordingly.

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FULL BENCH

S. S. SANDHAWALIA C. J.,
PREM CHAND JAIN AND
S. S. KANG JJ.

Munshi Ram and another, Petitioners v. State of Haryana and others, Respondents.

Civil Writ Petn. Nos. 8740 of 1976, 5178 of 1978 and S. A. O. No. 54 of 1977, D/-2-8-1979.

(A) Punjab Village Common Lands (Regulation) Act (18 of 1961), S. 13-B (as added by Haryana Act (34 of 1974)) — Interpretation.

Section 13-B does not embrace within itself any suit or proceeding against the Gram Panchayat. The fact that relief of injunction has also been prayed for, would not make such a suit triable by the Civil Court in case the said suit is against the Panchayat and in which relief has been claimed on the ground that the land be excluded from Shamilat deh Decision in 1977 Pun LJ 446 held not be contrary to Decision in 1976 Pun LJ 237. (Para 3)

(B) Punjab Village Common Lands (Regulation) Act (18 of 1961), S. 13-B (as added by Haryana Act (34 of 1974)) — Provision not unworkable for absence of S. 13-A (5) or (7). 1979 Pun LJ 78, 1977 Pun LJ 446 Approved. (Para 5)

(C) Punjab Village Common Lands (Regulation) Act (18 of 1961), S. 13-B (as added by Haryana Act (34 of 1974)) — Not unconstitutional on ground of absence of appeal.

The legislature designedly did not provide that provisions of sub-sec. (9) of S. 13 would also be applicable to the decisions made under S. 13-B of the Act. The right of appeal is a statutory right and if it is not so provided in the statute, then a litigant cannot claim that right or plead that on that ground the provision is unconstitutional. 1979 Pun LJ 78 Approved. (Para 19)

(D) Punjab Village Common Lands (Regulation) Act (18 of 1961) S. 13-B (as added by Haryana Act 34 of 1974) — Suit filed by appellant against Gram Panchayat for the exclusion of land in dispute from Shamilat deh — Appellants claiming themselves to be the owners-in-possession — Issue regarding jurisdiction of Civil Court not framed — Held in the circumstances, the appellate Court was justified in deciding question of jurisdiction and in remanding case to trial court for transferring the same to the Assistant Collector. (Para 25)

Cases Referred:	Chronological Paras
1979 Pun LJ 78	6, 20
1977 Punj LJ 446	1, 3, 4, 6
1976 Punj LJ 237	1, 3, 4
AIR 1956 Hyd 192	3
AIR 1954 All 768	3

Pt. Janinder Kumar with Yogesh Kumar Sharma, for Petitioners; A. S. Nehra, Addl. Advocate General for the State; Ashok Aggarwal, (for No. 8) and I. C. Jain, (for Nos. 4 and 5) for Respondents.

PREM CHAND JAIN, J.:— This judgment of ours would dispose of C. W. P. No. 8740 of 1976 (Munshi Ram etc. v. State of Haryana etc.), C. W. P. No. 5178 of 1978 (Diwan Singh etc. v. State of Haryana etc.) and S. A. O. No. 54 of 1977 (Teja etc. v. Jit Ram etc.) as common question of law arises in all these cases. It appears that at the time of motion hearing of the aforesaid cases, it was projected by the learned counsel for the petitioners/ap-

pellant that there was a conflict between the two Division Bench judgments of this Court in the Karnal Co-operative Farmers Society Limited v. Gram Panchayat 1976 Pun LJ 237, and Digh Ram v. State of Haryana 1977 Pun LJ 446, with regard to the interpretation of S. 13-B as added by Haryana Act No. 34 of 1974 in the Punjab Village Common Lands (Regulation) Act (18 of 1961) (hereinafter referred to as the Act). As is evident from the order of the Bench in C. W. P. No. 8740 of 1976, dated 6th of April, 1977, a conflict was apparently found in the two aforesaid Division Bench judgments, with the result that the matter was referred to a larger Bench and that is how we are seized of the matter.

2. Before I advert to the merits of each case, I propose to deal with the alleged conflict as was tried to be brought out by the learned counsel for the petitioners/appellant at the time of hearing.

3. It was contended that in Karnal Co-operative Farmers Society's case, the view taken by the learned Judges of the Division Bench was that only such suits which had been instituted in the Civil Courts against the Panchayat for exclusion of certain lands or other properties from Shamilat-deh under S. 2 (g) or on any of the grounds mentioned in S. 4 (3) of the Act alone could be transferred while in Digh Ram's case (to the decision of which I was a party), it has been held that S. 13-B provides for all claims based on the ground of any land or other immovable property being excluded from Shamilat-deh. The relevant observations in Karnal Co-operative Farmers Society's case read as under:—

"A reading of this section shows that the suits pending in Civil Court against the Panchayats, wherein relief has been claimed on the ground that the land be excluded from Shamilat-deh, shall be transferred to the Assistant Collector Ist Grade. Emphasis has been laid by Mr. Anand Swaroop, on the words 'excluded' and 'against the Panchayat,' which I have underlined in the section reproduced above. It is noteworthy that the suits which are contemplated to be transferred from the Civil Court, to the Assistant Collector Ist Grade, must have two ingredients, namely (i) it should be for exclusion of the land from the Shamilat-deh, and (ii) it should be against the Panchayat. In case any suit does not contain the aforesaid ingredients, it cannot be transferred by the Civil Court to the Assistant Collector Ist Grade. It is a well known principle of interpretation of statutes that where the grammatical construction is clear and manifest, that construction ought to prevail unless there is some strong reason to the contrary. In case the language of the statute is unambiguous, the Court must give effect to it, and it has no right to extend its operation in order to carry out the supposed intention of the Legislature. It is the duty of the Court to take the statute as it stands and to construe its words according to its natural significance. The intention of the Legislature is to be given effect as expressed in the words used in the statute. No outside consideration can be called in aid to find that intention. In the above section, in my view, the words used by the Legislature, are clear and unambiguous. They cannot be interpreted in such a way that all the cases relating to the Shamilat-deh, pending in the Civil Court, shall be transferred to the Assistant Collector Ist Grade. If the intention of the Legislautre has been to that effect, the language of the section would have been different. In my view, S. 13-B covers only such suits which have been instituted in the Civil Courts against the Panchayat for exclusion of certain lands or other properties from Shamilat-deh under S. 2 (g) or on any of the grounds mentioned in S. 4 (3) of 1961 Act. A suit instituted by a Gram Panchayat for declaration to the effect that certain land should be included in Shamilat-deh, is not covered by the provisions of the aforesaid section."

while in Digh Ram's case, the relevant observations to which our attention was invited, are in the following terms:—

"To seek support for his contention as raised under this point, the learned counsel has referred to the provisions of Section 37 (2) of the Specific Relief Act. It is submitted that a relief of injunction is not provided for under the Village Common Lands Act and the suit in the present case being one for injunction, the matter could be adjudicated upon only by a Civil Court. Reference is made in this behalf to Angnu v. Mahabir, AIR 1954 All 768, and Illinka Venkatayya v. Adi Kishtayya, AIR 1956 Hyd 192. These authorities are, however, distinguishable even on facts. In the Allahabad case, both the parties conceded that the forum for the suit was the Civil Court and not the Revenue Court. It was held that if the Revenue Court was not competent to grant all the reliefs prayed for, the suit

would lie only in a Civil Court. Similarly, in the second case, the Court was seized of the Hyderabad Tenancy and Agricultural Lands Act, and it was held that S. 99 of the Act would operate as a bar to the jurisdiction of the Civil Court only if the case is of such a nature as is required to be settled by the authorities mentioned in the Act. In the present case, S. 13-B of the Amendment Act, however, provides for all claims based on the ground of any land or other immovable property being excluded from Shamilat deh. The fact that the colour of injunction is spread over the basic relief sought for, as envisaged under S. 13-B, would not make any material difference, nor would it oust the Assistant Collector from determining the dispute and granting relief, if called for. The petitioner fails on this point also."

After giving my thoughtful consideration to the entire matter, I find that the judgment in Digh Ram's case so far as it deals with the interpretation of S. 13-B of the Act, is not being read in the right perspective, and that an imaginary conflict is sought to be projected. What was argued before the Bench was that under S. 13-B, a suit for perpetual injunction was not within the competence of the Revenue Court and the jurisdiction of the Civil Court could not be barred for such a suit and it is on that point that the above reproduced observations were made. From the said observations, it cannot be spelt out at all that S. 13-B has been interpreted so as to embrace within itself any suit or proceeding against the Gram Panchayat. What has been held in Dighram's case is that this fact that relief of injunction has also been prayed for, would not make such a suit triable by the Civil Court in case the said suit is against the Panchayat and in which relief has been claimed on the ground that the land be excluded from Shamilat deh.

4. In this view of the matter, I hold that the judgment in Dighram's case does not run counter to the decision of the Division Bench in the Karnal Co-operative Farmers Society's case, with respect to the interpretation of S. 13-B of the Act.

5. It was also sought to be argued by Mr. Jinendra Kumar, learned counsel that as the entire S. 13-A has been struck down, S. 13-B should also meet the same fate as sub-secs. (5) and (7) of S. 13-A have been embedded in S. 13-B. What was sought to be argued by the learned counsel was that sub-secs. (5) and (7) of S. 13-A having been struck down, could not be read in S. 13-B and that in this situation, S. 13-B becomes unworkable in the absence of the procedure prescribed under sub-secs. (5) or (7) of Section 13-A.

6. This contention of the learned counsel need not be gone into on merits and is liable to be rejected straightway in view of the judgment in Digh Ram's case and another recent Division Bench judgment in Latur Singh v. The Collector, Karnal 1979 Punj LJ 78.

7. In the ordinary course, the petitions/appeals would have been sent back to the learned single Judge for disposal on merits, but we did not adopt that course and decided to hear the petitions/appeals on merits also.

8. Now I would deal separately with the merits of each case.

CWP No. 8740/1976.

9. In this petition, Subedar Munshi Ram and Hari Singh have challenged the legality of the order passed by the Assistant Collector Ist Grade, Jhajjar, dated 8th of June, 1976 and the judgment of the Collector, Rohtak, dated 6th of September, 1976 (copies Annexures P/1 and P/2, respectively). The admitted facts of the case are that in Sept. 1973, Bhola Ram, respondent No. 8, filed an application before the Gram Panchayat, respondent No. 4 for the removal of the encroachment on the thoroughfare made by the petitioners. The application was allowed by the Gram Panchayat and the order for the removal of the encroachment was passed. But on revision, the said order was set aside by the Judicial Magistrate Ist Class, Jhajjar and the case was remanded for fresh decision. On remand, the case was tried by another Panchayat. On consideration of the material, the Gram Panchayat found itself incapable of deciding the case and directed respondent No. 8 to seek his remedy in an appropriate court.

10. Thereafter, respondent No. 8 filed a suit for mandatory injunction against the petitioners in the Court of Subordinate Judge, Jhajjar for the removal of the encroachment. During the pendency of the suit, the Punjab Village Common Lands Act was amended in its application to Haryana, and Ss. 14-A and 13-B were introduced with the result that the suit was transferred to the Assistant Collector Ist Grade, Jhajjar for trial by the learned Subordinate Judge. The Assistant Collector tried the suit on merits and ultimately decreed the same vide his

order dated 8th of June, 1976. The petitioners' appeal before respondent No. 3 was also dismissed vide order dated 6th of Sept. 1976 by the Collector.

11. On the facts narrated above, it is evident that the suit which was transferred by the learned Subordinate Judge to the Assistant Collector Ist Grade, was the one which had been filed by Bhola Ram, respondent No. 8 for permanent injunction restraining the petitioners from making any encroachment on the alleged thoroughfare. From the averments made in the plaint, it is evident that the suit filed by Bhola Ram did not satisfy the two ingredients, i. e., that it was not a suit for the exclusion of the land from Shamilat Deh and that the same had not been filed against the Gram Panchayat. In this situation, legally the suit could not be transferred by the learned Subordinate Judge for trial to the Assistant Collector Ist Grade.

12. Faced with this situation, it was contended by the learned Additional Advocate General that the petitioners are not entitled to any relief as the order by which learned Subordinate Judge transferred the suit to the Assistant Collector Ist Grade, has not been challenged by the petitioners.

13. To me, this objection appears to be untenable. Under the Act, the Assistant Collector had no jurisdiction to try the suit which was transferred by the learned Subordinate Judge and in this situation, the order of the Assistant Collector Ist Grade would be a nullity. Further, it is wrong to say that the order of transfer passed by the learned Subordinate Judge has not been questioned by the petitioners. In the petition, besides challenging the constitutional validity of S. 13-B, it has been specifically pleaded that the suit could not legally be transferred from the Court of the Subordinate Judge because in the suit, no relief had been claimed by the plaintiffs against the Gram Panchayat on the ground that the immovable property concerned was excluded from the Shamilat Deh under S. 2 (g) of the Act or on any other grounds mentioned in sub-sec. (3) of S. 4 of the Act.

14. No other point was urged on either side.

15. In view of the aforesaid discussion, I allow this petition, set aside the order of the Assistant Collector Ist Grade, Jhajjar dated 8th of June, 1976 and the judgment of the Collector, Rohtak, dated 6th of Sept. 1976 (copies Annexures P/1 and P/2, respectively) and also the order of the learned Subordinate Judge by which the suit was transferred to the Assistant Collector for trial, and direct the learned Subordinate Judge to register the case and thereafter proceed to decide the same in accordance with law. In the circumstances of the case, I make no order as to costs.

16. The parties through their learned counsel have been directed to appear before the learned Subordinate Judge on August 27, 1979.

C. W. P. No. 5178/1978.

17. Diwan Singh and others have filed this petition for the quashing of the order of the Assistant Collector Ist Grade, Rohtak dated 9th of June, 1978 by which the suit of the petitioners under S. 13-B of the Act was dismissed and the application filed by the Gram Panchayat under S. 7 of the Act was allowed and the petitioners were ordered to be ejected from the land in dispute in case they did not vacate the same within 10 days of the passing of the order.

18. In this petition, the petitioners filed a suit under S. 13-B of the Act and rightly so as the suit of the petitioners was against the Gram Panchayat and for the exclusion of the land from Shamilat deh the ownership of which was claimed by them. In this situation, the suit was triable by the Assistant Collector Ist Grade and it was rightly decided by him.

19. The only other point that was debated before us was that no appeal is provided against the judgment of the Assisant Collector and on that score S. 13-B deserves to be struck down as unconstitutional. The argument on the face of it appears to be fallacious. The legislature designedly did not provide that provisions of sub-sec. (9) of S. 13 would also be applicable to the decisions made under S. 13-B of the Act. The right of appeal is a statutory right and if it is not so provided in the statute, then a litigant cannot claim that right or plead that on that ground the provision is unconstitutional.

20. This view of mine finds full support from the latest Division Bench judgment of this Court in Latur Singh v. Collector, Karnal, 1979 Pun. LJ 78.

21. No other point arose in this petition.

22. In view of the aforesaid discussion, I find no merit in this petition and consequently dismiss the same but without there being any order as to cost.

S. A. O. No. 54/1977.

23. Teja and Sadhu filed a suit for grant of perpetual injunction restraining the defendants from interfering in any manner whatsoever in the legal and peaceful possession and ownership of the plaintiffs in the land in dispute and also to the effect that the order passed by the Gram Panchayat under S. 21 of the Gram Panchayat Act is void and without jurisdiction. The suit was contested by the defendants. The defendants alleged that the land in dispute was a public place, and that the Civil Court had no jurisdiction to try the suit. On the issues which were framed on the pleadings, the parties led evidence. The trial Court on consideration of the entire evidence found no merit in the claim of the plaintiffs and accordingly dismissed their suit. Feeling aggrieved from the judgment and decree of the trial Court, the plaintiffs filed an appeal.

24. The learned District Judge, who heard the appeal, found that the issue regarding the jurisdiction of the Civil Court was not framed. However, he allowed the arguments to be advanced on that matter and ultimately held that the suit was not triable by the Civil Court with the result the judgment and decree of the trial Court was set aside and the case was remanded to the trial Court for transferring the same to the Assistant Collector Ist Grade for deciding the matter in accordance with law. Dissatisfied from the order of remand passed by the learned District Judge, the present appeal has been filed.

25. It was contended by the learned counsel for the appellants that the suit was triable by the Civil Court and that the provisions of S. 13 or 13-B of the Act were not applicable. I am afraid, I am unable to agree with this contention of the learned counsel. From the admitted facts, it is evident that the suit has been filed by the appellants against the Gram Panchayat for the exclusion of the land in dispute from Shamilat deh. The appellants claim themselves to be the owners-in-possession of the property. In this situation, the learned District Judge was justified in deciding the question of jurisdiction and in remanding the case to the learned Subordinate Judge for transferring the same to the court of the Assistant Collector Ist Grade.

26. In this view of the matter, I find no merit in this appeal and consequently dismiss the same but without there being any order as to costs. The parties through their learned counsel have been directed to appear before the trial Court on August 27, 1979.

S. S. SANDHAWALIA C. J. :— I agree.

SUKHDEV SINGH KANG, J. :— I agree.

Orders accordingly.

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RAJENDRA NATH MITTAL J.

Smt. Mohinder Kaur, Appellant v. Bikkar Singh, Respondent.

F. A. F. O. No. 133-M of 1978, D/- 10-8-1979.*

(A) Hindu Marriage Act (1955) S. 12 (1) (c), (2) (a) (ii) — Voidable marriages — Marriage procured by fraud — Subsequent single act of cohabitation after discovery of fraud — Effect.

One cannot challenge his marriage on the ground of fraud if he had sexual intercourse with the other party to the marriage after having found that his consent to the marriage was obtained by fraud. Even a single act of cohabitation after discovery of fraud would be a good ground for the dismissal of petition for nullity of marriage. The principle underlying it is that of condonation. It is always open to the parties to marriage to stand by the alliance even after their knowledge of a vitiating circumstance. If they approve the alliance by cohabiting together as husband and wife, it will no longer be open to either of them to reprobate by filing of the petition for decree of nullity. AIR 1963 Punj 235 Foll. (Paras 6, 7)

(B) Hindu Marriage Act (1955), Ss. 28, 12, 13 — Petition for nullity of marriage under S. 12 — Plea of decree for divorce in appeal — Maintainability.

In an appeal from a decree of nullity of marriage under S. 12, the plea that respondent was entitled to a decree for divorce as appellant was suffering from a venereal disease, could not be raised for the first time, when the petition was for nullity of marriage under S. 12 and no such claim for divorce was made by raising such issue in trial Court. (Para 8)

Cases Referred : Chronological Paras

AIR 1963 Punj 235 6

Ujagar Singh, for Appellant; Y. P. Gandhi, for Respondent.

JUDGMENT :— This is an appeal against the judgment and decree of the

*(Against order of Amar Bir Singh Gill Addl. Dist. J. Ludhiana, D/- 5-6-1978.

Additional District Judge, Ludhiana, dated June 5, 1978, granting a decree of annulment of the marriage in favour of Bikkar Singh, petitioner.

2. Briefly, the facts are that the petitioner was married to the respondent on June 19, 1977. It is alleged that prior to the marriage he was shown a girl who was good looking and literate but when after the marriage the respondent came to the house of the petitioner, his mother and he on seeing her found that she was a different girl than the one shown to him. It is further stated that she was an illiterate lady having small stature and grey hair and was aged about 40 years. He further averred that his consent for the marriage with the respondent was obtained by fraud and consequently the marriage was not binding upon him. It is also alleged that she was suffering from a venereal disease at the time of marriage and he also contacted it after intercourse with her. He consequently prayed for a decree for annulment of the marriage under S. 12 of the Hindu Marriage Act (hereinafter referred to as the Act).

3. The application was contested by the respondent wherein she denied that any fraud was played upon the petitioner. She further said that she stayed with the petitioner for about 20 days. Thereafter, it is said, he started demanding Rs. 5,000/- and a motorcycle from her parents, and when they could not meet the demand he turned her out. Later, her parents approached the petitioner but he refused to keep her unless her father paid Rs. 5,000/- and gave a motorcycle. On the pleadings of the parties the following issues were framed by the trial Court :—

1. Whether the respondent has been married by fraud?

2. Whether the petitioner is entitled to a decree as prayed for?

3. Relief.

It held that fraud was played upon the petitioner and, therefore, he was entitled to a decree of nullity of marriage. Consequently, a decree was passed in his favour. The respondent-wife has come up in appeal to this Court.

4. The only contention of the learned counsel for the appellant is that the respondent admitted that after the fraud had been discovered, he cohabited with the appellant. According to him, if he cohabited with her then he is not entitled to decree of nullity of marriage. The counsel for the respondent, on the other hand has vehemently argued that he cohabited with her only once after the discovery of the fraud and consequently the decree had been correctly passed in his favour.

5. I have heard the learned counsel for the parties at a considerable length. I, however, find force in the contention of the learned counsel for the appellant. S. 12 of the Act deals with voidable marriages. Sub-sec. (1) provides that a marriage where the consent of the petitioner was obtained by fraud as to the nature of ceremony or as to material fact or circumstance concerning the respondent, shall be voidable and may be annulled by a decree of nullity. Sub-sec. (2) says that notwithstanding anything contained in sub-sec. (1) no petition for annulling marriage on the aforesaid ground shall be entertained if the petitioner has with his or her full consent lived with the other party to the marriage, after the fraud had been discovered. A reading of the section shows that marriage is voidable if consent of a spouse has been obtained by fraud. But it stands ratified if they live together after discovery of fraud with the consent of the defrauded spouse.

6. Before dealing with the proposition of law, it is appropriate to mention that the learned counsel for the appellant has not challenged the finding of the trial Court that fraud had been played on the respondent. The counsel for the respondent has also admitted that the respondent cohabited with the appellant after discovery of fraud. The question arises as to whether the respondent is entitled to a decree of nullity if he had sexual intercourse with his wife once after having come to know that a fraud had been played upon him. In my view even a single act of cohabitation after the discovery of fraud would be a good ground for dismissal of the petition for nullity of marriage. The principle underlying it is that of condonation. It is always open to the parties to the marriage to stand by the alliance even after their knowledge of a vitiating circumstance. If they approve the alliance by cohabiting together as husband and wife it will no longer be open to either of them to reprobate by filing a petition for decree of nullity. The language of the section is clear according to which the voluntary cohabitation by a spouse, who pleads fraud, condones the same. In the aforesaid view I am fortified by the observations of this Court in

Kunta Devi v. Siri Ram Kalu Ram, AIR 1963 Punj 235, wherein it was held that a marriage procured by fraud, abduction terror or coercion has no sanctity and is voidable and is liable to annulment at the election of the injured party. It is further held that such a marriage may be ratified by voluntary cohabitation which may neutralise the effect of early coercive and fraudulent acts.

7. After taking into consideration all the facts and circumstances of the case, I am of the opinion that the respondent could not challenge the marriage on the ground of fraud as he had sexual intercourse with the appellant after having found that his consent to the marriage was obtained by fraud.

8. Mr. Gandhi, faced with the aforesaid difficulty sought to argue that the appellant was suffering from venereal disease and the respondent after having intercourse with her contacted the same. He argues that the respondent in the aforesaid situation was entitled to a decree of divorce. No issue on this plea was claimed in the trial Court. The prayer of the respondent was for a nullity of marriage under S. 12. He did not claim divorce under S. 13 of the Act. Consequently he cannot be allowed to raise the question in appeal.

9. For the reasons recorded above, I accept the appeal, set aside the judgment and decree of the trial Court and dismiss the petition for nullity of marriage under S. 12 of the Act. No order as to costs.

Appeal allowed.

AIR 1979 PUNJAB AND HARYANA 250

RAJENDRA NATH MITTAL, J.

Darshan Singh, Petitioner v. Kuldip Singh, Respondent.

Civil Revn. No. 528 of 1979, D/- 7-8-1979.*

Evidence Act (1872), S. 41 — Civil P. C. (1908), S. 11 — Letters of administration granted on basis of will by the High Court of Justice at Birmingham — Deceased alleged to have executed will in U. K. where he was working — Letters of administration, held, conclusively proved execution of will and the matter could not be reopened in the Civil Court — Judgment would operate as res judicata only to that extent — Succession Act (1925), S. 213. (Para 4)

Cases Referred: Chronological Paras

AIR 1963 SC 1 5
AIR 1962 SC 1471; 1962 All LJ 695 5
AIR 1959 Mad 410 4
AIR 1957 SC 875 4

G. R. Majitha, for Petitioner; H. L. Sarin, Sr. Advocate with R. L. Sarin and M. L. Sarin, for Respondent.

ORDER:— This is a revision petition against the order of the Subordinate Judge, Jullundur, dated February 20, 1979.

2. Kuldip Singh plaintiff instituted a suit for declaration to the effect that he was the owner of the property in dispute as a sole heir of Ram Kishan Singh, his father, and the mutation No. 2447 sanctioned on May 16, 1975, in the name of the defendant on the basis of an alleged will by his father is illegal, null, void and inoperative against him. The case of the plaintiff is that after the death of his father Ram Kishan Singh, he became owner of the property in dispute, being his legal heir. He averred that the defendant got the mutation sanctioned on May 16, 1975 on the basis of will dated September 11, 1973, alleged to have been executed by Ram Kishan Singh in his favour. The defendant inter alia pleaded that Ram Kishan Singh executed a valid will in his favour and he obtained letters of administration from the High Court of Justice at Birmingham on the basis of that will on Aug. 9, 1977(?) which operated as res judicata between the parties. One of the issues framed by the Court was as follows:—

"Whether the order dated August 9, 1977 passed by the High Court of Justice at Birmingham operates as res judicata between the parties?"

The said issue was treated as a preliminary issue. The Court held that the order of the High Court at Birmingham does not operate as res judicata and consequently decided the issue against the defendant. He has come up in revision to this Court.

3. It is contended by the learned counsel for the petitioner that the judgment of a Probate Court is a judgment in rem and is binding on the whole world in addition to the parties. According to the counsel, the letters of administration were applied for by the petitioner on the basis of the will and the Court pronounced that the will had been properly executed. He argues that the plaintiff

*(To revise order of Jora Singh P.C.S. Sub-J., 3rd Class, Jullundur, D/- 20-2-1979.)

cannot challenge it in a suit and say that the will was not properly executed. It is also submitted by him that if he wants to challenge the execution of the will, he can do so before the High Court of Justice at Birmingham.

4. I have heard the learned counsel for the parties at a considerable length. It is well settled that the judgments of Probate Courts are judgments in rem and these are binding on all persons whether they are parties to those proceedings or not, whereas the judgments of the Civil Courts are judgments in personam and bind the parties to the suit only. Letters of administration granted on the basis of a will attached, by a competent court is a judgment in rem regarding execution of the will and it binds the world at large. In this regard, reference may be made to Surinder Kumar v. Gian Chand, AIR 1957 SC 875, wherein it was held that the judgment of a Probate Court granting probate of a will in favour of the petitioner is presumed to have been obtained in accordance with the procedure prescribed by law and it is a judgment in rem. Judgments in rem as already observed above, are judgments binding on the whole world. A reference may also be made to Blackwood & Sons Ltd. v. A. N. Parasuraman, AIR 1959 Mad 410, where it was held as follows:—

"S. 213 of the Succession Act, however, would certainly not apply to a case where under the provisions of the Indian Succession Act, a person who asserts his rights as a legatee or as an executor is disabled by law from obtaining a probate from any court in India. This section is primarily concerned with wills of Indian Nationals and those executed in India. Section 228 of the Succession Act enables the granting of an ancillary probate in the case of foreigners. It stands to reason that S. 213 of the Succession Act cannot be construed as insisting on the production of a probate which no court in India is competent to grant in regard to a will for which probate has been granted by a foreign Court of competent jurisdiction. The foreign probate would be sufficient proof of title of the legatee or the executor and admissible in evidence under S. 41 of the Evidence Act in the proof of that right."

It is further observed that the probates which are certified copies of the probates granted by the Probate Division of the High Court of England are admissible in evidence under S. 82. Section 41 of the Evidence Act, deals with judgments of probate, matrimonial, admiralty and insolvency courts. It inter alia provides that a final judgment of a competent court in exercise of probate jurisdiction which confers upon or takes away from any person any legal character or which declares any person to be entitled, to any such character, or to be entitled to any specific thing, not as against any specified person but absolutely, is relevant when the existence of any such legal character, or the title of any such person to any such thing, is relevant and such judgment is conclusive proof that any legal character which it confers accrued at that time when such judgment, came into operation. From a reading of the aforesaid section and the authorities it is clear that the letters of administration granted by the High Court of Justice at Birmingham on the basis of the will of late Ram Kishan Singh conclusively proves the execution of the will. It may be appropriate to point that Ram Kishan Singh is alleged to have executed the will in United Kingdom where he was working and, therefore, the High Court of Justice, at Birmingham had the jurisdiction to decide the matter. In case the plaintiff wants to challenge the execution of the alleged will he can do so in that court alone. Therefore, the judgment of the High Court of Justice at Birmingham is final so far as the execution of the alleged will of Ram Kishan Singh is concerned and the matter cannot be gone into or re-opened in the civil court in the present suit. The judgment will operate as res judicata only to that extent.

5. The learned counsel for the respondent referred to Mrs. Hem Nolini Judah v. Mrs. Isolyne Sarojbashini Bose, AIR 1962 SC 1471 and R. Viswanathan v. Rukn-ul-Mulk Syed Abdul Wajid, AIR 1963 SC 1. In Mrs. Hem Nolini Judah's case (supra), the plaintiff-respondent claiming as a legatee under a will of which she had obtained letters of administration filed a suit for declaration of her title in regard to the property included in the will. She sought to establish that the ownership of that property vested in her testator as a legatee under a will executed in favour of her testator by another person. No probate or letters of admniistration had however been obtained in regard to that will. Taking into consideration the facts and circumstances of that case it was held that the questions of title are not decided in proceedings for the grant of probate or letters of administration. The abovesaid observations

of their Lordships were made in different context and related to the facts of that case. In my view, the respondent cannot derive any benefit from the aforesaid observations. R. Viswanathan's case (supra) does not specifically deal with the judgment of a probate Court. Consequently, the observations in that case are not applicable to this case.

6. For the aforesaid reasons, I accept the revision petition as indicated above. The parties are directed to appear in the trial Court on August 31, 1979. No order as to costs.

Petition allowed.

AIR 1979 PUNJAB AND HARYANA 252

RAJENDRA NATH MITTAL, J.

Rajinder Singh and others, Petitioners v. The Financial Commissioner (Revenue) Punjab, Chandigarh and others, Respondents.

Civil Writs Nos. 2308 and 2309 of 1969 and Civil Misc. Nos. 868 and 1027 of 1979, D/- 2-8-1979.

Punjab Security of Land Tenures Act (10 of 1953), S. 24-A — Proceedings for declaration of surplus area — Person interested — Notice — Pre-emptors, who were sons of landowner, were persons interested and entitled to notice.

A transferee from a big landowner in the instant case, pre-emptor who was son of the landowner is a person interested in participating in the proceedings for declaration of surplus area and he must be given an opportunity of being heard before declaration of surplus area in the hands of transferor so that his interest may not prejudicially be affected. AIR 1972 Punj 232 (FB), Foll. (Paras 6 & 8)

Where the Collector or the authorities under the Act formed the view that the person interested was all along aware of the proceedings and was guilty of laches in coming forward to contest the proceedings, he would not be entitled to a hearing on merits. AIR 1975 Punj 71 (FB), Foll. (Para 6)

If there is decrease in the reserved area of a landowner on account of consolidation, he cannot suffer for that. He, even after consolidation, would be entitled to 30 standard acres. Consequently, in case of decrease in the reserved area, he is entitled to be compensated from the surplus area. In addition, he would be allowed a fresh selection. (Para 7)

HW/IW/E97/79/VBB

Cases Referred: Chronological Paras

1979 Pun LJ 387 9
1976 Pun LJ 585 9
(1975) 77 Pun LR 140: AIR 1975 Punj 71 (FB) 6, 9
(1972) 74 Pun LR 127: AIR 1972 Punj 232 (FB) 6, 8

U. S. Sahni, for Petitioners; Jagat Singh Bawa, for Advocate-General, Punjab, for the State; K. L. Sachdeva, for Respondents Nos. 5 to 7.

ORDER:— This judgment will dispose of Civil Writ Petitions Nos. 2308 and 2309 of 1969. First I shall deal with Civil Writ Petition No. 2308 of 1969. The facts as given in the petition briefly are as follows:—

Kheta Singh, respondent No. 4, was a big landowner. He sold land measuring 35 bighas and 18 biswas in favour of Jaimal Singh and Nachhtar Singh for a sum of Rs. 10,000 vide sale-deed dated June 14, 1958. The petitioners filed a suit for possession by way of pre-emption on the ground that they were sons of respondent No. 4 and, therefore, had a superior right of pre-emption. The suit was decreed on August 17, 1959 and the petitioners obtained possession of the land in pursuance of the said decree.

2. The Collector, Ferozepur, commenced proceedings for declaration of surplus area against respondent No. 4 and declared the land measuring 19-12 standard acres as surplus vide order dated August 31, 1962. The area which had been sold by respondent No. 4 was declared surplus. It is alleged that before declaring surplus area, the petitioners were not served with any notice regarding the declaration of surplus area proceedings. It is further said that the appeal and revision of respondent No. 4 were dismissed by the Commissioner and the Financial Commissioner vide their orders dated March 8, 1965 and May 14, 1965, respectively. The consolidation proceedings were taken in village Khaneki Dhab, District Ferozepur, where the petitioners had become owners of the land by pre-emption. It is alleged, the Collector (Agrarian) Ferozepur, respondent No. 3, again started proceedings for determination of the surplus area. He, however, did not give any notice of the proceedings to the petitioners. He declared an area to the extent of 18-1¼ standard acres as surplus with respondent No. 4 because in consolidation proceedings, his total holding had been reduced from 49-12 standard acres to 48-1¼ standard acres.

3. The petitioners, it is stated, came to know about the aforesaid order and they filed an appeal against it before the Commissioner, Jullundur Division, respondent No. 2 wherein they contended that they being transferees of the land of respondent No. 4 were entitled to be heard before declaration of surplus area with him, which had not been done. The plea was rejected by the Commissioner as per order dated March 3, 1969. They went up in revision before the Financial Commissioner, respondent No. 1, which was dismissed by him on August 28, 1969. They have come up in writ petition against the aforesaid orders to this Court.

4. It is contended by Mr. Sahni, learned counsel for the petitioners, that the property in dispute was transferred by respondent No. 4 in favour of Jaimal Singh and Nachhttar Singh before July 30, 1958. The petitioners filed a suit for possession by pre-emption which was decreed. The right of pre-emption is a right of substitution and, therefore, the petitioners will be deemed to be transferees of the property with effect from June 14, 1958, the date when the sale-deed was executed by respondent No. 4 in favour of original vendees. He further submits that the sales before July 30, 1958, are protected. He also contends that that being the case, the petitioners were entitled to notice before declaration of the surplus area in the hands of respondent No. 4 but it was not done by the Collector and as soon as they came to know that the land in dispute had been declared as surplus area in their hands, they filed an appeal against the order of the Collector to the Commissioner. In the aforesaid circumstances, the counsel submits, the Commissioner as well as the Financial Commissioner have taken erroneous view of the matter and decided it against them.

5. Mr. Sachdeva, learned counsel for respondents Nos. 5 to 7, allottees of the surplus area, has vehemently contended that the petitioners did not file any appeal against the order of declaration of surplus area dated August 31, 1962. He argues that they filed an appeal against the order dated September 13, 1967, which was made by the Collector after consolidation proceedings and that order cannot be said to be an order for declaration of surplus area. It is further argued that as the order dated August 31, 1962 has not been challenged by them before the revenue authorities, therefore, they are not entitled to any relief in these proceedings. Similar contentions were raised by Mr. Jagat Singh.

6. I have given due consideration to the arguments of the learned counsel. It is well settled that a transferee from a big landowner is a person interested in participating in the proceedings for declaration of surplus area and he must be given an opportunity of being heard before declaration of surplus area in the hands of transferor so that his interest may not prejudicially be affected. (See Harnek Singh v. State of Punjab, (1972) 74 Pun LR 127 (FB)). It is also well settled that it is not intended by the Act that in case the Collector or the authorities under the Act formed the view that the person interested was all along aware of the proceedings and was guilty of laches in coming forward to contest the proceedings, he would be entitled to a hearing on merits. (See Ashok Kumar v. State of Haryana, (1975) 77 Pun LR 140 (FB)). It is now to be seen how far the aforesaid principles are applicable to the present case.

7. It may be highlighted that the land in the hands of respondent No. 4 was declared surplus on August 31, 1962. The appeal and revision against that order were dismissed by the Commissioner and the Financial Commissioner. Thereafter, consolidation proceedings took place in the village and respondent No. 3 after the consolidation proceedings, proceeded under sub-section (2) of Section 24-A of the Act which provides that if after the declaration of surplus area of any person and before the utilization thereof his land has been subject to the process of consolidation, the officers concerned shall be competent to separate the surplus area of the person out of the land obtained by him after consolidation. The petitioners filed an appeal in 1968 against the order of the Collector dated September 13, 1967, wherein necessary changes in the reserved area of Kheta Singh were made under Section 24-A of the Act, in view of consolidation proceedings in the village. At that time, they must have come to know about the order of declaration of surplus area in the hands of Kheta Singh on August 31, 1962. It was incumbent upon the petitioners to have challenged that order. The order under Section 24-A of the Act was not an order declaring surplus area in the hands of Kheta Singh but an order to separate his surplus area out of the area obtained by him after consolidation. It is well settled that if there is decrease in the re-

served area of a landowner on account of consolidation, he cannot suffer for that. He, even after consolidation, would be entitled to 30 standard acres. Consequently, in case of decrease in the reserved area, he is entitled to be compensated from the surplus area. In addition, he would be allowed a fresh selection. In the present case, the area of Kheta Singh was reduced from 49 standard acres 12 units to 48 standard acres 1¼ units. Therefore, instead of 19 standard acres 12 units his surplus area decreased to 18 standard acres 1¼ units.

8. The writ proceedings emanate from the order of the Collector dated September 13, 1967. Consequently, the petitioners can challenge therein the said order and not the order of declaration of surplus area dated August 31, 1962. Now they cannot say that they should have been associated with the proceedings for declaration of surplus area in 1962. However, they were entitled to be associated with the proceedings under S. 24-A of the Act which have been initiated after consolidation. The observations in Harnek Singh's case (supra) are not fully attracted to this case. After taking into consideration all the circumstances, I am of the view that the petitioners were entitled to be served with notices and heard by the Collector in the proceedings under Section 24-A of the Act and the finding of the learned Commissioner and that of the Financial Commissioner to the contrary is not correct. The orders of the Collector, the Commissioner and the Financial Commissioner are, therefore, liable to be quashed. The Collector may, however, decide the matter under Section 24-A of the Act afresh after hearing the petitioners and other concerned parties.

9. The learned counsel for the petitioners has made a reference to Bibi Daljit Kaur v. Financial Commr., Punjab, 1976 Pun LJ 585 and Chandgi v. State of Haryana, 1979 Pun LJ 387. In Daljit Kaur's case (supra), observations were that the donee was entitled to a notice before declaration of surplus area and in Chandgi's case (supra) it was held that the land pre-empted by the sons of a pre-emptor cannot be declared surplus in the hands of their father. However, the circumstances in which the above observations were made were different. It may be relevant to state that in Daljit Kaur's case (supra) the observations of the Full Bench in Ashok Kumar's case (supra) were not brought to the notice of the learned Judges. In my view, the abovesaid cases are not of much assistance to the counsel for the petitioners.

10. Now I shall deal with Civil Writ Petition No. 2309 of 1969. The petitioners in this writ petition are the same as those in C.W.P. No. 2308 of 1969. Regarding the respondents, there is some difference. Out of the respondents in C.W.P. No. 2308 of 1969, all except Collector are parties to this writ petition. In addition Bir Singh and Naib Tehsildar have been added as respondents.

11. Briefly, the facts which gave rise to the present petition are as follows:—

The Naib Tehsildar Surplus Area, Muktsar after the order dated August 31, 1962, was passed by the Collector, allotted the surplus area to respondents Nos. 1 to 4 vide order dated February 19, 1968 (copy Annexure 'C'). It is alleged that the appeal of the petitioners against the order of the Collector was pending at that time before the Commissioner. They went up in appeal against the order of the Naib Tehsildar Surplus Area to the Collector, who accepted the same on September 28, 1968 and remanded the case to him with the direction that the question of allotment of land be considered after giving notice to the petitioners. Respondents Nos. 1 to 4 filed appeal against the order of the Collector before the Commissioner. He accepted it vide order dated March 3, 1969 and restored the order of the Naib Tehsildar. The petitioners, being dissatisfied with the order of the Commissioner, filed a revision petition, which was dismissed by the Financial Commissioner vide order dated August 28, 1969. They have now challenged the order of the Financial Commissioner through this writ petition.

12. I have already quashed the orders of the Collector dated September 13, 1967 passed under Section 24-A of the Act, the Commissioner in appeal and the Financial Commissioner in revision. I have also directed that in the proceedings under Section 24-A of the Act, the petitioners should be heard by the Collector. In view of the setting aside of the said orders, the impugned orders in this writ petition are also liable to be quashed. Surplus area authorities may, however, take proper proceedings for allotment of surplus land after the matter has been decided by them under Section 24-A of the Act.

13. For the aforesaid reasons, I accept Civil Writ Petition No. 2308 of 1969 and